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THE
LAW JOURNAL REPORTS

FOR

THE YEAR 1905.

CASES DECIDED IN

The Chancery Division

OF

THE HIGH COURT OF JUSTICE

REPORTED BY

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MR. JUSTICE FARWELL	}	W. IVIMEY COOK, R. J. A. MORRISON, and JOSEPH E. MORRIS.
MR. JUSTICE SWINFEN EADY				

IN

The House of Lords

REPORTED BY

JAMES EYRE THOMPSON,

AND IN

The Court of Appeal

REPORTED BY

AUBREY JOHN SPENCER, AMYAND JOHN HALL, ARTHUR CORDERY,
W. E. GORDON, G. HUMPHREYS, AND JOSEPH SMITH,
BARRISTERS-AT-LAW.

EDITOR:

JOHN MEWS.

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} The Judicial Committee Act, 1833 (3 & 4 Will. 4. c. 41), s. 1.

} The Judicial Committee Act, 1833 (3 & 4 Will. 4. c. 41), s. 30.

} The Judicial Committee Amendment Act, 1895 (58 & 59 Vict. c. 44), s. 1.

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DECISIONS
OF THE
CHANCERY DIVISION
AND ON APPEAL THEREFROM
TO THE
COURT OF APPEAL AND HOUSE OF LORDS
AND
CASES IN LUNACY.

[IN THE HOUSE OF LORDS.]

1904.
March 15, 18, 21, 22, 24. } SIMPSON v.
April 25. May 2, 9. } ATT.-GEN.*
Aug. 5. }

River—Locks and Sluices—Grant by Crown to Owners of Right to take Tolls—Franchise—Right of Public to Navigate—Dedication to Public—Reasonable Tolls—Duty of Person taking Tolls to keep Locks in Repair—Charters of Crown—Validity—Permissive Act of Parliament—Act for Preserving and Improving the Navigation of the River Ouse (6 Geo. 1. c. 29).

A Royal charter purporting to confer upon the patentee the exclusive navigation for all time of part of a public navigable river, and the exclusive licence of transporting goods thereover, is void both by the Statute of Monopolies, 1623 (21 Jac. 1. c. 3), and by the common law.

There is no presumption in favour of the legal obligation of an immemorial burden. Consequently, a person who under patent or statute has succeeded to the ownership of locks or other mechanical appliances for facilitating navigation, with the right to charge for their use a reasonable toll,

* *Coram*, Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Lord Lindley.

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is not bound to work or keep them in repair to his own detriment if the tolls are not sufficient to defray the cost of maintenance and repairs, and is justified in closing them altogether.

An Act of Parliament authorising and empowering a person to improve the passage of boats, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require, although intended to serve a public purpose, must be construed to be permissive only, and not obligatory.

Decision of the COURT OF APPEAL, 70 L. J. Ch. 828; [1901] 2 Ch. 671 (LORD DAVEY and LORD LINDLEY dissenting), reversed.

Appeal and cross-appeal from orders of the Court of Appeal (Rigby, L.J., Vaughan Williams, L.J., and Stirling, L.J.), varying a judgment of Farwell, J., in an action in which the Attorney-General (at the relation of the Huntingdonshire County Council) and the Huntingdonshire County Council were plaintiffs, and the appellant Leonard Taylor Simpson was the defendant. The object of the action was to establish a right on the part of all his Majesty's subjects, subject only to the payment of certain tolls, to navigate the river Ouse from a point above St. Neots, in the county of

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Huntingdon, to a point below St. Ives, in the same county, and thence to the sea, and to use for the purpose of such navigation six several locks and a stanch, the property of the appellant, and also to establish a liability on the part of the appellant to keep such stanch and locks in good repair and working order, and to obtain consequential relief.

The circumstances which gave rise to the action were shortly as follows: The said stanch and locks belonged in the year 1893 to one Frank Manly Bendall, subject nevertheless to a legal mortgage for 5,700*l.* in favour of one Harold Simpson, which mortgage is still subsisting; but, owing to want of repair, both stanch and locks were, and had been for some time, almost, if not wholly, incapable of use for navigation purposes. In February, 1893, the appellant purchased the equity of redemption in the said locks and stanch, and, after expending over 10,000*l.* in repairs, re-opened the same for navigation purposes, making certain charges for the use thereof both in respect of trading barges and pleasure-boats. In the year 1894 the Corporation of Godmanchester forced open the gates of two of the said locks during a flood, thereby necessarily injuring such gates and impairing the efficiency of the locks; but in an action which the appellant commenced for an injunction, the said corporation established in the House of Lords a right to force open such gates in time of floods under a grant made by one of the appellant's predecessors in title—*Simpson v. Godmanchester Corporation* [1897].¹ The appellant, finding that the exercise by the Corporation of Godmanchester of their right to force open the said gates in times of flood would seriously increase the costs of maintaining and repairing the locks, and that his receipts from the whole river amounted to about 150*l.* per annum only in the year 1897, closed the said locks and discontinued the use of the stanch, and thereupon the respondents instituted this action.

The facts and history are stated in Lord Macnaghten's judgment.

Neville, K.C., and *R. J. Parker*, for the appellant.

Upjohn, K.C., and *Tebbutt (Brooke Little with them)*, for the respondents.
Neville, K.C., replied.

The House took time for consideration.

Aug. 5.—LORD MACNAGHTEN.—Before the incident occurred which led to the present action the navigation of the river Ouse between St. Neots and St. Ives, a distance of about sixteen miles, was maintained by means of six locks. Below St. Ives it was maintained by means of a lock built in a stanch stretching across the river, and situated about half a mile below St. Ives, where the passage of boats and vessels used to be impeded by shallows and "hills of gravel," and where the tide now ends. The six locks were constructed under the authority or under the cover and protection of certain letters patent in the early part of the seventeenth century by a predecessor in title of the appellant Simpson. He put them upon land of his own which he had acquired for the purpose. By the use of these locks boats and vessels were enabled to pass from one level to another, and so to get round six ancient milldams which penned back the water, deepening the reach above, but forming an obstruction in the course and channel of the river, and interrupting the waterway. The St. Ives stanch was originally constructed in the same century, but at a later date, by the then owner of the navigation, for the benefit of the traders on the river, who agreed to pay a charge or toll on going through the stanch. It was afterwards dealt with by an Act of Parliament passed in 1720 (6 Geo. 1. c. 29), which authorised one Henry Ashley, who was also a predecessor in title of the appellant Simpson, his heirs and assigns, to rebuild and improve the stanch, and then to take a toll over and above the toll due or payable before the Act was passed. The Act of 1720 also authorised and empowered Henry Ashley, his heirs and assigns, to improve the passage for boats and vessels on the river within the county of Huntingdon from a place called Hollowell, below St. Ives stanch, right away up to St. Neots, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require.

(1) 66 L. J. Ch. 770; [1897] A.C. 696.

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In the early days of the navigation after the six locks were built there was a good deal of trouble and litigation in connection with them, principally about the charges demanded from the traders on the river. Ultimately the charge or toll for passing through the six locks came to be settled at the uniform rate of three-pence per customary load at each of the six locks. Thenceforward, until the introduction of railways, the navigation appears to have been a profitable concern, and naturally enough no attempt was ever made to unsettle the toll. When railways were introduced, traffic on the river fell off, and the owners of the navigation had to lower the toll by allowing an increase in the weight or quantity of the customary load.

In the year 1893 the appellant Simpson bought the navigation. Everything was then out of repair. He paid several thousands for his purchase. He had to spend about 10,000*l.* more on the property to put it in order. But he soon found that there was little or nothing to be made of it. Trade on the river was dying out. At the same time there was a growing increase in pleasure traffic. But the owners of pleasure-boats protested against paying any toll, and evaded payment when they could. At last, in self-defence, Simpson took the step of shutting up the six locks and the stanch. Thereupon this action was brought. The Attorney-General, at the relation of the County Council of Huntingdonshire, and the County Council of Huntingdonshire came forward as plaintiffs. Simpson was made defendant. The plaintiffs claimed a declaration that the six locks and the stanch with their appurtenances formed part of the river Ouse, that the Ouse from St. Neots to the sea was a public navigable river, and that all members of the public were entitled to pass through the six locks and the stanch, but, as regards the passage of boats and vessels laden with goods or merchandise, subject to the statutory toll mentioned in the Act of 1720 in respect of the passage through the stanch and subject to the toll of three-pence per customary load in respect of the passage through each of the six locks. They also asked for a declaration that the

defendant was bound to maintain all the six locks and the stanch in an efficient state and condition, and to provide attendants and all appliances necessary to work the same, and to enable the public navigating the river to have free and convenient passage through the same, subject only in the case of boats laden with goods and merchandise to the tolls aforesaid. The plaintiffs also sought to have the rights which they claimed enforced by injunction. Mr. Justice Farwell decided that the Ouse, including the six locks, the stanch and their appurtenances, was a public navigable river, and that all members of the public were entitled to pass through the six locks without paying any toll whatever, and through the St. Ives stanch on payment of the statutory toll in the case of boats and vessels laden with goods or merchandise; but he held that the defendant was not bound to maintain or work any of the six locks or the stanch, and he granted an injunction to restrain the defendant from obstructing or interfering with any of her late Majesty's subjects in the exercise of their rights as thus declared. He gave no costs to either side.

The defendant appealed from the whole judgment except from the order as to costs. The plaintiffs did not appeal. The Court of Appeal differed from Mr. Justice Farwell on many points of importance, and varied his order. As varied, the order is substantially in terms of the plaintiff's claim, except that the tolls payable in respect of the six locks are declared to be "such tolls, rates and charges as may from time to time be reasonable, that is to say, such tolls, rates and charges as will from time to time provide a reasonable profit for the defendant beyond the necessary cost of repair and maintenance." As regards the six locks, the declaration of the Court is that the defendant is bound to maintain them in an efficient state and condition, and to provide attendants and all appliances necessary to work the same. As regards the St. Ives stanch, the declaration is that so long as the defendant takes the statutory toll in respect thereof he is bound to maintain and repair it, without prejudice to any question as to his obligations in

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respect thereof, in the event of his ceasing to take the statutory tolls. An injunction was granted to enforce the rights so declared, but no costs were given to either side. From the order of the Court of Appeal both parties have appealed to this House. The defendant appeals from the whole order. The plaintiffs seek to omit the words "such tolls, rates and charges as may from time to time be reasonable," and to limit the toll to a toll of threepence for each of the six locks. And they appeal against the order as to costs.

Pausing here for a moment, I would ask the House to consider the practical effect and necessary result of the order of the Court of Appeal. The litigation so far has been disastrous to Simpson. The judgment of Mr. Justice Farwell stripped him of every particle of beneficial interest in the six locks. But, stripped and despoiled as he was, he was yet allowed to go away scot free. Not content with that privilege or immunity, he appealed to the Court of Appeal. There he fared worse. He is now under orders to repair, maintain, and work the locks, to keep a staff of attendants, and to provide all necessary appliances for the purpose. True, he may take reasonable tolls—such tolls as will "provide a reasonable profit beyond the necessary cost of repair and maintenance." I am sure the Court was serious. But where is the profit to come from? Pleasure-boats are to pay no tolls. The present tolls on goods and merchandise are not enough to keep the navigation open. Will raising the tolls attract traffic? Will the one or two traders who still use the river, partly I think in consequence of some squabble with the railway company, be persuaded to pay enough not only to provide for repair and maintenance, but to yield a profit besides? I do not feel very sanguine about that. And if Simpson is ruined, how will the public be benefited? As a last resource he can assign to a pauper. If he does so, the assignment will not transfer any of his rights, such as they are, to the public or to the county council. The locks will be left derelict, at the mercy of everybody and everything, and the whole concern will go to rack and ruin in a very short time. Is it not permissible to doubt

whether a conclusion so lame and impotent, which must be disastrous to everybody concerned, is founded on sound premises?

The case was very fully and ably argued. Many interesting topics were introduced. The history of the Ouse was carried back to *Domesday Book*. We had glimpses of men famous in their day. The lord of Kent, the abbot of Ramsey, with his "cruel and furious mind," and several relatives of the great Protector were brought on the scene. And there was a copious citation of authorities. But, after all, I think the real question before us lies within a comparatively narrow compass of time, and depends upon a few simple considerations.

As regards the six locks, one has first to consider the state and condition of the river Ouse between St. Neots and St. Ives at the date of the letters patent under which the six locks were constructed. These letters patent were granted in 15 Jac. 1. (July 21, 1618) to one John Gason, and are known as Gason's patent. Gason's patent was for the term of twenty-one years. While that patent was in existence there were divers proceedings before the Privy Council. There was also a suit of *Thelwall v. Jackson* [1632],² there was an action of *Juxon v. Thornhill* [1628],³ and there were two other patents—one of 3 Car. 1. (January 3, 1628) called Spencer's first patent, and the other of 14 Car. 1. (December 11, 1638) known as Spencer's second patent. The events which took place during this period are material and require close attention. I do not think it necessary either to go into the earlier history of the river Ouse or to dwell on what occurred after the toll of threepence per customary load for each of the six locks came to be recognised as the regular charge. Just as one would expect, so long as the navigation was profitable nobody thought of disturbing the accustomed toll; and, indeed, very soon the circumstances under which the toll originated were quite forgotten. In later times we find its origin attributed sometimes to statute, sometimes to immemorial usage, and sometimes to one of

(2) Not reported.

(3) Cro. Car. 132.

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the three patents which does not even purport to create a toll.

Mr. Justice Farwell found—and with Lord Justice Stirling I accept his finding—that at the date of Gason's patent the river Ouse between St. Neots and St. Ives was a public navigable river, not indeed throughout, but in sections or in a succession of reaches, from milldam to milldam. In ancient times the river was probably a public stream, navigable throughout for such boats as were then used. This seems to be proved by ancient records, and is not, I think, disproved by the modern state of the river, which must have been greatly altered by the draining of the fens. Gason's patent authorised the patentee (who represented that he had invented a method of making locks, sluices, bridges, cuts, cranes, and milldams for grinding corn, raising water, and making rivers navigable and passable) to practise and use his invention in any rivers within the realm for the period of twenty-one years, and to take for his own use without let of the King whatever contribution, composition, advantage, and commodity might be agreed, or consented to be paid, in respect thereof. There was a proviso enabling the King to revoke the patent if, upon examination had before six or seven of the Privy Council, they should declare in writing that the patent was inconvenient to the realm. Gason assigned his patent to Spencer and Girton. Spencer, having become by survivorship sole owner of the patent, assigned it to John Jackson, and before 1625 the six locks between St. Neots and St. Ives were constructed by Jackson alongside the six milldams in the manner I have described.

Now, what was Jackson's position with regard to these six locks? They were his own private property, and constructed on his own land. But in order to work them it was necessary to make cuts from the river. The river was the King's highway, and under his care and protection. No cut or diversion could be made without the King's licence. These cuts were sanctioned for the public good, for the promotion and encouragement of trade. The effect of sanctioning them was to confer on the patentee a virtual monopoly

in regard to the navigation of the river, not only during the life of the patent, but so long as the condition of things remained unchanged. The result was, I think, according to the doctrine of Lord Hale, that these locks, although private property, became "affected with a public interest," and ceased "to be *juris privati* only." Consequently the owner, if he worked them for his own profit, could not make either an arbitrary or an excessive charge. As Lord Hale points out, "the duties must be reasonable and moderate, though settled by the King's licence or charter"—*Hale, De Jure Maris*, Part II. chap. 6 in *Hargrave's Tracts*, vol. i. p. 77, cited in *Alnutt v. Inglis* [1810].⁴ And further, so long as the private owner kept the locks open and took toll, all members of the public belonging to the class for which they were made were entitled to free passage on paying the regular charges. Such, I think, are the respective rights of the private owner and the public in a case like this. And, if you think of it, the public can require nothing more for its protection. It is absurd, as it seems to me, to order a man who is the owner of a mechanical contrivance to go on working it for the benefit of the public if the working is expensive, and if it can only be worked at a loss. You may be sure he will get rid of his property altogether if there is no other way of getting rid of the burden attached to it.

Very soon after the locks were constructed complaints were made to the Lords of the Privy Council, founded probably on the proviso for revocation contained in Gason's patent, to the effect that Jackson was oppressing the country by taking unreasonable tolls. The Privy Council held several meetings and made various references with the view of arranging matters; but their proceedings as a board of conciliation ultimately came to nothing. Next in order is Spencer's first patent. I do not think I ought to delay by referring to its terms, because the Court of Appeal came to the conclusion—and I think rightly—that there were so many difficulties about it that it might be put aside altogether. In this view the counsel on both sides agreed.

(4) 12 East, 527.

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It was never put in use. The King's rent reserved by it was never paid; and Spencer, to whom it was granted, seems to have had nothing to do with the Ouse when the grant was made. Mr. Justice Farwell seems to have thought that Spencer's first patent created a toll. But, if the point is worth noticing, I think it will be found that it does not purport to create a toll, but to put a limit on the charges to be taken by the patentee. That limit was not threepence per customary load for each lock, the amount which was then or soon afterwards established or regarded as the regular charge, but threepence per ton of the vessel's burthen, which might produce a very different result.

Then comes the suit of *Thelwall v. Jackson*.³ On behalf of certain traders and watermen it was sought to have the tolls and charges in respect of the six locks fixed in accordance with an order of the Earl of Manchester, the lord-lieutenant of the county, to which it was alleged Jackson and the traders had submitted. In the course of the suit a decree was made fixing a scale of charges in accordance with the report of a commission of the Justices of the county of Huntingdon, which it was thought would give Jackson 160*l.* a year. The decree reserved further consideration in the event of the receipts as certified by the Justices falling short of that sum. By an order made in *Thelwall v. Jackson*,² and dated June 18, 1632, it was declared that the decree in the cause was made for the public good, and that as to the rates the same were granted on the opinion of the Earl of Manchester and the Justices that the same would be sufficient to reimburse Jackson his money in convenient time, howbeit experience had shewn that the same had fallen and would fall much too short, and "it was never the intention of the Court by providing for a public good to ruin Jackson in his estate, more especially since every man was at liberty to carry by land carriage or otherwise as was theretofore used if they would not come up to the rates at which Jackson could offer it"; and on Jackson's suggestion it was further declared that if any would enter into a

treaty to take the same off Jackson's hands, Jackson should leave the same, but if no one would undertake the same in a reasonable time the Court declared that it "saw no other way but to leave Jackson to make the best thereof." No one, it seems, came forward to take the concern off Jackson's hands, so, ultimately, by an order dated February 16, 1632, Jackson was left, in the words of the order, "to go on with the work and make what he can thereof."

I do not propose to dwell on the action of *Juxon v. Thornhill*,³ which began and ended while *Thelwall v. Jackson*² was pending. "Juxon" was no doubt Jackson, the maker and owner of the locks. The case does not, I think, carry the matter any further. It goes to shew that the locks were on Jackson's own land, but that fact is not disputed now. It also goes to shew that Jackson, so long, of course, as his demands were reasonable, was free to bargain with the traders on the river for passage through the locks. That, again, is just what Gason's patent contemplated, and what the Privy Council and the Lord Keeper left Jackson at liberty to do.

I now come to Spencer's second patent (14 Car. 1.). I must ask careful attention to this document, because the judgment of the Court of Appeal is, as it seems to me, founded entirely upon their view of its meaning, or rather I should say upon their conception of what its meaning would or might have been if the patent in question had been expressed differently. I do not propose to set out all its provisions at length. It has been read more than once, and this House is, I think, familiar with it. Whatever its effect may be, the language, I think, is absolutely clear. It is frank—I might almost say blunt—in its audacious defiance of statute law and common law too. Spencer besought the King to grant to him, his heirs, and assigns "the sole and absolute benefit of all and singular the water-carriage in and upon the said river of Owse from the said town of St. Ives to St. Neotts aforesaid." And the King granted to Spencer, his heirs and assigns, "the sole and exclusive passage and transit for boats, barges, and other vessels

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laden with corn, coal, and all other goods and merchandise through all that river or trench of Owse aforesaid leading from the town of St. Ives aforesaid to the said town called St. Neotts." The King also granted to Spencer, his heirs and assigns, that he, his heirs and assigns, from time to time in perpetuity might and should "have thenceforth for the future the sole and exclusive licence and power of carrying and re-carrying, transporting and re-transporting, in and through all the river aforesaid from the said town of St. Ives aforesaid to the said town called St. Neotts . . . all and all manner of food, coal, goods, and merchandise whatsoever in ships, boats, barges, and other vessels ascending or descending." For this exclusive privilege or monopoly, Spencer, his heirs and assigns, were to pay the King the yearly rent of 6*l.* 13*s.* 4*d.* No one else was to "presume to enter on or navigate" the river. In case of default in payment of the rent of 6*l.* 13*s.* 4*d.*, the King was to have a power of distress over all the boats, barges, and vessels "in or upon the said river being or to the said river . . . belonging or appertaining." Is there any ambiguity in that language? Is it possible that it can have any meaning but that which is expressed so clearly on the face of it? Mr. Justice Farwell held the patent void. Lord Justice Vaughan Williams thought that it was "a good charter," and that it was based "on the assumption that the grantee would suffer all the King's subjects to have in perpetuity the benefit of that franchise of navigation which had been granted to him and his heirs in perpetuity." I confess I have some difficulty in following the learned Lord Justice. Why should a man who has paid for and obtained an exclusive privilege be expected to communicate it forthwith to all the world? That would be a remarkable instance of conduct which it is the fashion nowadays to call altruism, and all the more remarkable because the owner of the locks was evidently an unpopular character, and it would have only been human nature to conciliate opposition by publishing abroad so disinterested an action instead of doing good by stealth, and hiding generosity to the public under

the cloak of selfish exclusiveness. However, a similar view was taken by Lord Justice Stirling. He held that Spencer, the defendant's predecessor in title, "by applying for and putting in use the charter of 14 Car. 1." (which in point of fact he never did or attempted to do), "gave the public a right to resort to the locks and sluices which were his property." Now I must say that I think it is impossible to attach any meaning but one to the charter of 14 Car. 1. I think that this charter was absolutely void. It was void by the Statute of Monopolies, which had been passed in 1623 (21 Jac. 1. c. 3). If Spencer or any of his successors had attempted to put it in force, he or they would have been liable to serious penalties. Apart from the Statute of Monopolies the charter was, I think, absolutely void at common law. The King has the care and protection of all highways by land or by water. It is his province, as Lord Hale says, in reference to this matter, "*sustinere personam vindicis et tutoris jurium publicorum.*" It sounds better, perhaps, in a learned language than in the vulgar tongue, but the meaning is the same. It is impossible that the champion and guardian of public rights should sell them in the gross to a private individual for 6*l.* 13*s.* 4*d.* a year. Upon this very ground the Court of King's Bench in *Williams v. Wilcock* [1838]⁵ declared that a charter, whether before or after Magna Charta, authorising the erection of a weir across a navigable river was utterly void at common law. As far as I can discover, no similar patent has ever been upheld even in the worst days of the Stuarts. I trust this House will not make a precedent now under the impression that this patent has been put in use. The King's rent has been paid ever since the date of the patent, but the patent was never put in use by the patentee or anybody claiming under him. Nothing has ever been done from first to last which can possibly be attributed or referred to the rights and privileges which the King's grant as expressed in the patent, however construed, purports to confer.

(5) 7 L. J. Q.B. 229; 8 Ad. & E. 314.

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In this connection I ought perhaps to notice in passing an argument in favour of the validity of Spencer's second patent, which is alluded to apparently without disapproval by Lord Justice Stirling. It seems that about fifty years after the date of Gason's patent there was litigation between persons claiming under Spencer as to their rights *inter se* in the profits of the navigation. The litigation has no bearing on the question now before your Lordships. There were two suits—*Jemmatt v. Ashley*⁶ and *Jemmatt v. Ashley, jun.*⁷ It seems that the bill of complaint in each case began by stating Spencer's second patent, and referred to it as the origin of the toll and the authority under which the locks were constructed. It was alleged on the other side that the patent was void in law and never put in use. Ashley, jun., said he should be only too glad if it could be put in execution—he would be “a considerable gainer.” It was immaterial for the purposes of these suits what the origin of the toll was; it was quite immaterial whether Spencer's second patent was good or bad; but from this casual and incidental reference to Spencer's second patent the Court in the present case was asked to draw the inference that the patent had received judicial recognition and a sort of judicial confirmation. Such an argument hardly requires a serious answer. Then some selections from depositions made in those cases were put in. How they can be evidence in the present case I do not quite understand. But both parties treated them as admissible. If they are admissible they seem to me to confirm the view I am presenting. They shew that Spencer's second patent was never put in use, that the river was free to all the King's subjects, and that boats carrying merchandise were entitled to use the locks, paying the regular charges. But these charges, I think, were not made in respect of a “toll thorough,” or a “toll traverse.” If Lord Hale's view is accepted, they were made in respect of the use of a mechanical contrivance—the water lift of the lock chamber—belonging

indeed, to a private individual, but, to use Lord Hale's words, “affected” in the hands of the private owner “with a public interest.” That, I think, was the very able argument of counsel for the appellant, and I agree in it.

Now it appears to me that if this House agrees with Mr. Justice Farwell as to the invalidity of Spencer's second patent, it is not necessary to say anything more about it; but if for any reason a different view should be entertained, I would ask the House to bear in mind two things which are quite plain on the face of the patent. In the first place, the patent does not create or purport to create a toll. It does not continue or purport to continue a toll. It does not even contemplate any toll being paid. The whole waterway—all the water carriage—was to be Spencer's. Every boat, barge, or vessel on the river within certain limits was to be in the hands of Spencer, his heirs and assigns. No man takes a toll from himself or wants the power of distress (which is incident to every legal toll) over his own property. In the next place, there is nothing to be found in the patent about repairs or maintenance. The consideration on the part of Spencer, as expressed in the patent, is not what he was going to do, but what he had done—his “great costs and expenses in carrying out these works.” It may be asked, what is the meaning of this patent if it is so plainly void on the face of it, and if it was never intended to be put in force according to its tenor? I think the meaning of the patent is not far to seek. It appears from the certificate of the Earl of Manchester, who made a report to the Lord Keeper in the suit of *Thelwall v. Jackson*,² on February 13, 1632, that there had grown up a strong feeling of opposition and dislike to Jackson and his works. His opponents professed to be moved by zeal for the King's interest. The earl declared that he opposed the passage of boats as well for the cause of other men as for his own interest, but principally for preserving the King's right. He was told, he said, by the tenants of divers mills that if the passage be suffered to continue “the mills will be

(6) Not reported.

(7) Not reported.

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quite decayed, and the King's rent lost." Obviously the best way of getting rid of this opposition was to procure some instrument manifesting the favour and countenance of the King. I have no doubt that this patent, though never intended to be put into execution according to its terms, was worth to Spencer a great deal more than he was to pay for it.

Now I would ask the House to consider the grounds on which the Court of Appeal held the appellant Simpson bound to repair and maintain the locks whether he took toll or no. Their view, if I may say so with all deference, seems to me to be founded on a mistaken analogy and on a mistaken view of the true nature and character of such a mechanical contrivance as locks on a waterway. There is nothing in the language of Gason's patent or in the language of Spencer's second patent imposing on the owner of the locks any liability in respect of repair or maintenance. There is nothing in the books recognising such an obligation in any case bearing any resemblance to this. The learned Judges of the Court of Appeal admit, I think, that there is no authority to be found in support of their view. But they say in effect: "The rights conferred by Spencer's second patent as we construe it are very like a right of ferry. A right of ferry imposes on the grantee the obligation of maintaining the ferry. It follows, therefore, that the owners of these locks are bound to keep them always ready for the public service." Now, with the utmost deference to the Court of Appeal, I cannot see the slightest analogy between the right which Spencer's second patent purported to confer on the patentee and the right to an ancient ferry. If you construe the patent according to the plain meaning of the language used, no two things could be more dissimilar. But even upon the view of the Court of Appeal of what the effect of the patent is or ought to be I cannot see any analogy. All ancient ferries have their origin in Royal grant or in prescription which presumes a Royal grant. A right of ferry is in derogation of common right,

for by common right any person entitled to cross a river in a boat is entitled to carry passengers too. Within the limits of an ancient ferry no one is permitted to convey passengers across but the owner of the ferry. No one may disturb the ferry. The ferry carries with it an exclusive right or monopoly. In consideration of that monopoly the owner of the ferry is bound to have his ferry always ready. But there is nothing of that kind here. No one is bound to pay for the locks except the person who uses them. Anybody may make other locks or other contrivances for getting past the mill-weirs. And, after all, as the Lord Keeper very justly observed, if the traders will not come to the terms at which the owner of the locks can afford to offer the accommodation he has provided, they are no worse off than they were before. If they take their goods by road, or draw them over the mill-weirs, or pass them through the mill-slucies, as seems to have been done occasionally in former times, they are not asked to pay anything for facilities and conveniences which they do not care to use. Why, then, should the owner of the locks, if it does not pay him to keep them up, be "grievously amerced," like the owner of a ferry who puts the public to inconvenience by failing to perform the duty which he has undertaken and which no one else may perform? Then it was said: "This state of things has gone on so long that it must now go on for ever. True, the owner of the locks has been acting all along in his own interest as well as for the benefit of the public. He had to maintain the locks to enable him to earn his remuneration. Now that no remunerative toll can be got he must go on maintaining them for the benefit of other people and to his own loss. If you cannot evolve the obligation from any one of the three existing patents, you must presume a lost patent to fit the circumstances of the case. If you cannot presume an appropriate patent"—and I venture to say that no such patent is to be found in the books, for the charter in *Lyme Regis (Mayor) v. Henley* [1834]⁸ was

(8) 2 Cl. & F. 331.

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a very different case—"you must presume a lost Act of Parliament. You may put in it what you like, and then there is an end of the defence." It is quite true that the Court will go almost any length to support a right openly asserted, long continued, and never before contested, if it can find any legal origin for such a right. But the converse does not hold good in the case of a burthen, however long it may have been borne. I took the liberty of asking counsel for the respondents if he had any authority for making a presumption in favour of the legal obligation of an immemorial burthen, and he admitted that no such authority was to be found. There is authority the other way. In the great case of gleaning—*Steel v. Houghton* [1788]⁹—Mr. Justice Heath says, "If A. and his ancestors have from time immemorial repaired a bridge or a highway, there is no obligation on him to continue the repair, unless he is so bound by the tenure of lands, or the like."

The matter that lies at the root of the difference between the view of the Court of Appeal and the view that I have endeavoured to express may, I think, be shortly summed up in this question: What is the real nature and character of these locks? How are they to be regarded? Are they really part and parcel of the highway, or are they nothing more than a mechanical contrivance worked by water drawn from the river for the purpose of transporting boats and vessels from one level of the water-way to another—up or down as the case may be? The Court of Appeal regards the cuts as the principal, and the locks as merely accessory to the channel of the cuts. I regard the cuts as auxiliary to the locks, and the locks as the principal. As a mechanical contrivance for surmounting differences of level in the waterway, which was the whole object of the original patent, I can see no real difference between locks and any other mechanical contrivance for the same purpose, as, for instance, an inclined plane or a hydraulic lift—the most ancient and the most modern, I think, of all such contrivances.

If it were necessary to consider the position and the rights of pleasure-boats, I am afraid I should differ from the Court of Appeal on that point also. Obviously, at the time that the locks were made, pleasure-boats were not within the contemplation of the patent or the patentee. In my view of the case it is not necessary to consider the position of owners of pleasure-boats at all. I do not think they can be held to have established a right for themselves as a separate class of the public. That sort of traffic, as everybody knows, has only come into vogue in recent years. Mr. Bateman-Brown, who was a witness on behalf of the plaintiff, admits that when he first had a pleasure-boat there were but few others on the river. "As people grew richer," he says, "boats increased"; and then he added, "It never has been worth while collecting tolls on pleasure-boats." There was no charge for pleasure-boats in the list or schedule of tolls, and I should think that, at any rate until the scarcity of water which occurred some years ago—in 1868, I think—a tip to the attendant, if there was an attendant at hand, was all that was expected from a pleasure-boat. At the locks where there were no attendants, the persons in pleasure-boats could let themselves through or carry their boat round, if it were a light one. Putting aside the fact that of late years—since 1872 at any rate—no pleasure-boat has been allowed to go through the locks without paying, the evidence satisfies me that the passage of pleasure-boats through the locks was a matter of indulgence, and not a matter of right. It would have been a churlish thing to stop a pleasure-boat going through if it went through with barges; and if there were no barges going through at the time, and there was no scarcity of water, I should think the owner of the locks in former days would never have thought of objecting to the attendant making a trifle by opening the locks for a pleasure-boat. When dealing with this point allow me to remind this House of what was said by Lord Justice Bowen in *Blount v. Layard* [1888].¹⁰ It was a case about a fishery,

(9) 1 H. Bl. 51, 60.

(10) [1891] 2 Ch. 681n.

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and it was alleged that the person claiming a several fishery must have been very careless in stopping people from fishing, if he had a right to do so. There was to be a re-trial; "if the case is re-tried," said the learned Lord Justice, "the jury ought to be most carefully warned . . . not to do injustice under the idea that they are vindicating a public right. I think they ought to be solemnly told . . . that nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

Of course, if I am wrong in my view, and if these locks are, as the Court of Appeal have held, a public highway, and all and sundry not conveying goods or merchandise have a right to go through the locks without payment at their will and pleasure, and to call upon the appellant Simpson to have in readiness for their convenience or amusement a staff of attendants and all necessary appliances, the owners of pleasure-boats may avail themselves of that accommodation in common with the rest of his Majesty's subjects. But that view—from which I altogether dissent, and which seems to me to be most unreasonable—is founded upon two propositions—first, that Simpson, the appellant, is bound to repair and maintain these locks whatever happens; and secondly, that Simpson's predecessor in title dedicated the locks to the public as a part of the river—that is, as a public highway. With the first proposition I have already dealt. As regard the second it is, I think, enough for me to say that it is clear law that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication—*Barradough v. Johnson* [1838].¹¹ Here it is not alleged that there was any formal dedication. There very

rarely is. There is nothing whatever, not a trace or scintilla of evidence, from which any jury could have inferred any intention to dedicate, nor would such a dedication be of the slightest advantage to the public, though it might be very detrimental to the owner of the locks. There are two circumstances which seem to me to go a long way to negative any intention to dedicate the locks to the public as a public highway. Whatever may have been the actual relations between Spencer and Jackson, Spencer must have known everything that was going on, and he must have known that it was only by reason of his private ownership of these locks that Jackson came unscathed through the ordeal of the Privy Council and escaped the perils of the Court of Chancery. It seems to me hardly conceivable that Spencer would have thrown away that advantage with a light heart the moment the property came into his hands. Then I rather doubt whether he would have been justified in dedicating the locks to the public. The making of the cuts which fed the locks was sanctioned by the King for the encouragement of trade, and it was no doubt for the sake of trade in which they themselves benefited that the mill-owners submitted to the loss of water withdrawn by the locks. I rather doubt whether it would have been competent for the owner of the locks, considering the end and purpose of their existence, to dedicate them as a highway to the public, and so give everybody, whether a trader or not, a right to diminish or interfere with the water-power of the mills.

Then comes the question which is really the question in the action, Was the appellant Simpson, if under no obligation to repair and maintain the locks, justified in closing them altogether? In my opinion he was. I think he was bound to close them, both for his own protection and as a matter of duty. It must be borne in mind that, although he leaves the locks derelict, he does not thereby divest himself of his property therein. If they go to rack and ruin and get worse and worse, still I have no doubt that people will use them so long as they can be used. Some day, perhaps, an electric launch may try

(11) 7, L. J. Q.B. 172; 8 Ad. & E. 99.

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to go through, and get wrecked, and then I should imagine there would be promising materials for an action against the owner of a dangerous structure which had come to be a trap for those who are invited by gates, left open or capable of being opened, to pass through. I do not see how the appellant Simpson can make himself perfectly safe except by shutting the locks up. But I go further. I think the licence of the King to make these cuts or diversions was obtained on the faith that the water so diverted would be used for working the locks, and that it would not be allowed to run to waste. Now, if the locks are no longer kept in repair, and no longer used as they were intended to be, I think it becomes the duty of the owner of the locks to take care that there is no flow of water through the cuts.

The stanch below St. Ives stands on rather a different footing. I think it may be disposed of very briefly. The Act of 1720 is, I think, merely permissive. In railway Acts similar words are found, and even larger powers are given. But it is now clearly established that railway Acts and Acts of that class, although they are intended to serve a public purpose, and although the undertakers are authorised to take toll from the public, are merely permissive. No authority to the contrary can be produced. I think the Act of 1720 is no more obligatory as regards repairing the stanch than it is as regards cleansing, scouring, and deepening the river all the way up to St. Neots, where and as often as occasion requires. And I think that if the appellant Simpson ceases to take toll at the St. Ives stanch and ceases to repair the lock, he is justified in shutting it up, and indeed bound to do so. The result may be that when the lock is permanently closed the St. Ives stanch will come to be a nuisance, and possibly the appellant Simpson may be answerable for keeping it as a nuisance in the river. That, however, is not the question in this action.

One word more. If this navigation is worth maintaining—whether it is or not I do not know—but if it is, it seems tolerably plain that statutory powers must be obtained and the navigation placed under the management of a public

body. It cannot succeed in private hands, and no decree of any Court can make it work.

I think this action is misconceived. Whatever the result might have been—whether the view of Mr. Justice Farwell or of the Court of Appeal or of this House prevailed—this litigation could not have been of any practical benefit to the County Council of Huntingdon or the towns on the Ouse.

I move that Simpson's appeal be allowed and the plaintiffs' cross-appeal dismissed and the action dismissed, and that the plaintiffs do pay to the appellant Simpson his costs both here and below, including the costs of the cross-appeal.

Lord Robertson desires me to say that he concurs in the motion I have made and for the reasons I have given.

LORD DAVEY (read by Lord James of Hereford).—The facts about which there is no dispute in this case are that for a period of time certainly exceeding two centuries the owners of the six locks on the river Ouse between St. Ives and St. Neots have maintained those locks in a proper state of repair for the purpose of navigation, and barges and other boats have been in use to pass through the locks at will, paying only to the owners of the locks a maximum toll of threepence for every ton of goods laden on such barges and boats at each lock, subject to this exception—that from the year 1868 certain charges have been made upon pleasure-boats passing through the locks, which Mr. Justice Farwell finds have been usually paid. Certainly these charges on pleasure-boats were not invariably paid, and on the evidence I should not myself have found the fact in language quite so favourable to the appellant Simpson, the present owner of the locks.

By the decree of Mr. Justice Farwell it was declared that the six locks in question, as also a certain stanch below St. Ives Bridge, formed part of the river Ouse, and that the river was a public navigable river open and free for all the King's subjects to pass and re-pass as of right with boats and barges, laden or

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unladen, as regards the six locks, without payment of any toll, charge, or imposition whatsoever; and thirdly, that the defendant Simpson was not under any liability to maintain or work any of the six locks or the stanch. By the judgment of the Court of Appeal it was ordered that the second declaration be varied by declaring that as regards the six locks the public right of passage was upon payment, in the case of boats and barges laden, but of no other boats, barges, or vessels, of such tolls, rates, and charges as may from time to time be reasonable—that is to say, of such tolls, rates, and charges as will from time to time provide a reasonable profit for the defendant beyond the necessary cost of repair and maintenance; and it was ordered that the defendant was bound to maintain the six locks and provide necessary attendants and appliances. The case comes before this House on cross-appeals. Mr. Simpson, the appellant in the first appeal (whom I will hereafter refer to as the appellant) contends that the six locks, and the cuts in which they are situated, are not part of the public navigable river, but are his private property, for the passage through which he is entitled to make such charges as he may think fit, and that he is under no liability to maintain them or keep them open for the passage of any boats or other vessels. The Attorney-General and the County Council of Huntingdon (whom I will hereafter refer to as the respondents) by their appeal seek to substitute a toll of threepence per customary load, as defined in the statement of claim, in respect of the passage through each lock, for the reasonable toll allowed by the Court of Appeal. The question of the stanch below St. Ives Bridge is a separate one, depending on different considerations from those affecting the six locks, and will be dealt with by itself.

The questions as to the right of the public (if any) to use the six locks, and the terms (if any) upon which they are entitled to use them, depend largely upon the proper construction of, and the effect to be given to, three patents of the Crown—namely, a patent 15 Jac. 1, referred to as Gason's patent, of which

the date is July 21, 1618; a patent of 3 Car. 1, referred to as Spencer's first patent, the date of which is January 3, 1628; and a patent of 14 Car. 1, referred to as Spencer's second patent, the date of which is December 11, 1638.

At the time of the execution of the works constructed under the powers of Gason's patent, the Ouse appears to have been divided into reaches or sections by milldams placed across it at intervals, so that there was no uninterrupted waterway from St. Ives to St. Neots. Mr. Justice Farwell has found that there was a public right of navigation over the several sections of the river between the milldams. Goods were portered or "backed" across the milldams, and in some cases perhaps the boats were drawn across also. The Court of Appeal agreed with this finding, and I believe that this House also agrees. There is some evidence that the Ouse was originally a public navigable river throughout, and the milldams were placed there in infringement of the common right. But whether this was so or not it is unnecessary to determine. By Gason's patent the King purported to grant to the patentee power for his own benefit in any lands or rivers in England, for the term of twenty-one years from the date of it, to make locks, sluices, and cuts for (amongst other things) making rivers navigable and passable, and to receive any contribution, composition, advantage, and commodity which any of the King's subjects might consent to pay in respect of the making of the same, and also to receive any profit which might accrue by reason of any vessel passing upon the rivers, cuts, passages, streams, or waters so to be cut, made navigable, or perfected as aforesaid, and other persons were prohibited from putting in use the patentee's invention during the term. Powers were given to the patentee to take land which, though expressed in large terms, did not, I think, amount in law to more than a power to take land by agreement. A rent of forty shillings was reserved to the Crown, and power was given to the Privy Council to revoke the patent if it should be found inconvenient to the realm. The benefit of this patent

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became vested in two persons named Girtton and Spencer, and subsequently by survivorship in Spencer alone.

It humbly appears to me that the discussion of the question whether Gason's patent was nothing more than an inventor's patent is somewhat academic. It was granted before the passing of the Statute of Monopolies (21 Jac. 1. c. 3), and it is not regulated or confined in its effect by any statutory provisions. It must be construed, and full effect must be given to it, as a charter granted by the King by virtue of his prerogative. The diversion of a public navigable river by cuts or trenches would be a nuisance (*Hale*, Part I. chap. 3) unless duly authorised in consideration of some benefit to the public. The powers of the patent were put in force on the river Ouse. Before the end of the year 1625 the six locks in question had been constructed (it is stated) by Spencer and Jackson, and the river was thereby made passable for boats from St. Ives to St. Neots (see Orders of Privy Council, December 5, 1625, p. 82). The locks were constructed on land purchased or, in the case of the Godmanchester lock, leased from the corporation of that town, and cuts were made round the heads of the milldams, into which the water from the river was diverted. Complaints were made to the Privy Council of the unreasonable charges made by Spencer and Jackson on goods passing through the locks, or (as they are called) sluices; and after an enquiry directed to, and certificate made by, certain Justices of the peace of Huntingdon and Bedford, by an Order of the Privy Council of October 29, 1626, it was ordered that the undertakers should receive upon every ton, wain, or cartload that should pass through the sluices, eighteenpence—that is, for every sluice threepence the ton, wain, or cartload between St. Ives and St. Neots. This order, however, did not settle the disputes. Other proceedings took place before the Privy Council, in which Jackson alone is named as the person interrupting the passage of the river by his unreasonable demands; and by an Order of February 11, 1628, it was ordered that such competent rate or toll as should be agreed on by the Lord Privy

Seal, or the Justices of the Peace at their sessions, should be paid, or otherwise that the county, if they thought it beneficial for the public, might take the work into their own hands, satisfying Jackson. It appears that, in pursuance of this Order, the Earl of Manchester, the lord lieutenant of the county and also Lord Privy Seal, fixed twopence-halfpenny a ton at every sluice as a reasonable toll for Jackson to take on goods passing through his locks.

I have troubled this House with a statement of these proceedings in the Privy Council because they appear to me to shew in the clearest manner the construction which was placed by all parties at that date on Gason's patent, and throw some light on the subsequent events. The Privy Council derived their jurisdiction to fix a reasonable toll to be paid by the owners of vessels passing through the locks from the power reserved to them of revoking the patent if it should be found inconvenient to the realm. On the other hand, the amount determined by the Privy Council was not binding on the owners of the patent, or on the traders, or on a Court of law, though the owner of the patent would disregard it at the peril of having the patent revoked. The important point is, that all parties assumed, and acted on the assumption, that Gason's patent conferred on the patentee or his assigns the right to take a toll of a reasonable amount from the vessels passing through the locks; and in fixing that amount regard was had to the expense of maintaining the locks. No question, however, was raised as to the right of the public to use the locks on payment of a reasonable toll. In *Hale, de Jure Maris*, Part I. chap. 3, it is said, "But if any person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams; and hereby that river, which was his own in point of propriety become now capable of carriage of vessels; yet this seems not to make it *juris publici*, and he may pull it down again, or apply it to his own private use." And after mentioning certain ways in which such a stream may become *publici juris*,

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the author adds: "So likewise if he purchaseth the King's Charter to take a reasonable toll for the passage of the King's subjects, and puts it in use, these seem to be devoting and as it were consecrating of it to the common use. . . . For no man can take a settled or constant toll even in his own private land for a common passage without the King's licence." This seems to me to be good law and good sense, and to be supported by the passage which was quoted from 2 *Rolle's Abridgment*, fo. 171, tit. "Prerogative le Roy," par. D. I think it probable that the cuts made and locks constructed in exercise of the powers of Gason's patent became and were in law part of the navigable river and a common passage, which all the King's subjects had the right to use on payment of a reasonable toll on passing through the locks. If this were not so, it is difficult to see what consideration the public received for the authority conferred on the patentee to divert the water from the river, which was in law a nuisance. But in the view which I take of the effect of Spencer's first patent, I do not think it necessary to rely on this point.

The case of *Thelwall v. Jackson*² in the Court of Chancery, on which the appellant placed so much reliance, and the case of *Juxon or Jackson v. Thornhill*³ in the King's Bench, in my opinion lead to no certain conclusion. In the former case we have not got the bill of complaint, but it appears to have been a claim for a free passage by traders on payment of a certain toll fixed by the Earl of Manchester. Nor is it quite clear from the proceedings in evidence what Jackson's defence to the suit was. After various attempts by the Court (which apparently would have been *extra cursum Curie* unless the public had a right of passage) to settle a reasonable toll by reference to Justices and others, and proposals for purchase of the rights by "the company," and for re-purchase of them by Spencer, which came to nothing at that time, the Court ultimately dissolved an interim order which had been granted, that Jackson should suffer a free passage at fifteen pence a ton for all goods, and left Jackson to go on with the work and make what he

could of it. In the language of modern times, the Court seems to have held there was no equity to support the bill, and left Jackson to his remedy at law. But there was no decision that there was not a right of free passage.

Spencer's first patent, dated in 1628, contains two separate grants. It proceeds on the recital that the river Ouse had been made navigable by the order and at the expense of Spencer, and that he proposed to make other rivers navigable. The first grant is a general one, substantially in the same terms as Gason's patent, for eleven years from July 21 next ensuing, with a grant of all profits, commodities, benefits, and advantages to arise from vessels passing in or upon the rivers, cuts, passages, or sluices to be so cut or made navigable as aforesaid, but limited by reference to a charter granted by James I to the Corporation of Stamford to the rate of threepence per ton for every vessel at every lock that should go through, according to the burden of such vessel. The second grant is of the benefit which Spencer might receive in respect of the river Ouse, and also any benefit which might accrue in respect of any river hereafter during the term aforesaid to be made navigable by Spencer, "according to the limitations and provisions before expressed," for the aforesaid term, and for a reversionary term of eighty years, paying an annual rent of five pounds to the Crown. This term of eleven years would therefore expire on July 21, 1639, the same date on which Gason's patent would expire, and it cannot be doubted that this patent was granted on a surrender of Gason's patent; and so far as the power of making rivers navigable by making cuts and constructing locks is concerned, it was in substitution for, and in confirmation of, the similar powers in the earlier patent. I think that, by force of the words "according to the limitations and provisions before expressed," it granted to Spencer a maximum toll of threepence per ton for each of the six locks on the river Ouse. There is no evidence of any disputes about rates after the date of this patent, or of any other rates having been demanded or received, until the year 1851, when the toll was lowered to meet the competition of the

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railway. I understand Mr. Justice Farwell to have found, with the acquiescence of both sides, that the toll of threepence was paid and received from that date. I should myself draw the same inference from the documentary evidence. The Court of Appeal were of opinion that this patent was never put in force. Their grounds for so holding are that Spencer was not the owner of the Ouse navigation at the date of the patent, and that there is no evidence of the rent of five pounds to the Crown ever having been paid. Reference was also made to the Statute of Monopolies, which had then been passed. But it will be observed that Spencer's patent does not purport to extend the inventor's monopoly beyond the term of Gason's patent. We do not know the exact relations which existed between Spencer and Jackson. The latter is not shewn to have had any interest in Gason's patent, except as regards the Ouse navigation. And I think that a fair inference from the facts and documents in evidence is that Spencer remained and was the owner of Gason's patent, and Jackson was his licensee or holder from him of some derivative interest confined to the purpose of putting it in force on the Ouse. If so, I suppose Spencer was the proper person to surrender Gason's patent and receive the new patent in substitution for it, with the consent of Jackson, which may be presumed. I am of opinion that the reasons given by Lord Justice Stirling are insufficient for holding that Spencer's first patent was not put in use; and, in fact, if the finding of Mr. Justice Farwell that the threepence toll was paid from the date of it be well founded, as I think it is, it is difficult to say that it was not put in force. I think it is at least a plausible inference that Spencer's first patent gave effect to a compromise which had been come to between Spencer and Jackson and representatives of the traders and the county for settling the disputes between them as to rates which the Privy Council and the Court of Chancery had failed to settle.

Mr. Justice Farwell, on the other hand, thought that Spencer's second patent, dated in 1638, had never been put in force. In opposition to this view, reliance

is placed on the facts that the rent of 6*l.* 13*s.* 4*d.* reserved to the Crown has been regularly paid by the owners from time to time of the locks from the date of the patent to the present time, and that the patent was put forward as the foundation of the plaintiff's title to the tolls in both suits of *Jemmett v. Ashley*.⁶ I am not disposed, under the guise of construing the patent, to give the language of this patent a meaning which the words will not bear. But I think that if the words are susceptible of a construction which will support and shew a legal origin for the usage proved, it ought to be adopted, although it may not be in accordance with the *prima facie* or obvious meaning of the words used. The patent (which I think was intended to operate as a surrender of Spencer's first patent) commences with a recital that by virtue of Spencer's first patent Spencer had extended the navigation from St. Neots to within four miles of Bedford (for so I understand the recital, having regard to the existing facts), and that he was engaged in making another river, called the Stour, navigable. It purports to grant to Spencer, his heirs and assigns, "so much as in us lieth" — first, the sole and exclusive passage for laden vessels through the Ouse from St. Ives to St. Neots, and thence to within the said four miles of Bedford, and so much further as Spencer, his heirs or assigns, should thereafter make the river navigable; secondly, the sole and exclusive right of carrying goods on the Ouse described in the same words; thirdly, the sole and exclusive government and disposition of all vessels navigating in and upon the river between the towns; and fourthly, all profits, commodities, pre-eminences, rights, and privileges by reason of the carriage of goods upon the river in any vessels between the several towns and places aforesaid.

The powers and franchises purporting to be granted by this patent, according to the plain meaning of the words, are such as the Crown had no power to grant to a subject. It appears to me that the grant, if valid, would be a gross infringement of both public and private rights. I have anxiously, and with a willing mind, tried

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to find some construction of the language of the instrument which would make it a valid patent. Like Lord Macnaghten, I cannot adopt Lord Justice Vaughan Williams's suggestion of an underlying assumption which is not expressed, and indeed is at variance with the words used. Nor, with unfeigned respect for Lord Justice Stirling's opinion, can I adopt the view taken by him, for he seems to construe the patent as conferring a franchise for which there is no precedent. He thought that there was some analogy to be found in the well-known franchise of a right of ferry; but I agree with Lord Macnaghten that there is no real analogy between the two cases. The only suggestion I can make is that by the words *quantum in nobis est* the grant is so qualified and limited as to be subject to whatever rights the public had acquired or private owners possessed. These words, however, are common-form words in a Crown grant, and I am not aware of any case in which such an effect has been given to them as would reduce the grant to nothing. Such a construction would, in fact, be repugnant to the grant itself. The part of the patent which I have called the fourth grant contains words similar to those used in Spencer's first patent, which, by the context, conferred a right to a toll limited to threepence per ton at the passage through each lock. I think that the profits must mean the profits to which Spencer had a legal right under his first patent; and the effect, in my opinion, was to give him (if the second patent was valid) a perpetual enjoyment of the threepenny toll in consideration of an increased rent to the Crown. Unless the patent can be construed in some such way as I have suggested by limiting the first three subjects of grant by the clause *quantum in nobis est*, or the patent can be upheld as a several grant of the subjects fourthly granted (which is inadmissible on principle), I think that Spencer's second patent must be treated as void; and the consequence would be that the right to take any tolls expired on the termination of the eighty years' reversionary term granted by Spencer's first patent, as was in fact held by Mr. Justice Farwell.

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On the other hand, it appears that in both suits of *Jemmatt v. Ashley*⁶ and *Jemmatt v. Ashley, jun.*,⁷ the plaintiffs by their bills based their title to the tolls taken on the navigation from St. Ives as far as the town of Bedford on Spencer's second patent. The defendants, by their answers in each suit, contended that the patent was void and had never been put in force. The particular question in litigation in the first suit related to a portion of the river above St. Neots and between that town and Barford Bridge, the place within four miles of Bedford to which Spencer was stated to have made the river navigable. The defendant Ashley was lessee of the whole navigation and owner of one moiety of the reversion, the plaintiffs being owners of the other moiety. Ashley's contention appears to have been that he had constructed the navigation above St. Neots under the powers of a certain Act of Parliament of 16 Car. 2, and therefore the plaintiffs had no interest in that part of the navigation. The decree dated July 2, 1690, contained a declaration that the river being made navigable up to Barford Bridge by Spencer, and the defendant having taken a lease of the said navigation (from Spencer's successors) and having enjoyed the same under the title of the said lease, and the right of the said letters patent (Spencer's second patent), he ought not to be accounted the undertaker under the said Act of Parliament save only as to the navigation between Barford Bridge and Bedford; and the decision was in favour of the plaintiffs. There was an appeal to this House, and the decree of the Court of Chancery was affirmed. The cases lodged by the parties are before the House, and contain the whole story. There is no doubt that the validity of Spencer's second patent was in issue in both suits, and the plaintiffs apparently succeeded on the strength of their title under the patent. But I doubt whether the validity of the patent was really material in either suit, and I do not think that the decree in either suit can be regarded as a judicial decision on the point. At any rate, it is not *res judicata* as between the parties to the present litigation. There is, however,

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one matter which clearly appears from the proceedings in these suits. Both parties acknowledge, and the old witnesses who were examined concurred in saying, that there was a public right of passage for boats through the locks from St. Ives to St. Neots, subject only to the payment of a toll of threepence per ton for all goods passing through each lock. For instance, Thomas Woodstock, in his deposition in the first suit, taken in September, 1689, said that he had known the river Ouse from St. Ives to St. Neots for above sixty years, and that there was a free passage up the river for boats during the deponent's remembrance, without any leave or licence of the proprietors of the sluice; paying the toll at the several sluices the said boats came through, which was threepence a ton for each sluice they passed through; and other old witnesses spoke to the same effect. This evidence was read and commented on without objection by both sides.

I ought to mention two arguments addressed by the appellants' counsel to this House. One was that the passage through the locks could not have been dedicated to the public use by Spencer, because he and his successors were lessees only of the land on which the Godmanchester lock was constructed until the year 1689, when a conveyance of it was made to Ashley by the corporation. I think the correct answer to this argument was given by the respondents—namely, that a lessee can make a valid dedication with the acquiescence of his lessor, for which they cited *Rex v. Barr* [1814]¹²; and that in the circumstances of this case such acquiescence should be presumed. Another argument was that goods continued to be brought by boat to the milldam and then “backed over” instead of passing through the locks, and no toll was demanded for such goods. Assuming that the owner of the locks would otherwise be entitled to demand the toll on such goods or to prevent the evasion of the payment of his tolls in such manner, I think the answer to the argument is that the establishment of the new passage through the locks would not

prevent the public from using the older and accustomed way of carrying their goods up and down the river.

With regard to the stanch below St. Ives, I am quite sensible of the difficulty of the question, and express my opinion with some hesitation. On the whole, I think there is not enough in the Act of 6 Geo. 1 to impose upon the appellant the duty of maintaining the stanch, and that Mr. Justice Farwell's decision was right.

I am therefore of opinion that Mr. Justice Farwell's decision was correct and should be restored. The point on which I differ from Lord Macnaghten is in thinking that by Spencer's acceptance of a grant of the threepenny toll the cuts and passage through the locks became a public waterway, and that we are not at liberty to disregard the views to that effect held and expressed by the owners of the navigation in the seventeenth century, though they differed as to the origin of it, and the strong evidence of the common reputation at that time.

As I understand the majority of this House agree with Lord Macnaghten, the order will of course be in accordance with his motion.

LORD JAMES OF HEREFORD.—For myself I would only say that, having had a full opportunity of reading and considering the judgment of Lord Macnaghten after it was printed, I concur in the judgment which he has given.

LORD LINDLEY.—I will not trouble the House with a narrative of the many facts which have to be studied in order to master this extremely difficult case. I will confine myself to the inferences at which, after a careful study of all the evidence, I have myself arrived.

Both Mr. Justice Farwell and the Court of Appeal agreed in holding that the cuts in which the six locks are situate were part of the public navigable river. I am convinced that upon this point, at all events, their decision is right. I cannot accept the view that all that has been done in the past by Simpson and his predecessors in title is simply attributable to their ownership of the cuts and locks.

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I have very carefully studied the documentary and other evidence in the case, and I think it proved with reasonable certainty that in early times the Ouse was a public river navigable from the sea up as far, or nearly as far, as Bedford. But its navigation was interrupted above St. Ives by weirs, probably unlawfully constructed, but which were legalised by statute 25 Edw. 3, as explained in *Williams v. Wilcox*.⁵ For the purposes of this appeal it is immaterial to consider whether the Ouse between St. Ives and Bedford ought to be treated as one public navigable river interrupted by legally existing milldams, or as a series of public navigable rivers between milldam and milldam. The important point is that the public navigation brought the waterway of the Ouse within the jurisdiction of the Crown.

I have examined all the authorities I can find on navigable rivers and nuisances in them, but none of them bear very closely on the right of private owners to make cuts and locks so as to divert the water from its ancient course. It is laid down in books of great authority that a river common to all men is called a highway, or is in the nature of a highway; but there are many important differences between water highways and land highways.

There is a passage in Hale's treatise *De Jure Maris*, c. 3, to the effect that the owner of a private stream may make it navigable and keep it private; but I am not aware of any authority which shews that a private individual can divert the water of a public navigable river through his own land into another public river or another part of the same public river and levy a toll on the public passing over his land through the water which he so diverts. Lord's Hale's treatise *De Jure Maris*, c. 3, is adverse to the existence of any such right. There being no authority in favour of such a right, I am not prepared to assume it. It appears to me inconsistent with the general principles applicable to public navigable rivers and to the taking of tolls. As regards tolls for passing over land, the passage cited from 2 *Rolle's Abr.* 171 D., and 16 *Viner's Abr.* (2nd ed.), 577 Dd., is a very strong

authority against the right to take them in the absence of a grant from the Crown. No right so to deal with the waters of the Ouse has ever been claimed by any of the appellant's predecessors in title, and I am convinced that no such right would have been recognised by any Court in England in olden times.

I will not stop to read Gason's patent, which was granted in 1618, nor to enter in detail into the proceedings which followed. That patent and the Orders of the Privy Council, which I have carefully studied, appear to me to establish that Jackson was held entitled under the patent to a reasonable rate or toll for goods carried through the locks. So far as he was concerned, the Privy Council could fix its amount, for if he did not submit to their Orders they could revoke Gason's patent. But the public were in a different position: they were not bound to go through the locks; and if they did, the Orders of the Privy Council were not technically binding on strangers to the proceedings before them. Gason's patent, as interpreted and acted upon in the Ouse district before subsequent patents were granted, appears to me to shew—first, that it conferred on the patentee the right to interfere with the navigation of the Ouse by erecting locks and sluices; secondly, that he had a right to charge a reasonable sum for the use of such locks by persons carrying goods through them; thirdly, that this right was not a mere incident of the ownership of the soil on which the locks were erected; fourthly, that the sums fixed by the Privy Council were regarded as tolls payable under the patent, and that the right to levy them involved a duty to keep the locks in repair; fifthly, that an action of *assumpsit* would lie for the sum or toll so fixed if a person used the lock by carrying goods through it and refused to pay the fixed sum; sixthly, that a promise to pay such sum was not invalid for want of consideration.

The right of the public on the one hand to use the locks for the carriage of goods, and the right of Gason and his assigns on the other hand to a toll in respect of such goods (but subject to keeping the locks in repair), was in my

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opinion established, so far as the Ouse is concerned, by Gason's patent and the Orders in Council to which I have referred. The inference that the public had a right to go through the locks on paying the tolls seems to me warranted by the facts; and the doctrine, once a highway (always a highway, is, I believe, as applicable to rivers as to roads. But the obligation to maintain the locks and the right to take tolls might have come to an end when Gason's patent terminated. Instead, however, of coming to an end, it was continued for over three hundred years—in fact, down to the commencement of this litigation—under the circumstances which I will now shortly explain.

On January 3, 1628, old style (or 1629 new style), Charles I granted a patent to Spencer. This was Spencer's first patent. Why it was not granted to Jackson is not known. Unlike Gason's patent of 1618, this patent refers in terms to the Ouse. I will not stay to read it. In my opinion, Spencer's first patent recognised the right of the public to pass through the locks, and legalised and in effect, although not in express terms, continued the tolls which had grown up under Gason's patent, and in effect fixed those tolls at threepence per ton per lock. If this first patent had not been superseded ten years afterwards by another patent, these tolls would have been payable until July, 1720. The consideration for them would be, as regards the Crown, the annual payment of five pounds to the Crown, and, as regards the public, the improvement of the navigation by means of the cuts and locks. Mr. Justice Farwell and the Court of Appeal both agree that after Spencer's first patent, if not before, the cuts were parts of the public navigable river; but these eminent persons have taken different views of the duration of this patent. I agree with the Court of Appeal in their conclusion that this patent was superseded, and in point of law was impliedly if not expressly surrendered, by another patent granted to Spencer in 1638 (Spencer's second patent). This second patent gives rise to the real difficulty in the case. If taken to grant all the monopolies mentioned in it, it would be hopelessly in excess of the Royal autho-

rity. But the grant is qualified by the words "as much as in us lieth," and the user of 250 years enables this House to see how the grant has been understood and acted upon, and how [it can be properly interpreted so as to give it some effect. It is well settled that if a Crown grant admits of two interpretations, one of which makes the grant void and the other of which makes it valid, the latter is to be preferred—*Comyn's Dig.* tit. "Grant," G. 12; *Reg. v. Eastern Archipelago Co.* [1853],¹³ per Mr. Justice Coleridge. This rule may, in my opinion, be properly applied to the present case. The usage shews how much and how little has been treated as lawfully granted by the patent, and the extent to which the general words ought to be restrained.

The interpretation practically put upon the patent for many years cannot be properly disregarded; and when interpreted by what has been done under it until the defendant departed from the usage which had prevailed up to his own time, I see no reason for holding the patent to be wholly invalid and of no effect. Practically it has received a very limited interpretation. It has never been treated as conferring on the patentee any control over the navigation of the Ouse outside the locks erected under Gason's patent or Spencer's first patent; nor over any boats or barges except such as carried goods through those locks. In effect it continued, but did not create, the right to tolls which had grown up under Gason's patent, and had been authorised to be taken by Spencer's first patent; and, as already pointed out, the right to those tolls was accompanied by the duty to keep the locks in repair. The tolls which thus grew up and were afterwards sanctioned and continued were in the nature of tolls thorough, conferring on those who paid them the right of passing through the locks from one part of the old navigable river to the other. Towards the end of the seventeenth century Spencer's second patent was brought to the attention of the Courts in two suits known as *Jemmat v. Ashley*,⁶ and, although they cannot be regarded as conclusive in the present

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controversy, they go far to shew that this patent was judicially recognised as valid. It was the foundation of the plaintiff's case in both suits. I will not trouble the House with the details of them.

As regards pleasure-boats the charters are silent, and the usage is comparatively modern, and by no means uniform. The toll under the charters was confined to boats and barges carrying merchandise, and I agree that none can be claimed for pleasure-boats. But the cuts are part of the highway, and pleasure-boats can be taken through them without payment.

If I am right in the view which I take of Spencer's second patent, and of the long usage, it becomes quite unnecessary to call in aid any presumption of a lost grant; and I do not propose to trouble the House with any observations on that very debatable topic. Further, it will follow that the obligations imposed by the patent cannot be got rid of by ceasing to levy the tolls payable under it if they can be got. The appellant cannot divest himself of those obligations simply by ceasing to take tolls. If he wishes to surrender his patent or to procure its cancellation, he must do so in the proper manner; but so long as it remains in force, and he can obtain tolls enough to enable him to repair the locks, or asserts his rights by taking tolls, so long is he legally bound to perform the duties imposed by it. But I cannot find any duty to keep the locks in repair if the tolls do not enable him to do so, and if he takes none; and here, I think, the Court of Appeal have gone too far, for they have declared his duty to repair to be unconditional. The Court of Appeal have decided that the sums payable for toll since Spencer's second patent are not the sums fixed under Gason's patent and authorised by Spencer's first patent, but reasonable tolls. I feel great difficulty in coming to a clear conclusion on this point; but I am not prepared to differ from the Court of Appeal upon it, as the tolls originated with the Orders of the Privy Council, and were clearly fixed with a view to what was reasonable, having regard, *inter alia*, to cost of erection and repair.

I pass now to the stanch below St. Ives. This is governed by statute, not by any

charter. The statute 6 Geo. 1 was passed in 1720. Its provisions are materially different from those found in ordinary railway Acts, and the decisions upon them do not appear to me to govern this case. But the tolls actually obtainable are not sufficient to keep the stanch in repair, and I see no duty cast upon Mr. Simpson to keep the stanch in repair out of his own pocket.

It follows, in my opinion, that both his right to take tolls for repairs and his duty to repair have ceased. If he could obtain money enough from the tolls to keep the stanch in repair, I think it would be his duty to levy the tolls and keep it in repair, and if he levied any tolls his duty would be the same.

The conclusions at which I have arrived may be summarised thus:

1. That the cuts in which the locks are situate are part of the public navigable river, and Simpson has no right to exclude the public from them.

2. That his obligation to keep the locks in repair is conditional on his ability to raise the money necessary for the purpose by the tolls he is entitled to levy, and on his ceasing to avail himself of his right to collect tolls under the patent.

3. That if he is not able to collect enough to keep the locks in repair and he collects no tolls, his obligations to keep the locks in repair also cease, although technically his patent might have to be cancelled to make his position legally invulnerable.

4. That the insufficiency of the tolls appears to be established, but if it is doubtful an enquiry should be directed.

5. That similar observations apply to the stanch.

6. That both Mr. Justice Farwell's judgment and the order of the Court of Appeal should be varied in accordance with these views.

7. That as each party has claimed too much, each should bear his own costs here and below.

That is the order I should propose, but the order of the House will of course be that proposed by Lord Macnaghten. I will, however, add the remark that it is obvious that, in any view of the case, if the Ouse is to be maintained as a public

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navigable river a special Act of Parliament must be obtained.

Judgment of FARWELL, J., and order of the COURT OF APPEAL reversed; appeal allowed; respondents' cross-appeal and the action dismissed, with costs both here and below. Cause remitted to the Chancery Division.

Solicitors—Batten, Proffitt & Scott, for appellant; Peacock & Goddard, agents for J. Percy Maule, Huntingdon, for respondents.

[Reported by J. Eyre Thompson, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 25.

ROSE, *In re*;
HASLUCK v.
ROSE.

Bankruptcy—Limited Power of Appointment—Right of Trustee to Release—"Power"—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (ii.)—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 52, sub-s. 1—Absence of Possibly Interested Parties.

Appeal from decision of Farwell, J. (73 L. J. Ch. 726; [1904] 2 Ch. 348), who held that the right of the donee of a limited power of appointment to release that power, whether inherent or given him by sub-section 1 of section 52 of the Conveyancing Act, 1881, is not a power in or over or in respect of property within the meaning of section 44 (ii.) of the Bankruptcy Act, 1883, and accordingly cannot be exercised by his trustee in bankruptcy by virtue of that section.

The decision was given upon a summons taken out by the trustee in the bankruptcy of the donee of the power in question. The only defendants to the summons were the trustees of the will under which the power arose.

The trustee in bankruptcy appealed.

Upjohn, K.C., and E. Ford, for the appellant.

Jenkins, K.C., and Bischoff, for the respondents.

On the hearing of the appeal facts were brought to the attention of the Court as to the absence of parties who might possibly be interested under an exercise of the power, and their Lordships were of opinion, having regard to those facts, that the proceedings on the present summons would be ineffective even if they were to decide in favour of the appellant; and at the suggestion of the Court the parties agreed that an order should be made discharging by consent the order of Farwell, J., the appellant paying the respondents' costs of the appeal as between solicitor and client.

Solicitors—Henry Hilbery & Son, for appellant; Bompas, Bischoff, Dodgson, Cox & Bompas, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
1904.
Nov. 8.

CRAWFORD, *In re*;
COOKE v. GIBSON.

Husband and Wife—Settlement—Trust for Wife "if she shall survive her now intended coverture"—Termination of Coverture by Divorce—Effect of Trust.

By a marriage settlement the wife's father covenanted that his executors should within twelve months of his death, if the wife were then living, pay to the trustees 10,000l. on trust (in default of issue, which happened) for the wife absolutely "if she shall survive her now intended coverture, but if she shall die during her now intended coverture," then in trust for the father absolutely. The husband obtained an absolute decree for dissolution of the marriage, and the wife survived her father:—Held, that the wife had survived the coverture within the meaning of the settlement, and was therefore entitled to receive the 10,000l. from the trustees when paid to them.

Semble, that, an order of the Divorce Court having dealt with the settled pro-

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party as if the husband were dead, the husband must be considered as dead for the purpose of construing the settlement, and the coverture might be considered as terminated in this manner also.

Quære, whether under the Matrimonial Causes Acts, 1857, 1859, and 1878, the Divorce Court has power to interfere with the interests, rights, or liabilities of persons not parties to the suit—for example, a wife's father covenanting to settle a fund.

Adjourned summons.

By an indenture of settlement dated July 26, 1881, and made on the marriage of Donald Crawford and the defendant Virginia Mary Smith, each of the contracting parties brought funds into the settlement, and T. E. Smith, the father of the wife, covenanted that his executors or administrators should within twelve calendar months after his death in case the said Donald Crawford and Virginia Mary Smith or either of them or any issue of the said marriage should be living at his death, pay to the trustees of the settlement the sum of 10,000*l.* with interest from the day of his death to the day of actual payment, and it was thereby declared that the trustees should stand possessed of all the trust funds in trust during the joint lives of the husband and wife to pay the income thereof to the wife for her sole and separate use, and after the decease of either to pay the income to the survivor during his or her life, and after the decease of such survivor upon trusts for children of the marriage, and it was thereby agreed and declared that in default of issue the trustees should stand possessed of the trust funds and the income thereof subject to the foregoing trusts in trust for the wife, her executors, administrators, and assigns "if she shall survive her now intended coverture, but if she shall die during her now intended coverture then in trust for the said T. E. Smith (the father) his executors administrators and assigns."

The husband and wife were divorced, and the divorce decree was made absolute on August 6, 1886, the wife being the guilty party.

By an order of the Divorce Court dated December 9, 1886, varying the terms of

the marriage settlement,¹ it was provided that the Smith trust funds, including the above-mentioned 10,000*l.*, should be held upon such trusts as would be applicable in respect of the same if the husband were dead and had died in the lifetime of the wife.

There was no issue of the marriage.

T. E. Smith, the father, died on December 5, 1903, and the wife being still alive the trustees of the marriage settlement took out this summons asking the Court to determine whether the sum of 10,000*l.* which the father covenanted by the settlement should be paid to them by his executors was, when paid, to be held by them upon trust for Mrs. Crawford the wife absolutely, or upon trust for her for life, with remainder in the event of her death in the lifetime of the husband to the executors of the father.

Knowles Corrie, for the trustees.

Borthwick, for the executors of the father.—It was intended that the coverture should last during the joint lives of the husband and wife, and the words "survive the now intended coverture" should be construed as if they were "survive the husband." The result of the divorce proceedings should not be allowed to wipe out the father's estate as a beneficiary from the settlement. The Matrimonial Causes Acts¹ do not give the Court any power to compel the father to give more than he had bargained to give. It is true that the wife, although she was the guilty party, cannot be deprived of all benefits under the marriage contract by reason of the divorce; but, on the other hand, she cannot increase her benefits under the contract. In *Fitzgerald v. Chapman* [1875],² Jessel, M.R., fully examined the effect of a divorce decree upon a trust for a wife if she

(1) By section 45 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), it was provided that the Court may order a settlement of property for the benefit of the innocent party and the children of the marriage, and this power was extended by section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), and further, for cases where there are no children of the marriage, by section 3 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19).

(2) 45 L. J. Ch. 23; 1 Ch. D. 563.

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should survive her husband, and the question of forfeiture for the offence leading to the divorce, and said that he was quite unable to follow certain cases "which were decided upon the ground that the dissolution of the marriage was equivalent to the death of the husband"—see also *Burton v. Sturgeon* [1876].³ The settlement stands except so far as the order of the Divorce Court has altered the beneficial interests of the husband and wife; the right should therefore be reserved to the father's estate of having the 10,000*l.* back, as it was clearly only intended that she should take absolutely if she survived her husband—*Cartwright v. Cartwright* [1853].⁴

The case is analogous to those under a covenant to settle after-acquired property, in which it has been held that funds have not been caught by the covenant, but go to the wife as a *feme sole*.

T. T. Methold, for the wife.—This is simply a question of construction on the words of the settlement; and if this provision is held to be bad, then many ordinary precedents of conveyancing in the recognised books are bad. "Survive" here does not mean "survive the husband." The words are plain, and the wife has in fact survived the coverture; she is therefore entitled absolutely. *Cartwright v. Cartwright*⁴ was a case not of a limitation, but of a proviso which can be declared void. This question was recently fully discussed in *Hope Johnstone, In re; Hope Johnstone v. Hope Johnstone* [1904],⁵ where it was held that a provision for a wife so long as she should continue the cohabiting wife of her husband was not void as being against public policy, on the ground that it contemplates a future separation.

Borthwick replied.

KEKEWICH, J.—This is one of those cases in which an event has happened which was not in the contemplation of the parties to the document in the sense that they really thought about it; although it does not follow that if the event was not

in their contemplation, if the language used be adequate, the Court may not give effect to the language, notwithstanding that it may see very well that the matter was not considered.

Now, upon the marriage of this husband and wife the father of the lady covenanted that his executors should pay to the trustees of the marriage settlement 10,000*l.* within twelve months of his death if his daughter should be then living; and he died on December 5, 1903, and his daughter is still living, so that in accordance with the covenant his estate is bound to pay to the trustees of the marriage settlement 10,000*l.*, and it cannot escape from the exigency of that covenant. But then the question arises, Upon what trusts are the trustees of the marriage settlement to hold it? The settlement first of all gives life interests in the money in common form to the wife and the husband and interests to their issue, and in default of issue gives the money in trust for the wife absolutely "if she shall survive her now intended coverture," but if she dies during the coverture, then in trust for the father absolutely. Of course, one can see that the draftsman framed this clause in negligence of the words of the covenant, and that the two do not quite fit. Under the covenant the lady is to be paid 10,000*l.* if she survives her father, but the latter under the trust is not to get the money back unless she dies during her coverture; and in fact the two things are not the same. The marriage was dissolved by the Divorce Court, and the coverture is no longer existing. There are three ways in which a coverture may come to an end—by the death of the husband, by the death of the wife, or by a decree absolute in the Divorce Division. In this case it has come to an end by divorce, which, although not a natural way, is such a way that the coverture has none the less come to an end, although the wife is still living. How can I construe the trust as meaning anything else than what it says? There is no issue of the marriage, and, the interest of the husband being out of the way, the trust for the lady takes effect. The words are "if she shall survive her now intended coverture." The coverture has come to an end. She is still living. Therefore

(3) 2 Ch. D. 318.

(4) 22 L. J. Ch. 841; 10 Hare, 630; 3 De G. M. & G. 982.

(5) 73 L. J. Ch. 321; [1904] 1 Ch. 470.

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she has survived the intended coverture, and the father's estate was only to get the fund back if she should die during her intended coverture.

With regard to the order of the Divorce Court directing that this fund is to be held upon such trusts as would be applicable if the husband were dead and had died in the lifetime of the wife, of course the Divorce Court has jurisdiction to vary settlements, as is provided by section 45 of the Matrimonial Causes Act, 1857, section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Matrimonial Causes Act, 1878; and in the exercise of those powers the Court has made this order, so that I must read the settlement as having been varied by saying that the husband is dead, and that the coverture has therefore ceased in that way. Of course, it is arguable that the Divorce Court has no power to interfere with the interests, rights, or liabilities of persons who are not parties, so that it cannot in this case make the father's covenant to pay other than what it was. If that argument were raised it would require careful consideration; but in this case the Divorce Court did not touch the father's covenant—it only ordered the money to be paid under the trust as if the husband were dead. Therefore, as the lady was living at the death of the father, his executors are bound to pay the money to the trustees of the settlement, and the trustees must pay it to the lady as having survived her coverture.

Solicitors—Russell-Cooke & Co., for trustees and wife; Pennington & Son, agents for Clayton & Gibson, Newcastle-upon-Tyne, for executors of T. E. Smith.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.

WARRINGTON, J. }
1904. }
Nov. 3. }
HORNE, In re;
WILSON v.
COX-SINCLAIR.

Trust and Trustee—Trustee also Beneficiary—Overpayment to Co-Beneficiaries—Underpayment to Himself—Absence of Mistake—Right of Adjustment.

A trustee, in administering an estate bequeathed to his brothers and himself for their respective lives, during a period of seventeen years made payments of income to the beneficiaries in irregular sums not corresponding with their respective shares, with the result that at his death he had overpaid his brothers and underpaid himself. The payments were not made by mistake, and his brothers' attention was not called to the fact that they were being overpaid:—Held, that his estate was not entitled to be repaid the amount overpaid.

Swithin Horne died on August 5, 1886, having by his will, which was duly proved, bequeathed certain leasehold property to trustees upon trust to perform the lessees' covenants and to keep the premises in repair, and directed them, after payments out of the rents of all necessary outgoings and of an annuity to his daughter, to pay the residue of the profits to his three sons Richard Edward Horne, William John Horne, and Edwin Henry Horne as tenants in common for their respective lives, and after the decease of any of his three sons to hold an equal third part of the estate in trust for the deceased son's next-of-kin according to the Statutes of Distribution.

By a deed of appointment dated November 4, 1886, Robert Wilson was duly appointed to act as trustee of the will conjointly with R. E. Horne.

R. E. Horne was the acting trustee of the will, his co-trustee merely signing cheques as requested, and in administering the trust he made payments of income from time to time to each of his two brothers and to himself. It appeared from the accounts that the payments were made in round sums and were not exact thirds of the income, nor were they equal or uniform either in amount or in date of payment. Speaking generally, R. E. Horne paid his brother Edwin a small sum monthly and his brother William (or his

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representatives, he having died in 1898) a larger sum approximately corresponding in total amount once or twice a year, while he appropriated for himself various sums at irregular intervals. The result was that between the testator's death and his own death, which took place on August 17, 1903, R. E. Horne had paid on account of income to his brother Edwin the total sum of 931*l.* 10*s.*, and to his brother William (or his representatives) the sum of 915*l.* 10*s.*, while he had retained for himself only the sum of 650*l.* In other words, as each of the three beneficiaries should have received 832*l.* 6*s.* 8*d.* or one-third of 2,497*l.*, he had overpaid Edwin the sum of 99*l.* 3*s.* 4*d.*, and William (or his representatives) the sum of 83*l.* 3*s.* 4*d.*, and had underpaid himself 182*l.* 6*s.* 8*d.*

The executors of R. E. Horne claimed that this sum of 182*l.* 6*s.* 8*d.* was due to the estate of R. E. Horne, their testator, and ought to be made good, and they sought to have the account adjusted accordingly.

There was in the hands or under the control of R. Wilson, as sole surviving trustee of the will of Swithin Horne, property representing the capital of the estate of the estimated value of 2,500*l.*, and a sum of 118*l.* 16*s.* 3*d.* representing income of which 33*l.* 11*s.* 10*d.* had accrued prior to the death of R. E. Horne.

On July 13, 1904, R. Wilson took out an originating summons against Edwin Henry Horne and the executors of R. E. Horne for the determination of the question whether R. Wilson, as the sole surviving trustee of the estate of Swithin Horne, ought to pay or allow to the executors of R. E. Horne the sum of 182*l.* 6*s.* 8*d.*, and if so whether out of capital or income, and if out of income whether he was entitled to deduct the sum of 99*l.* 3*s.* 4*d.* from the share of Edwin Henry Horne in accruing income and 83*l.* 3*s.* 4*d.* from the share of the representatives of William John Horne.

Bickmore, for the plaintiff.

Cox-Sinclair, for R. E. Horne's executors.—The amount which R. E. Horne overpaid to his brothers and underpaid to himself ought now to be made good to his

estate out of income accrued and accruing, and his executors are entitled to have the account adjusted accordingly—*Harris v. Harris* (No. 2) [1861],¹ *Livesey v. Livesey* [1827],² and *Dibbs v. Goren* [1849].³

Lampard, for E. H. Horne.—The cases which have been cited on the other side were all cases in which the payment which it was sought to recover had been made by mistake. There is no evidence to shew that there was any mistake in the present case. So far as appears, what R. E. Horne did was done by intention. He does not seem ever in his lifetime to have suggested to his brothers that they were being overpaid. Having regard to the accounts and his course of dealing, he would not have been able to go to his co-beneficiaries and say, "You have had too much, repay me the surplus," nor could he have repaid himself; and of course his executors can be in no better position. He made the payments in his capacity of trustee, and the beneficiaries were entitled to treat the money they received as their own. After the length of time which has elapsed—sixteen years—the matter ought only to be dealt with on strict legal grounds—*Ballard v. Marsden* [1880]⁴ and *Ridgway v. Newstead* [1861].⁵ Whatever difficulty has arisen has been caused by R. E. Horne's own *laches*; he ought to have raised the question of overpayment at the time if there was anything in it. His executors' claim must fail.

Cox-Sinclair, in reply.

[WARRINGTON, J.—I am not impressed by the suggestion of *laches*; but would it not be inequitable now, at the suit of a trustee who has done whatever it is which has been wrong, that the matter should be set right?]

The inconvenience to beneficiaries who have to refund is the same whether it is at the suit of a beneficiary who is also a trustee or of one who is merely a beneficiary.

WARRINGTON, J.—This is a somewhat curious case. The exact point which I

(1) 29 Beav. 110.

(2) 6 L. J. (o.s.) Ch. 13; 3 Russ. 287.

(3) 11 Beav. 483.

(4) 49 L. J. Ch. 614; 14 Ch. D. 374.

(5) 30 L. J. Ch. 889.

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have to decide does not seem to be covered by authority. [His Lordship stated the facts to the effect set out above, and continued:] If R. E. Horne had not been himself a trustee as well as a beneficiary, the case would be plainly covered by authority, and it would now be the duty of the plaintiff, the surviving trustee of the will, in properly administering the trust for the future, to equalise the payments which have been made out of income. That proposition is established by the three cases which have been referred to on behalf of R. E. Horne's executors—*Harris v. Harris*,¹ *Dibbs v. Goren*,² and *Livesey v. Livesey*.³ Those cases put the point clearly, but it is especially clearly put in *Dibbs v. Goren*.³ But in the present case we have the fact that the person who is seeking re-adjustment is himself a trustee. It seems to me that this fact introduces into this case an element of an essential character which was absent from the cases to which I have referred. When a trustee comes to the Court to have an account adjusted upon the ground that he, being also a beneficiary, has paid himself too little, it is well we should look and see what is or may be the effect of the proposed adjustment to the other beneficiaries, and particularly with reference to the great inconvenience that may be caused to them if the claim is allowed and the income has to be impounded to make good the deficiency to the trustee. Here there are three beneficiaries—Richard, Edwin, and William. Let us assume that the first of these to die is Richard the trustee himself. Richard's executors then after his death come and say to William and Edwin, "You have received a great deal more income than you were entitled to; we the representatives of Richard, who has paid you too much, say that your income must be stopped until his estate has been repaid what has been overpaid to you." This would be very inconvenient and a great hardship to the other legatees. The same difficulty arises when the claim is made at the instance of a beneficiary, but in that case the suitor is not the person responsible for what has been done. Here the trustee is the suitor, and he was respon-

sible. Upon what principle can it be said the trustee is entitled to recover? I think clearly none at all, because, having regard to the circumstances and mode of payment, it is plain he made no mistake: he seems to have made the payments without any exact reference to the actual amount of the income, but there was no mistake of fact. He clearly could not recover at law. Can he recover in equity? Can he call upon the other beneficiaries to repay him the amount which he has overpaid to them, or claim the right to impound their accruing income till he has repaid himself? I think he has no such right. Such right as he might have had in the character of a beneficiary is ousted by the fact that he is himself responsible for the payments made. I say here, as was said in *Ridgway v. Newstead*,⁵ that the right of a creditor to make legatees refund may be affected by the course of conduct of the creditor, and that not only has the trustee here no equity to entitle him to invite the Court to interfere, but that, having regard to the course he adopted, it would be inequitable now for the Court to give effect to his contention as against the other *cestuis que trust*, who were themselves perfectly innocent and were receiving in good faith what was paid; to them, believing that it was the amount to which they were properly entitled.

I think therefore I ought to declare that the trustee of the estate of Swithin Horne ought not to pay or allow to the executors of R. E. Horne the sum of 182*l.* 6*s.* 8*d.*, being the amount appearing by the accounts to have been overpaid. I think the plaintiff was bound to come to the Court to determine this question, and therefore, following my usual practice in these cases, I direct that the costs of all parties as between solicitor and client shall be paid out of the estate.

Solicitors—Walter A. Jennings, for plaintiff and E. H. Horne; J. A. Bartrum, for R. E. Horne's executors.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
1904. } BLAND'S SETTLEMENT, In
Nov. 3. } re; BLAND v. PERKIN.

Marriage Settlement—Covenant to Settle After-acquired Property—Vested Reversionary Interest—"Shall become entitled."

A marriage settlement contained a covenant that all property to which the wife during her then intended coverture "shall become entitled" should be settled. At the date of her marriage the wife was entitled to a vested reversionary interest in certain property expectant upon the death of tenants for life:—Held, that the words "become entitled" meant entitled "in interest" and not "in enjoyment," and that even if the reversionary interest in question fell into possession during the coverture it would not become subject to the trusts of the settlement.

Under the will of her grandfather, Philip Cazenove, who died on January 20, 1880, the plaintiff Susanna Haworth Bland was, at the date of her marriage, entitled in reversion expectant on the death of her mother, Emily Frances Peel, to a share of the residuary estate of the testator. By a settlement made on November 9, 1865, on the marriage of Emily Frances Peel with Lawrence Peel, the plaintiff was also entitled on the death of the survivor of her parents to certain funds therein settled, as they should appoint.

By a deed of appointment dated February 21, 1894, Lawrence Peel and Emily Frances Peel appointed that after the death of the survivor of them the trustees of the settlement of November 9, 1865, should hold certain funds in trust for the plaintiff and her sister equally.

By a settlement dated January 15, 1895, made on the marriage of Oscar Theobald Bland with the plaintiff, a sum of £5,000. was settled by the husband upon trust for himself for life, and on his death for his wife for life, without power of anticipation, and after the death of the survivor for the children equally. The settlement contained an after-acquired property clause whereby it was agreed and declared that except as thereafter mentioned "all property to which the wife

during her now intended coverture shall become entitled" should, as soon as circumstances permitted, be vested in the trustees upon trust, as to any annuity or interest determinable on the wife's death or in her lifetime, for the wife, for her sole and separate use, without power of anticipation during coverture, but with power of sale exercisable by the trustees with her consent in writing, and as to other property, real and personal, upon trust that the trustees should sell and convert the same, provided always that the trustees should not, during the life of the husband or the wife, sell or convert into money any real or personal property of a reversionary nature without the consent in writing of the husband and the wife, or the survivor of them.

The plaintiff's parents, Lawrence Peel and Emily Frances Peel, were still living, and the plaintiff was desirous of dealing with her above-mentioned interest under the will of her grandfather, and also under the appointment. The question was accordingly raised upon an originating summons on her behalf whether, having regard to the covenant to settle after-acquired property contained in the settlement of January 15, 1895, her interest under the will of Philip Cazenove was now, or would if it should fall into possession during the present coverture, be bound by the settlement. A similar question was also asked as to the plaintiff's interest under the deed of appointment of 1894. The defendants were the trustees of the indenture of January 15, 1895.

Leigh Clare, for the summons.—This lady is absolutely entitled to all the interest which she had at the date of her marriage settlement of 1895, even if such interest falls into possession during the coverture. It is not, therefore, caught by the covenant, which only applies to property to which she "shall become entitled." The words are strictly words of futurity. The question comes to this: whether the words "shall become entitled" mean entitled in point of title or of enjoyment. The construction of words such as occur here has come before the Court in many cases—*Wilton v. Colvin* [1856],¹

(1) 25 L. J. Ch. 850; 3 Drew. 617.

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Wilcox v. Smith [1857],² and *Pedder's Settlement Trusts, In re* [1870].³ A case which appears somewhat against the construction contended for is that of *Clinton's Trusts, In re* [1872].⁴ All of these cases were decided before the Married Women's Property Act, 1882, and the necessity, or assumed necessity, of excluding the husband influenced the decisions in them. In the present case the provision in the settlement as to reversionary interests not being sold except with the consent of the husband and wife assists the plaintiff's contention. She can, therefore, sell or mortgage her interest to which she was entitled at the date of the marriage, as the covenant to settle does not apply. Even if the covenant could apply to these funds on their falling into possession before being assigned or mortgaged by the plaintiff, she has power to divert them by an assignment while they are still reversionary. To hold otherwise would be to hold that they are now unassignable—that is, that they are bound.

R. H. L. Errington, for the trustees of the settlement.—The words “become entitled” indicate a change of interest, and if the plaintiff becomes entitled in possession during the coverture the property in question will be caught by the covenant—*Blythe v. Granville* [1842].⁵

[KEKEWICH, J.—Is there any authority which decides that you may have the two different meanings attached to such words as these in the same instrument—namely, “entitled either in interest or in enjoyment” ?]

There appears to be no direct decision. The point was raised in *Clinton's Trusts, In re*,⁴ but was not expressly decided by the Judge. That case, however, governs the present, and the words “become entitled” must be held to mean “entitled in possession.” In *Archer v. Kelly* [1860],⁶ Kindersley, V.C., followed the decision in *Blythe v. Granville*,⁵ although he did not follow all the reasoning in that case.

Leigh Clare, in reply.—In *Clinton's Trusts, In re*,⁴ Wickens, V.C., said

that the words could not imply both the meanings which he there gave as the second and third alternatives. The second alternative is that which is in question here.

KEKEWICH, J.—Notwithstanding the period of upwards of thirty years which has elapsed since the decision of Vice-Chancellor Wickens in *Clinton's Trusts, In re*,⁴ and notwithstanding the fact that during that period these covenants have been in constant use, and are to be found in various forms in various books, and have been carefully considered by conveyancers, and have also been the subject of various decisions of the Courts, I think it may not unfairly be stated that the remark of the Vice-Chancellor in that case, that the law was “in a very embarrassing state,” is still as true to-day as it was then. Probably the embarrassment arises from the great variety of language, and some variety in the circumstances to be found in the marriage settlements which have to be construed. I think also one is bound to remember that fact to which my attention was called by the counsel for the plaintiff—that in the meantime the position of a married woman has been materially changed by the Legislature as regards her property, and in consequence the position of her husband has also been affected. That must be borne in mind when a husband's covenant has to be considered, as distinguished from the form of covenant which has been adopted here.

It seems to me there is a certain point which has been fairly well settled. In *Blythe v. Granville*,⁵ Vice-Chancellor Shadwell says in the course of the argument that the words “become entitled” mean “become entitled either in possession or in reversion.” Probably something to the same effect might be found in some of the other judgments which have been cited to me; and I take it that there is no doubt about it at all, and if these words “become entitled” occur in a covenant of this kind, you necessarily read in the words “in possession or in reversion.” notwithstanding that they are not written in fact. In the present covenant, words “in possession or in reversion”

(2) 26 L. J. Ch. 596; 4 Drew. 40.

(3) 40 L. J. Ch. 77; L. R. 10 Eq. 585.

(4) 41 L. J. Ch. 191; L. R. 13 Eq. 295.

(5) 12 L. J. Ch. 82; 13 Sim. 190.

(6) 29 L. J. Ch. 911; 1 Dr. & Sm. 300.

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to be read in after "become entitled." These words are words of futurity. That is as clear as in the case before Vice-Chancellor James of *Pedder's Settlement Trusts, In re.*³ Nothing to which the wife was entitled at the date of the marriage could possibly be brought in, and therefore I confess I cannot for a moment think that the wife can be regarded as becoming entitled on her coverture in a different way or in a different character to property to which she was entitled in possession immediately before the solemnisation of the marriage. The Vice-Chancellor, in his reasoning in the case of *Blythe v. Granville*,⁵ seems to have found a certain amount of futurity in the marriage itself which Vice-Chancellor Kindersley did not appreciate in *Archer v. Kelly*,⁶ and which I too fail to appreciate. We are dealing here with something to which the wife was entitled in reversion at the date of the marriage, and which may fall into possession during the coverture.

Before going further, it is important to observe that there is a provision in this very agreement concerning the duty of the trustees as regards property of a reversionary nature brought into settlement under this covenant. Therefore, quite apart from the point as to the meaning of the words "become entitled," the parties do contemplate that the wife may, during the coverture, become entitled to property in reversion which would be bound.

The question arises in this way: A lady was at the time of her marriage entitled to property in reversion, and she is still so entitled. That is only material upon this point, that the property to which she was entitled in reversion is clearly not covered by this covenant, since the words are words of futurity. The words in the clause dealing with property of a reversionary nature of course do not apply to property to which she then was entitled in reversion, but only to property to which she might become entitled in reversion during the coverture. It may be that during the pre-coverture she will become entitled in and possession to that which at the time of marriage she was entitled in reversion; mentioned is stated on behalf of the trustees

that if she becomes entitled in possession during the coverture, then that property will come within the terms of the covenant, and should be settled. In order to effect that I must hold that "become entitled" not only means "become entitled in interest," but also means "become entitled in enjoyment." It certainly means become entitled in interest, if I am right in what I have already said, and it is argued that it also means "become entitled in enjoyment." I venture to say that there is no form of covenant in married settlements framed in that way, as it has not been the practice to form covenants so as to cover both meanings. The very point came before Vice-Chancellor Wickens in the case of *Clinton's Trusts, In re*,⁴ and he puts it in this way: "The expression 'become entitled to' in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife, and this may mean an acquisition of property in which the wife had no interest at the time of marriage, and which vests in her absolutely during the coverture—or an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture—or an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined." Then he goes on to say that there could be no doubt as to the first of these classes being within the covenant, and continues: "the difficulty arises with regard to the other two classes. Both of them cannot be included in such a covenant, and the question is, which of them is, *prima facie*, to be considered as so included." He gives no reason, but expresses his judicial view that both meanings cannot be included; and I respectfully agree with the Vice-Chancellor that you cannot include both in the words "become entitled" which are used in this covenant. No doubt they could be included by the ingenuity of conveyancers, but I do not think they are included in the words which we have here. The Vice-Chancellor asks which of the two classes is *prima facie*

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to be included, and unfortunately he does not answer the question directly, and counsel have not been able to furnish me with any authority which gives an answer to that question. I therefore have to answer the question so far as I can without the assistance of any authority directly in point upon it, although the authorities which have been called to my attention all bear more or less upon it. To my mind, the *prima facie* meaning of the words is "entitled in interest" and not "in enjoyment." There is no difficulty in holding that they mean "entitled in enjoyment" where the context requires such a conclusion, or where even that conclusion is more consistent with all the circumstances; but here I have to consider whether they can mean both, because certainly they mean "entitled in interest." The Vice-Chancellor says you cannot have both meanings in the absence of express words; and as I am of the same opinion, it follows that this lady will not "become entitled" to the property in question here, within the meaning of the covenant, although it may fall into possession during the coverture. That is the best conclusion I can come to upon this covenant.

That being so, it is unnecessary for me to decide what would be the result if this interest were covered by the covenant, and whether the lady could defeat the trustees' title by making an assignment before the interest fell into possession. With regard to that, I only desire to say that the argument of plaintiff's counsel does not commend itself to me and, as at present advised, seems to me erroneous.

Solicitors—W. F. Foster, for applicant;
Upperton & Co., for respondents.

[Reported by G. Macan, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J. }
1904. } CAYLEY, *In re*;
Oct. 27. Nov. 1. } AWDREY v. CAYLEY.

Revenue—Settlement Estate Duty—Will—Legacy of Specific Chattels—Direction to Pay 'death duties' out of Specific Fund—Exoneration of Specific Chattels—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, sub-s. 1.

The bequest of a specific fund of money upon trust "to pay thereout . . . the death duties payable out of my estate" throws the burden of the payment of settlement estate duty, payable in respect of property specifically bequeathed, upon the specific fund in exoneration of the property specifically bequeathed.

Lewis, *In re*; Lewis v. Smith (69 L. J. Ch. 406; [1900] 2 Ch. 176), distinguished; Pimm, *In re*; Sharpe v. Hodgson (73 L. J. Ch. 627; [1904] 2 Ch. 345), applied.

Summons.

By her will the late Ellen Louisa Cayley (*inter alia*) settled certain specific chattels. And the testatrix thereby further bequeathed a specific fund of money to certain trustees "upon trust to pay thereout my funeral and testamentary expenses and debts and the legacies bequeathed by this my will and the death duties payable out of my estate."

A question having arisen as to whether the settlement estate duty payable in respect of the settled chattels was payable, under section 19, sub-section 1 of the Finance Act, 1896,¹ out of the chattels themselves, or out of the specific fund of money, the present summons for its determination was taken out by the trustees of the will.

T. A. Nash, for the summons.

Coldridge, for the residuary legatee.

—The settlement estate duty is payable out of the settled chattels. This is the general incidence directed by section 19,

(1) Finance Act, 1896, s. 19, sub-s. 1: "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

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sub-section 1 of the Finance Act, 1896, and there is no "express provision to the contrary" to be found in the present will, unless it be shewn that settlement estate duty is properly included under "death duties." This is not the case. Settlement estate duty has, indeed, been held to be included under estate duty in *Leveridge, In re; Spain v. Lejoindre* [1901],² and, similarly, it has twice been decided that estate duty is included under "testamentary expenses"—*Clemow, In re; Yeo v. Clemow* [1900],³ and *Treasure, In re; Wild v. Stanham* [1900],⁴; whilst in *Pimm, In re; Sharpe v. Hodgson* [1904],⁵ it was held that both estate duty and settlement estate duty were involved in the phrase "funeral and testamentary expenses and duties." So, too, a direction to pay "without any deduction" has been held a sufficient "express provision to the contrary"—*Maryon-Wilson, In re; Wilson v. Maryon-Wilson* [1900].⁶ On the other hand, in *King, In re; Travers v. Kelly* [1904],⁷ it was held that settlement estate duty was not a "testamentary expense"; whilst in *Lewis, In re; Lewis v. Smith* [1900],⁸ it was decided that settlement estate duty is not even included under so large a phrase as "all duties payable by law." None of these cases is exactly in point; but *Lewis, In re; Lewis v. Smith*,⁸ is undoubtedly the nearest, and suggests that "settlement estate duty," in the present case, cannot be included under the words "death duties payable out of my estate."

A. Adams, for the legatees of the specific chattels.—The duty ought to be paid out of the specific fund of money specially appropriated for the payment (*inter alia*) of "death duties." Settlement estate duty is properly comprehended under that term—at least as properly as under the term "duties," which was the word used in *Pimm, In re; Sharpe v. Hodgson*.⁵ It is noticeable that the expression "death

duties" is actually defined in section 13, sub-section 3 of the Finance Act, 1894 (57 & 58 Vict. c. 30), as including estate duty for the purposes of that Act. Estate duty, in its turn, was held to include settlement estate duty in *Leveridge, In re; Spain v. Lejoindre*.² It is natural to construe "death duties" in a similar sense for the purposes of a similar Act.

SWINFEN EADY, J.—The question is whether the settlement estate duty on the settled chattels is payable out of those chattels, or out of the specific fund bequeathed "upon trust to pay thereout my funeral and testamentary expenses and debts and the legacies bequeathed by this my will and the death duties payable out of my estate." Does that direction amount to "an express provision to the contrary" within the meaning of section 19, sub-section 1 of the Finance Act, 1896? Unless it does, the settled chattels must bear the duty under section 19, sub-section 1. On the other hand, if the trust amounts to "an express provision to the contrary," effect must be given to it under the sub-section. I am of opinion that the language used by the testatrix is very wide, and I see no reason to cut it down. She directs that "the death duties payable out of my estate" shall be paid out of a certain specific fund. It is clear, in my judgment, that settlement estate duty is a "death duty." It was pointed out in argument that in section 13, sub section 3 of the Finance Act, 1894, where the expression "death duties" occurs, the expression is defined as including estate duty, and therefore settlement estate duty. In *Lewis, In re; Lewis v. Smith*,⁸ there was a direction to pay "all duties payable by law out of my estate." It was contended in that case that the testatrix had contrasted duties of two classes—namely, duties payable "by law" out of her estate—that is, duties payable by reason of death *simpliciter*; and duties payable by reason of something else—that is, the dispositions she had made. Mr. Justice Kekewich did not adopt this construction; but held that the expression "duties payable by law out of my estate" meant duties thrown on the residuary

(2) 71 L. J. Ch. 23; [1901] 2 Ch. 830.

(3) 69 L. J. Ch. 522; [1900] 2 Ch. 182.

(4) 69 L. J. Ch. 751; [1900] 2 Ch. 648.

(5) 73 L. J. Ch. 627, 628; [1904] 2 Ch. 345.

(6) 69 L. J. Ch. 310; [1900] 1 Ch. 565.

(7) 73 L. J. Ch. 210; [1904] 1 Ch. 363.

(8) 73 L. J. Ch. 406; [1900] 2 Ch. 176.

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estate. I am not, however, embarrassed by the expression "by law" in the present case.

In the recent case of *Pimm, In re; Sharpe v. Hodgson*,⁵ the testator, after settling certain freeholds directed "my debts, funeral and testamentary expenses and duties," to be paid out of residue. Mr. Justice Farwell says, "The expression 'my duties' is certainly a wide phrase, and I can see no ground for restricting its generality. I think it is a compendious way of expressing what [the testator] had in his mind, and that he meant to say, 'all duties to which my estate is liable by reason of any of the dispositions I have made in my will.' I can see no other sensible construction of this direction in the residuary clause of the will. The duties are payable to the revenue, but they arise under the provisions of the testator's will, and in this sense are the testator's duties. . . . The result is that in this case the settlement estate duty as well as the estate duty are payable out of the general residuary estate." In the present case I am of opinion that the expression "the death duties payable out of my estate" extends to all death duties—that is, settlement estate duty as well as estate duty. It is a convenient and compendious expression, and I can see no reason to restrict its meaning. The duties must therefore be borne by the specific fund.

Solicitors — Wood, Bigg & Nash, agents for W. J. & D. Awdry, Chippenham, for summons and for residuary legatee; Bell, Brodrick & Gray, agents for Gray & Dods-worth, York, for specific legatees.

[Reported by Joseph E. Morris, Esq.,
Bar-rister-at-Law.

BUCKLEY, J. } BLUNT'S TRUSTS, *In re*;
1904. } WIGAN v. CLINCH.
Aug. 3. }

Will—Construction—Charitable Bequest—Bequest of Annuity for Support of National Schools—Trust Deed—Gift over if Funds Necessary for Carrying on Schools should be Raised under Powers of any Act of Parliament—Perpetuity—Education Act, 1902 (2 Edw. 7. c. 42).

A testatrix, who died in 1900, by her will dated in 1891 bequeathed to her trustees a sum sufficient when invested to produce a yearly sum of 20l., and she directed them to pay such yearly sum to the treasurer for the time being of certain National schools so long as they should be carried on under the conditions contained in a deed of trust dated in 1873 and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect but should be null and void in certain events—*inter alia*, if the funds necessary for carrying on the school should be raised under powers for that purpose contained in any then present or future Act of Parliament; and that upon the happening of such event the payment of the yearly sum should cease, and the fund purchased should fall into her residuary estate. By the deed of 1873 it was declared that the schools should be conducted according to the principles and designs of the National Society. Subject to certain superintendence by the principal officiating minister of the parish, the control and management of the schools and premises and the funds and endowments thereof were vested in and exercised by a committee consisting of such minister and certain other persons, being communicants:—Held, first, that on the coming into operation of the Education Act, 1902, the schools ceased to be any longer carried on under the conditions contained in the trust deed of 1873; and secondly, that, as regarded the gift over, there was no infringement of the rule against perpetuities, for the Court was entitled to look at the will in order to ascertain whether the event had happened on which the yearly sum was to cease and determine; that on the coming into operation of the Act of 1902 the event contemplated

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by the testatrix had happened; and that therefore the fund producing the yearly sum fell into the residue.

Randell, *In re*; Randell v. Dixon (57 L. J. Ch. 899; 38 Ch. D. 213), *followed*.

Originating summons taken out by the trustee of the will of the late Mrs. Isabella Dorothea Blunt for the determination of the question whether, upon the coming into operation of Part III. of the Education Act, 1902, with reference to the Bicknor and Hucking National Schools mentioned in the will, the stock producing a yearly sum of 20% invested under the provisions of the will fell into and formed part of the residuary estate of the testatrix, and how the capital and income thereof ought to be applied or dealt with.

The testatrix, by her will dated August 10, 1891, after appointing the plaintiff and other persons trustees thereof, bequeathed such a sum as when invested in the purchase of certain stocks would produce a clear income or yearly sum of 20%. And she directed her trustees to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools "so long as they shall be carried on under the conditions contained in the Deed of Trust of the said Schools dated 18th June, 1873, and the funds necessary for so carrying them on shall be supplied by voluntary contributions"; but she declared that the bequest should not take effect but should be null and void if any of the three following events should happen in her lifetime—namely, "(1) If a School Board for the Parishes of Bicknor and Hucking shall be formed or (2) if the funds necessary for carrying on the said Schools shall be raised under powers for that purpose contained in any present or future Act or Acts of Parliament or (3) if a trust shall be created and a sufficient fund shall be set apart for the purpose of carrying on the said Schools under the conditions of the aforesaid Deed of Trust." And the testatrix further declared that if either of the two first mentioned events should happen after her death, then immediately on the

happening of such one of these events as should first happen the payment of the income or yearly sum to the treasurer aforesaid under the aforesaid direction in that behalf should cease and determine, and the fund purchased to produce the same should fall into and form part of her residuary estate.

The testatrix, after making various other pecuniary bequests, devised and bequeathed her residuary real and personal estate to her nephew, E. E. Green, absolutely.

The testatrix died on April 3, 1900, and her will was duly proved by the plaintiff alone, liberty being reserved to the other trustees to come in and prove, which they had not done.

By the deed of trust of June 18, 1873, which was in the form adopted by the National Society for Promoting the Education of the Poor in the Principles of the Established Church, it was declared "that such school shall always be in union with and conducted according to the principles and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales and subject to and in conformity with the declaration aforesaid such school and premises and the funds and endowments thereof in respect whereof no other disposition shall be made by the donor shall be controlled and managed in manner following that is to say: the principal officiating minister for the time being of the said parish of Bicknor shall have the superintendence of the religious and moral instruction of all the scholars attending such school subject to the provisions hereinafter contained and may use or direct the premises to be used for the purposes of a Sunday School under his exclusive control and management. But in all other respects the control and management of such school and premises and of the funds and endowments thereof and the selection appointment and dismissal of the schoolmaster and schoolmistress and their assistants (except when under the provisions hereinafter mentioned the dismissal of any master mistress or assistant shall be awarded by the Bishop of

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the Diocese or the arbitrators as the case may be) shall be vested in and exercised by a committee consisting of the principal officiating minister for the time being of the said parish his licensed curate or curates if the minister shall appoint him or them to be a member or members of the said committee such of the churchwardens for the time being of the said parish of Bicknor and of the ancient chapelry of Hucking as shall be communicants of the Church of England and of six other persons of whom the following shall be first appointed that is to say: Edward Leigh Pemberton of Wrinstead Court in the county of Kent Esq. M.P. and the Rev. Alfred Morden Bennett Vicar of Saint Peters Bournemouth in the county of Hants such other persons continuing to be contributors in every year to the amount of 20s. each at least to the funds of the said schools and to be communicants of the Church of England as by law established and either to have a beneficial interest to the extent of a life estate at least in real property situated in the said parish of Bicknor or to be resident therein or in a parish or ecclesiastical district adjoining thereto. And any vacancy which shall occur in the number of the said other persons by death resignation incapacity or otherwise shall be filled up by the election of a person or persons qualified as aforesaid who shall be elected by the majority of votes of such of the contributors during the year current at the time of the election to the amount of 10s. each at the least to the funds of the said school being members of the said Church of England and qualified as the persons to be elected by residence or estate as shall be present at the meeting duly convened for the purpose of the election or not being present thereat shall vote by any paper sent on or before the day of such meeting to the chairman thereof and signed by any contributor wherein shall be named the person or persons whom such contributor shall desire to elect and every contributor qualified to vote shall be entitled at every such election to give one vote in respect of each such sum of 10s. but no person shall be entitled to give more than 6 votes in respect of any sum so contributed. Pro-

vided that no appointment to serve the office of churchwarden nor any election as aforesaid shall give or vest any right to or in any lay person to serve upon the committee or anywise interfere with the management of the school and the funds and endowments thereof until after he shall have in the presence of the chairman at a meeting of the committee made and signed in a book to be kept at the said school a declaration in the manner and form following, that is to say, 'I, A. B. do solemnly and sincerely declare that I am and have been for three years last past a communicant of the Church of England.' Provided also that no vacancy during any current year shall prevent the other members of committee from acting until the vacancy shall be filled up. And it is further declared that all the provisions of the Elementary Education Act 1870 which constitute a public elementary school shall apply to the school to be constituted under this deed. Provided that if the committee of management herein described pass a resolution at a meeting composed of a majority of the managers for the time being to repay any grant made in aid of the establishment of the said school out of the Parliamentary grant for Education and if the said committee shall accordingly repay that amount to the Lords Commissioners of the Treasury for the time being the aforesaid declaration whereby this school shall be a public elementary school within the meaning of the Elementary Education Act 1870 shall forthwith become void and of no effect . . ."

In November, 1900, 800%. Midland 2½ per cent. debenture stock was purchased in the name of the plaintiff to meet the sum of 20l. per annum for the schools, and under a direction signed by him the dividends were paid every half-year to the account of the treasurer of the Bicknor and Hucking Schools.

On January 8, 1904, the Board of Education made a final order under section 11 of the Education Act, 1902—first, that the appointment of foundation managers of each of the schools specified in the second schedule thereto (which included the present schools) should be made in accordance with the provisions specified

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in the first schedule thereto; and secondly, that the order should take effect from the date thereof as a final order for the purposes of section 11 of the Act.

The first schedule to the order was as follows:

"1. The provisions contained in the First Schedule of the interim Order already made in the matter of the school shall continue in force for one year from the appointed day on which Part III. of the said Act came into operation in the area in which the school is situated.

"2. On and after the expiration of the said period the Foundation Managers shall (subject as hereinafter provided) consist of one *Ex officio* Manager and three representative Managers.

"3. The *Ex officio* Manager shall be the person who is the Principal Officiating Minister of the ecclesiastical parish or district within which the school is for the time being situated. If the said Minister refuses to act, or is absent from all meetings of the Managers during a period of six months, the Archdeacon of the Archdeaconry within which the school is situated may from time to time appoint some person to act as his substitute for a period not exceeding the current triennial period, and so in respect of each subsequent triennial period, provided that if the Minister in whose place the substitute is appointed vacates the office of Minister, his successor shall forthwith be *Ex officio* Manager in place of the said substitute.

"4. The representative Managers shall be qualified persons elected by qualified subscribers to the funds of the school at a meeting to be held triennially for that purpose. Their term of office shall be three years, but they shall remain in office till their successors are elected or otherwise appointed, and shall be eligible for re-election or re-appointment.

"If at the date of any meeting for the election of representative Managers there are less than eight qualified subscribers, or if the qualified subscribers fail to elect, the right of the qualified subscribers shall, for that turn, be exercised by the persons who are at the time the Foundation Managers of the school.

"5. 'Qualified persons' shall mean

persons residing in or near the said ecclesiastical parish or district, or having a beneficial interest to the extent of a life estate at the least in real property situated in the said parish or district, and in each case being and continuing to be *bona fide* members of the Church of England, and no person who is required to possess these qualifications shall be entitled to act as a Foundation Manager until he has signed a declaration that he is a member of the Church of England.

"6. 'Qualified subscribers' shall mean:

- (a) Persons who have voluntarily contributed a sum of not less than two shillings and sixpence to the funds of the school in each of the three last preceding school years; or
- (b) Persons who have voluntarily contributed to the funds of the school not less than five pounds in one sum; or
- (c) Societies or other bodies who have voluntarily contributed to the funds of the school not less than ten pounds in one sum.

"7. The Foundation Managers shall keep a list (corrected up to date) of qualified subscribers, and this list shall be open to inspection by all persons interested. No person as respects his right to vote shall be regarded as a qualified subscriber unless his name is included in the said list.

"8. It shall be the duty of the Foundation Managers, by public notice given a sufficient time, being not less than twenty-one days, before the expiration of the term of office of the First Foundation Managers appointed under the said interim Order, and afterwards, before the end of each triennial period, to call a meeting of subscribers for the purpose of electing Foundation Managers. Each subscriber shall have one vote only in respect of each vacancy.

"Subscribers may give their votes either personally at the meeting or by writing delivered before the commencement of the meeting to the person named for that purpose by the Foundation Managers in the notice convening the meeting.

"Any Society or body may exercise its power of voting through its Secretary or

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some other person authorised by it in writing for that purpose.

"The Foundation Managers shall choose one of their number to act as Chairman at the meeting for the election. In case of an equal division of votes the Chairman, if he is a qualified subscriber, shall have a second or casting vote. It shall be the duty of the Chairman before the close of the meeting to declare the result of the election.

"The names of persons elected or appointed to be Foundation Managers shall be communicated to the Clerk of the Local Education Authority by the Foundation Managers.

"9. If the Local Education Authority, under the provisions of Section 6 (3) (b) of the Education Act, 1902, have increased or at any time shall increase the total number of Managers, the additional number of Foundation Managers required shall be provided by the co-optation from time to time by the Foundation Managers of a sufficient number of qualified persons, who shall hold office for the same term and subject to the same conditions as if they were representative Managers.

"10. If any casual vacancy occurs among the representative Managers or the Managers co-opted under Clause 9 hereof, it shall be filled by the appointment by the remaining Foundation Managers of some other qualified person to hold office for the remainder of the term.

"11. Any Foundation Manager (other than a Manager *Ex officio*) who ceases to be qualified as aforesaid, or who is absent from all meetings of the Managers during a period of one year, or who is adjudicated a bankrupt, or who is incapacitated from acting, or who sends to the Foundation Managers his written resignation shall thereupon cease to be a Foundation Manager.

"12. If for any reason there is a failure to hold any election required by this Order, or make any appointment (by way of co-optation or otherwise) so required, any person interested may apply to the Board of Education, and the Board of Education may by Order give such directions as are necessary for the purpose of holding the election or making the appoint-

ment, and any election held or appointment made under such directions shall be as valid as if it had been held or made in pursuance of this Order.

"13. Any dispute (except a dispute on the question whether any person is or is not a *bona fide* member of the Church of England) arising out of or in relation to the election, appointment, or qualifications of Foundation Managers or the qualifications of subscribers, shall be referred to and determined by the Board of Education.

"Until the contrary is proved Foundation Managers shall be deemed to have been duly elected or appointed.

"14. The Interpretation Act, 1889, applies for the purpose of the interpretation of this Order as it applies for the purpose of the interpretation of an Act of Parliament."

Voluntary subscriptions to the Bicknor and Hucking National Schools during the four years which had elapsed since the death of the testatrix, other than the annual sum of 20*l.* bequeathed by her, had been given to the amounts following: For the year ending April 30, 1901, 39*l.* 16*s.*; for the year ending April 30, 1902, 30*l.* 5*s.* 4*d.*; and for the year ending April 30, 1903, 19*l.* 1*s.* 8*d.* The amount of the subscriptions for the year ending April 30, 1904, did not appear.

Owing to the passing of the Education Act, 1902, the question had arisen whether the annuity ought still to be paid towards the support of the schools, and the plaintiff took out the present summons for the determination of the question.

G. B. Rashleigh, for the summons.

O. Leigh Clare, for the managers of the schools and for the Kent County Council.—The gift over has not taken effect.

[BUCKLEY, J., referred to section 6, sub-section 2 of the Education Act, 1902.]

At the date of the will the schools were being carried on with funds arising partly from voluntary subscriptions and partly from the Government grant. Since the coming into operation of the Act of 1902 there has been no substantial change in the way in which the schools have been carried on. By section 11 of the Act

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provision is made for the appointment of foundation managers. By section 13 nothing in the Act is to affect any endowment, or the discretion of the trustees in respect thereof. By section 17 provision is made for the maintenance of the schools by the local education authority. Section 18 merely deals with the manner in which the money to meet the expenses of maintaining the schools is to be raised. The school buildings remain the property of the trustees, and the managers are still responsible for their maintenance and repair. This will involve an expenditure which in most cases will have to be met by voluntary subscriptions. It must be assumed that the testatrix did not intend that the schools should lose the endowment if they received additional assistance.

Further, under the provisions of the will the gift over is to take effect on the happening of a future event which need not necessarily occur within perpetuity limits, and is therefore void—*Bowen, In re; Lloyd Phillips v. Davis* [1893].¹ The gift over having therefore failed, the schools take absolutely. *Beard, In re; Butlin v. Harris* [1904],² was a case very similar to the present. There it was held, on the construction of the will and the Act, that a gift over on the schools ceasing to be supported by voluntary contributions had not taken effect.

Randell, In re; Randell v. Dixon [1888],³ does not apply.

F. G. Champernowne, for the residuary legatee, was not called upon to argue.

BUCKLEY, J.—I think the very event has happened on which the testatrix has said that the gift of the annuity is to cease and determine. She gave a certain sum of money to trustees upon trust "to pay such income or yearly sum to the treasurer for the time being of the Bicknor and Hucking National Schools for the support of the said schools so long as they shall be carried on under the conditions contained in the deed of trust of the said schools dated June 18, 1873, and the funds necessary for so

carrying them on shall be supplied by voluntary contributions." The deed of 1873 contained provisions that the school and endowments should be controlled and managed by the principal officiating minister for the time being of the parish of Bicknor; that there should be a committee consisting of the principal officiating minister for the time being of the said parish, his licensed curate or curates, if appointed by the minister, such of the churchwardens for the time being of the said parish of Bicknor and of the ancient chapelry of Hucking as should be communicants of the Church of England, and six other persons who were each to contribute 20s. a year at least to the funds of the schools and were to be communicants of the Church of England and have a beneficial interest in real estate in the parish of Bicknor or be residents therein. The deed contained a number of other provisions constituting qualifications of persons who should have control of the school. The result of the Education Act, 1902, is that that body is displaced. Are the schools carried on under the conditions contained in the trust deed? It is plain that they are not. Under the clause of the will which I have read the annuity has come to an end.

Then the testatrix goes on to declare that the bequests should be null and void if any of three events should happen in her lifetime—first, if a school board for the parishes of Bicknor and Hucking should be formed; secondly, if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; or thirdly, if sufficient funds should be set apart to carry on the schools under the conditions of the trust deed; and she declared that if either of the two first-mentioned events should happen after her death then the payment of the annuity was to cease and determine, and the fund purchased to produce this sum was to fall into and form part of her residuary estate. It was said on the authority of *Bowen, In re*,¹ that such a gift over was void, because it came within the rule against perpetuities—that you cannot have a gift over which does not take effect within the prescribed period of

(1) 62 L. J. Ch. 681; [1893] 2 Ch. 491.

(2) 73 L. J. Ch. 176; [1904] 1 Ch. 270.

(3) 57 L. J. Ch. 899; 38 Ch. D. 213.

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a life or lives in being and twenty-one years afterwards. That principle is quite firmly established, but it does not apply to this case. There is here no necessity to resort to the gift over. The gift over is a direction that the fund should fall into the residuary estate, and that is where it would go by law if the gift failed. Therefore I have only to look at the will to ascertain whether the event has happened on which the annuity was to cease and determine. Has the event happened on which it was to cease? If so, the fund by law goes into the residue, and there is no necessity to resort to the gift over; the gift having failed, the law takes the fund into the residue. As Mr. Justice North said in *Randell, In re*,³ "If she (that is, the testatrix) had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law." It results from this that I am also entitled to read the conditions in the defeasance clauses of the will and see whether they have taken effect. One of them is that the bequest of the annuity shall be null and void if the funds necessary to carry on the school shall be raised under any Act of Parliament. That is satisfied to a certain extent, for the funds are now provided under the Education Act, 1902. I am therefore of opinion that the gift of the annuity has ceased to take effect, and that the fund has fallen into the residue.

Solicitors—Wigan, Champernowne & Prescott,
for all parties.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }
1904. } LEWIS v. BAKER.
Aug. 10. Nov. 2. }

Landlord and Tenant—Distress—Lease—Assignment—Reversionary Term—Interests Termini—Merger—Landlord and Tenant Act, 1730 (4 Geo. 2. c. 28), s. 5—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 44.

A sub-lease for a period co-extensive with, or longer than, the sub-lessor's term operates as an assignment, and the sub-lessor cannot distrain for rent in arrear.

Parmenter v. Webber (8 Taunt. 593; 2 Moore, 656) and Preece v. Corrie (6 L. J. (o.s.) C.P. 205; 5 Bing. 24) followed.

A reversionary lease only confers an interests termini until after entry under the lease when the date fixed for the commencement of the term has arrived. It cannot, therefore, coalesce with an earlier subsisting term so as to cause a merger.

Smith v. Day (6 L. J. Ex. 219; 2 M. & W. 684) and Doe d. Rawlings v. Walker (4 L. J. (o.s.) K.B. 93; 5 B. & C. 111) followed.

Neither section 5 of the Landlord and Tenant Act, 1730, nor section 44 of the Conveyancing and Law of Property Act, applies so as to give a right of distress where the original right has been lost by reason of the lessor of a term at a rent parting with the whole of his interest.

By an indenture of lease dated December 6, 1865, the freeholder demised a house, No. 232 Great Portland Street, for a term of forty years, computed from July 6, 1864. The residue of the term of forty years in the said premises became vested in the defendant Baker by an indenture of assignment dated June 30, 1902. By an agreement in writing dated May 6, 1902, the owner in fee of the freehold agreed to grant to the defendant Baker a reversionary lease of the same premises for seventy-three years, computed from July 6, 1904, the day on which the current term of forty years would expire.

By an agreement in writing dated October 20, 1903, the defendant Baker agreed to sub-let the premises to the defendant Haddon for a term of twenty-one years from September 29, 1903. On

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the date of the agreement Haddon entered into possession.

Haddon sub-let the upper part of the premises to the plaintiff, under terms which made her an under-tenant, and not a lodger.

On February 19, 1904, the defendant Baker levied a distress for rent upon the plaintiff's goods at the premises.

The action, which had been originally one for an injunction to restrain the defendants Baker and the bailiff from proceeding with the distress, resolved itself into a claim for damages for illegal distress.

Eve, K.C., and *Beddall*, for the plaintiff.

—Baker had no reversion, and was not entitled to distrain—*Smith v. Day* [1837],¹ *Preece v. Corrie* [1828],² and *Parmenter v. Webber* [1818].³ He had no right to distrain under section 44 of the Conveyancing and Law of Property Act, [1881],⁴ which was not intended to apply to the case of a rent reserved upon a lease.

[They also referred to *Co. Lit.* 143a, 151; *Russell, In re*; *Russell v. Shoolbred* [1885].⁵]

Micklem, K.C., and *J. S. Green*, for the defendant Baker. — Assuming that the defendant Baker had no title, yet a tenant claiming under him would be estopped from denying his title, or objecting to his right to distrain, and the plaintiff who

claims title under a lessee of Baker and retains possession is in the same position — *Tadman v. Henman* [1893].⁶ It is a tenancy by estoppel, to which the same incidents apply as if it were a valid lease. That is the answer to *Preece v. Corrie*² and *Parmenter v. Webber*.³ The defendant Baker had an agreement for a reversionary lease, and must be regarded as having an actual lease—*Walsh v. Lonsdale* [1882].⁷ He has therefore a term which is not exhausted by the twenty-one years' term granted by him to Haddon. If there is no power of distress then this is a rent seck, and the landlord may distrain by virtue of section 5 of the Landlord and Tenant Act, 1730.

[SWINFEN EADY, J.—If there is any force in that argument, why did not the avowant in *Parmenter v. Webber*³ succeed?]

The point was not argued there.⁸ He may also distrain under section 44 of the Conveyancing and Law of Property Act, 1881.⁴

Israel, for the bailiff.

Eve, K.C., replied.

Cur. adv. vult.

Nov. 2.—SWINFEN EADY, J., read the following written judgment: This action is brought to recover damages for an illegal distress. The plaintiff occupied the upper part of 232 Great Portland Street, as tenant to Hart Haddon. On February 19, 1904, the defendant Alfred Baker distrained on the plaintiff's goods upon the premises for 57l. 3s. due from Haddon on December 25, 1903, for rent. The plaintiff denies that Baker had any right to distrain. She also contended that she was a lodger, and that her goods were protected by the Lodgers' Goods Protection Act, 1871. This latter point was disposed of during the trial. The plaintiff was not a lodger, but a tenant having exclusive occupation of the premises demised to her with a separate entrance from the street, the landlord

(1) 6 L. J. Ex. 219; 2 M. & W. 684.

(2) 6 L. J. (O.S.) C.P. 205; 5 Bing. 24.

(3) 8 Taunt. 593; 2 Moore, 656.

(4) The material portion of section 44 of the Conveyancing and Law of Property Act, 1881, is as follows: "(1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then . . . the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section. . . . (2) If at any time the annual sum or any part thereof is unpaid for 21 days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found."

(5) 29 Ch. D. 254.

(6) [1893] 2 Q.B. 168.

(7) 52 L. J. Ch. 2; 21 Ch. D. 9.

(8) It had previously been held that the statute did not apply to such a case—*Anon. v. Cooper* [1788] (2 Wils. 375); and see *Pascoe v. Pascoe* [1837] (6 L. J. C.P. 322; 3 Bing. N.C. 898).

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(Haddon) not retaining any control over them. The question remaining to be disposed of is whether Baker had a right to distrain. By an agreement dated October 20, 1903, Baker let to Haddon the house, shop, and premises, 232 Great Portland Street, for twenty-one years from September 29, 1903, at a rent of 300*l.* a year, and on the same day Haddon entered into possession of the premises. It is not disputed that the amount distrained for was due from Haddon under this agreement; but it is alleged that Baker had not such estate in the premises as entitled him to distrain, that he had not any reversion to which the rent reserved was incident. Alfred Baker's title was as follows: On June 30, 1902, Alfred Baker obtained an assignment to himself of a lease of 232 Great Portland Street, dated December 6, 1865, for a term of forty years from July 6, 1864, and by an agreement dated May 6, 1902, Baron Howard de Walden and Seaford, the owner in fee of the reversion, agreed to grant to Alfred Baker a reversionary lease of the same premises for seventy-three years from July 6, 1904. It was argued that Alfred Baker had no right of distress, as that right depends on the existence of a reversion in the lessor, and Baker had no such reversion; that the demise to Haddon was for a longer period than the unexpired residue of the lease of 1865, and therefore amounted to an assignment of that term; and that under the agreement of May 6, 1902, for the grant of a reversionary lease, Baker had only an *interesse termini* and no estate in the land, and that there was not any merger of the interests held by Baker.

Where a person parts with all his estate in land, as where he purports to demise for a period co-extensive with his own interest, or longer, the transaction is in law an assignment, although purporting to be a demise; an under-lease for the whole of a residue of a term is in law an assignment. In *Brooke's Abridgment*, tit. "Dette," pl. 39, the following proposition is laid down: "If a man hath a term for years, and grants all his estate of the term, rendering rent, he cannot distrain." In *Parmenter v. Webber*³ the defendant agreed to let two farms to

the plaintiff during the residue of the defendant's leases of the same, the plaintiff paying rent half-yearly, at Lady-day and Michaelmas; the plaintiff entered into possession of the farms and paid rent for a year, but the subsequent rent being in arrear the defendant distrained. It was held by the Court of Common Pleas that the agreement between the plaintiff and defendant amounted in law to an assignment of the defendant's estate, and, although there was a rent reserved upon the face of the instrument, the defendant could not legally distrain, as there was no reversion left in him. Again, in *Preece v. Corrie*² the facts were that Thomas White held certain premises for the residue of a term of years which would expire on November 11, 1826, and on September 11, 1826, he let the premises to the plaintiff to hold until November 11, 1826, rendering immediately 270*l.* for rent. This not being paid, the defendant, as the bailiff of Thomas White, distrained, and the plaintiff brought replevin. The Court of Common Pleas held that the distress was illegal, White having no reversionary interest expectant on the term, although an action of debt or *assumpsit* for the rent reserved might have been maintained. In my opinion the defendant Baker, having parted with all his estate in the term created by the deed of December 6, 1865, had no right to distrain. It was contended that Haddon, as tenant, was estopped from disputing his landlord's title, and that the plaintiff, being a sub-tenant of Haddon, was in the same position. It is not, however, a case of disputing title, but of denying the right of the landlord to pursue the summary remedy by distress, and both of the cases to which I have referred shew that even as between the two parties to such a transaction there is no estoppel precluding the lessee from questioning the legal right to distrain.

It was further urged that, having regard to the agreement to grant the reversionary lease and to the case of *Walsh v. Lonsdale*,⁷ the defendant Baker must be treated as having on October 20, 1903, a term of years expiring on July 6, 1977, and therefore that he had in fact the reversion expectant on the term

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agreed to be granted to Haddon. This contention is not well founded. Assuming that the reversionary lease had been actually granted, it would not have conveyed any estate to Baker, but he would only have had an *interesse termini* until entry on or after the date as from which he was entitled to enter into possession under it. *Smith v. Day*¹ is a clear authority on this point. There the ground landlord had granted to an under-tenant a reversionary lease to commence as from a future date, which was the date of the expiration of the original lease, and it was held that he still had the reversion expectant on the original lease, and was entitled to distrain for rent due under it, and that where a lease is granted to commence from a future date the lessee has thereunder no estate whatever, which remains in the lessor, but a mere *interesse termini* until after entry under the lease when the date for its commencement has arrived. Baron Parke said: "The second lease to commence *in futuro* was a mere *interesse termini*. The reversion continued in the lessor till the determination of the first term." And again: "The second lessee has no interest whatever till the determination of the first lease, except a mere *interesse termini*. It is clear that no reversion could pass by that deed, since it is a mere interest *in futuro*." The nature of an *interesse termini* was very fully considered in *Doe d. Rawlings v. Walker* [1826].⁹ It was there pointed out that such an interest merely gives a right to have the possession at a future time. It is a right, not an estate. The whole estate notwithstanding such right is in the lessor. The right may be granted away as a right, or extinguished by a release, but it cannot be conveyed as an estate. It has all the properties and consequences of a right only, not of an estate. See also *Beardmore v. Wilson* [1868]¹⁰ and *Hyde v. Warden* [1877].¹¹ As therefore the reversionary lease, if granted, would not have conveyed any estate to Baker, he cannot rely upon the agreement to grant it as giving him any reversion. On the ex-

piration or sooner determination of the lease of December 6, 1865, the freeholder would have had a right of entry. This point is well illustrated by the case of *Joyner v. Weeks* [1891].¹² It was an action for breach of a covenant by a lessee to deliver up the demised premises in repair at the expiration of the lease. Some two years before the expiration of the lease the lessors had granted to a third person a reversionary lease of the same premises at an increased rent, and it was urged that the lessors had therefore sustained no damage by the breach of covenant. The Court of Appeal held that the measure of damage for the breach was not affected by the fact that by reason of such reversionary lease having been granted the lessor was no worse off at the time of action brought than he would have been if the covenant had been performed. Lord Justice Fry said: "The second lease passed no estate until possession was taken under it. It only gave an *interesse termini* which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease."

The defendant Baker also relied on section 44 of the Conveyancing and Law of Property Act, 1881, but that does not appear to me to have any application to the present case.

Upon these grounds I am of opinion that at the date of the distress the defendant Baker had not any reversion in the premises, and therefore had not any right of distress as incident thereto; and I decide in favour of the plaintiff that the distress was illegal. The plaintiff is therefore entitled to recover against the defendants Baker and Pantlin, and I assess the damages at 50*l*. The plaintiff will have the costs of the action against these defendants. Judgment will be in favour of the defendant Haddon, but

(9) 4 L. J. (o.s.) K.B. 93; 5 B. & C. 111.

(10) 38 L. J. C.P. 91; L. R. 4 C.P. 57 (*sub m. Boardman v. Wilson*).

(11) 47 L. J. Ex. 121; 3 Ex. D. 72.

(12) 60 L. J. Q.B. 510; [1891] 2 Q.B. 31.

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without costs, as he did not appear to ask for them.

Solicitors—M. H. Lewis, for plaintiff; A. J. Harman, for defendant Baker; S. Myers, for balliff.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	{	TRECHMANN
ROMER, L.J.		v. CALTHORPE.
COZENS-HARDY, L.J.		DE LA COUR
1904.		v. CLINTON.
July 16, 18, 19, 20, 21, 26.		TAIT v. MACLEAY.

Company—Prospectus—Material Contract—Omission—Duty of Director—Liability—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38.

Where a director has issued a prospectus knowing that there might be contracts material to be stated under section 38 of the Companies Act, 1867, and taken no trouble to ascertain the facts, but left the matter to the company's solicitor, his responsibility under that section is not avoided by the fact that he may truthfully say that when he approved the prospectus he had in fact forgotten the existence of a particular contract which was material to be stated. It is not necessary for the plaintiff to shew that the directors' attention was deliberately and consciously directed to a particular contract which he then omitted to mention.

The duties and responsibilities of a director under section 38 considered, and the ruling of COCKBURN, C.J., in Twycross v. Grant (46 L. J. O.P. 636; 2 C.P. D. 469) explained.

These were three appeals by the defendants in the first two actions from the decision of Joyce, J., and by Sinclair MacLeay, the defendant in the third action, from the decision of Kekewich, J., declaring in each case that the prospectus of the Standard Exploration Company must be deemed fraudulent on the part of the respective defendants by reason of its not

having specified the date of and names of the parties to an agreement dated October 27, 1898, made between the London and Globe Finance Corporation and the Standard Exploration Company, whereby the corporation agreed to transfer to the company 5,000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor.

The Court of Appeal affirmed the judgments appealed from on this point, holding that the contract in question was material, that it was not covered by a waiver clause, and that the plaintiffs had proved sufficient damage to entitle them to an enquiry. The appeals in the first two actions do not call for any report. The appeal in the third action was argued immediately after, but separately from the appeals in the first two actions, the appellant's case raising this additional feature, that at the time when he, as director, approved the prospectus he had in fact totally forgotten the agreement in question.

The facts relating to this appeal were as follows:

The defendant Sinclair MacLeay was appointed one of the first directors of the Standard Company together with two other persons, and the following extracts from the minute-book of the company were relied on by the plaintiff as fixing the defendant with knowledge of the agreement of October 27, 1898.

At a board meeting held on October 26, 1898, at which Lord Donoughmore (the chairman) and the defendant were present, the solicitor of the company submitted an agreement in five parts between the London and Globe Finance Corporation, Lim., of the one part and the company of the other part, providing for the acquisition by the company of the 5,000 fully paid-up deferred shares in the undertaking known as the Austin Friars Finance Syndicate, Lim., in consideration of the 40,000 fully paid-up shares of the company, and it was resolved that the seal of the company be affixed thereto, and the agreement remitted to the London and Globe Finance Corporation for

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execution, and that thereafter the same be filed with the Registrar of Joint-Stock Companies.

At a board meeting held on October 27, 1898, at which Lord Donoughmore (the chairman) and the defendant were present, the minutes of the previous meeting of October 26, 1898, were read and signed by the chairman, and the company's solicitor reported that the agreement with reference to 40,000 fully paid shares of the company to be allotted to the London and Globe Finance Corporation, or its nominees, sealed at the previous board meeting, had been duly filed, and that such shares could be allotted. The secretary also produced a letter from the London and Globe Finance Corporation requesting such allotment to be made to certain nominees, and it was resolved that such allotment be made and that 40,000 shares, the numbers of which were specified, be and are hereby allotted to the nominees, such shares being credited as fully paid up, and the secretary be authorised to prepare and despatch letters of allotment accordingly.

At the next board meeting, held on May 12, 1899, at which six directors of the company were present, including Mr. Whitaker Wright (the chairman) and the defendant, the minutes of the previous meeting of October 27, 1898, were read and signed as a correct record of the proceedings at such meeting; and the draft prospectus was submitted by Mr. Whitaker Wright, and it was resolved that the same be approved subject to indorsement by the company's solicitors, and that the secretary be authorised to issue the same and receive subscriptions for 500,000 shares.

Notwithstanding these minutes, the defendant swore that in point of fact he had at the meeting of May 12, 1899, when the prospectus was approved, totally forgotten the agreement referred to in the minutes; that he did not attend to the reading of the former minutes at the meeting of May 12; and that the agreement was not in fact present to his mind on that occasion; and both Kekewich, J., and the Court of Appeal accepted his evidence in this respect as true; but the Court considered that he was aware that

there might be contracts requiring to be stated under section 38 of the Companies Act, 1867,¹ that he took no steps to ascertain whether this was so or not, and was content to leave it entirely to the solicitor of the company.

Kekewich, J., gave judgment for the plaintiff with costs. As to the agreement of October 27, 1898, his Lordship held that it ought to have been and was not disclosed, and that therefore *prima facie*, as the defendant was a director of the company and took part in the issue of the prospectus, he must be held liable under section 38, and continued: "'But,' he says, 'I did not knowingly issue the same, and the construction I put on the section, which is not denied on the other side, is that "knowingly" means knowing of the contract which ought to have been disclosed and which is not disclosed.' He says, 'I did not know of the contract; I had entirely forgotten it; it was not present to my mind on May 12, 1899, when I approved the prospectus. Therefore I cannot be said to have issued the prospectus knowing of this contract.' Now I have already said that in my opinion it may well be that total forgetfulness is equivalent to total ignorance. I am aware that any question of that kind transcends ordinary discussion and tends to pass into the sphere of metaphysics, but still I think that it is quite possible for a man to excuse himself with reference to his acts by saying that, though weeks, months, or years ago something was brought to his mind, it had, to use a vulgar expression, escaped his

(1) Companies Act, 1867, s. 38 (now repealed by the Companies Act, 1900, s. 33):

"Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

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memory, and he was entirely ignorant of it. I am not prepared to say that that is a plea which is impossible at law, but it is one which must be regarded with reference to all the facts. The contract in question was one entered into by the Standard Company, of which the defendant was a director, and it had been approved on behalf of the Standard Company at a meeting of directors at which the defendant was present. He explains that he was summoned by telegram and found the matter all cut and dried and did not go into it, but as a matter of fact he did approve of this very contract, and I am told that it was brought up on some other occasion, but I am content with the one when the document was approved. More than that, at a meeting of May 12, 1899, according to the ordinary rules of business the minutes of the last meeting were read and signed; and though it is quite possible that the defendant did not attend to that which to my mind is an extremely important part of the meeting, though often regarded as a perfunctory matter, he cannot be heard to say that he sat there and did not hear attention called to this very contract which he had himself approved at the former meeting. It seems to me that, whatever it may be right to say—under other circumstances in a different case—respecting ignorance and forgetfulness being equivalent, it is impossible to allow that in a case like this, where the forgetfulness was really due to the man's own neglect. He cannot be allowed to say, 'I sat there and did not hear the reference to this document, and therefore I had forgotten it.' I must therefore hold that he knowingly omitted to state this contract on the prospectus."

The defendant appealed.

Gore-Browne, K.C., and *Ashton Cross*, for the appellant.—The evidence is that the defendant did not attend to the minutes of October 27, 1898, being read at the board meeting of May 12, 1899, and that he had in fact totally forgotten the contract in question. There is no case of estoppel in favour of the plaintiff.

The true test of liability under section 38 is deliberate omission as to some-

thing the director knew at the time. If (as Kekewich, J., finds) the defendant had forgotten something he once knew, there is no such omission and no liability under the section. The Directors' Liability Act, 1890, raised no doubt a new standard of liability altering the law in *Derry v. Peek* [1889],² but section 38 of the Companies Act, 1867, must not be regarded from that point of view. Section 38 creates a criminal as well as a civil liability, and the director could be indicted for a misdemeanour.

[VAUGHAN WILLIAMS, L.J.—No. It only enacts that certain acts shall be deemed fraudulent between certain parties.]

The ruling of Cockburn, C.J., in *Twycross v. Grant* [1877],³ shows that the defendant cannot be made liable if the view of Kekewich, J., on the evidence is treated as correct.

[They also cited *Watts v. Bucknall* [1903].⁴]

[VAUGHAN WILLIAMS, L.J., referred to *Gomersall, In re* [1875].⁵]

W. Higgins (Hughes, K.C., with him), for the respondent.

[VAUGHAN WILLIAMS, L.J.—The argument against you is that the defendant did not do it "knowingly" if the contract was not present to his mind.]

That is too narrow a view of the section. If the defendant knew there were or might be contracts material to be stated, and omitted all enquiry, the fact that he may have forgotten the particular contract will not save him. *Watts v. Bucknall*⁴ entirely governs the present case. Section 38 does not create any criminal liability.

July 26.—Their Lordships, after giving judgment in *Trechmann v. Calthorpe* and *De la Cour v. Clinton* affirming the judgment of Joyce, J., proceeded to give judgment on the third appeal.

(2) 58 L. J. Ch. 864; 14 App. Cas. 337.

(3) 46 L. J. C.P. 636; 2 C.P. D. 469.

(4) 72 L. J. Ch. 447; [1903] 1 Ch. 766; affirming *Byrne, J.*, 71 L. J. Ch. 903; [1902] 2 Ch. 628.

(5) 45 L. J. Bk. 1; 1 Ch. D. 137; affirmed in H.L., *sub nom. Jones v. Gordon*, [1877] 47 L. J. Bk. 1; 2 App. Cas. 616.

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VAUGHAN WILLIAMS, L.J.—This case has been argued before us on both sides on the basis that it differs from the two cases in which we have delivered judgment only in this, that the defendant in this action sets up a defence which was not set up by the defendants in the other actions.

The evidence generally taken in the two first-mentioned actions was taken by consent as if given in this action, and therefore all we have to do in this action is to consider the nature of this additional defence and the evidence given by the defendant in support of it. The defendant pleads (*inter alia*) in his amended defence that "In any case he did not 'knowingly' issue a prospectus not disclosing such contracts"—namely, the contracts mentioned in the statement of claim; and in the argument the contract of October 27, 1898, was treated as the only contract to which the Court need address its attention. [His Lordship referred to the defendant's evidence and continued:]

Now it is common ground in this case that Mr. MacLeay is to be considered as a witness of truth, and that his statements are to be accepted, as far as they go, as true in fact. But what is the substance of his evidence? I do not think that it comes to more than this—that the particular contract of October 27, 1898, was not present to his mind on May 12, 1899. He nowhere states that it was not generally present to his mind that there had been a purchase by the Standard Company from the London and Globe, or even that it was not present to his mind there had been a contract of some sort between the Standard Company and the London and Globe in respect of the Austin Friars Syndicate. Moreover, Mr. MacLeay makes it clear that he contemplated that there might be some contracts which might not be inserted because the solicitor did not consider the contract as necessary or material. Such being the general knowledge of Mr. MacLeay, I am not prepared to hold that, because he had not present to his mind the particular contract of October 27, 1898, he had not present to his mind generally that there was some contract between the Standard

and the London and Globe as to the Austin Friars Syndicate and its property or shares. Nor am I prepared to hold that he was not content that such contract should be omitted if the solicitor was of opinion that as a matter of law it was not so material a contract as to necessitate its insertion in compliance with section 38 of the Act of 1867. I therefore come to the conclusion that the prospectus was "knowingly" issued by Mr. MacLeay with a general knowledge of the existence of contracts within the section, and that he was content that such contracts should be omitted if the solicitor thought for any reason that it was not necessary to insert them or refer to them in the prospectus, and that the case is brought within the definition of Chief Justice Cockburn in *Twycross v. Grant*³ of "knowingly issuing," which runs thus: "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." It is not necessary that there should be a conscious fraud on the part of the defendant to render him liable to be sued under the provisions of section 38 of the Act of 1867. Omission because the defendant was advised that a particular contract did not require, as a matter of law, to be specified will not afford ground of defence. This is *Twycross v. Grant*.³ Neither will omission left to the discretion of the solicitor.

I have felt it necessary to express my opinion upon this additional defence which is raised by Mr. MacLeay, but as a matter of course the judgment given in the other cases applies against him. The only question is whether he can escape from the effect of this judgment on the ground of his having forgotten this contract of October 27, 1898. My judgment is that he cannot, and therefore the appeal must be dismissed, and in effect the judgment delivered in the other case will also be judgment in this case.

ROMER, L.J.—This case is governed by our former decision except as to one further point raised on behalf of the defendant. That point depends upon this:

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He says that at the time when the prospectus was settled and agreed to by him on May 12, 1899, and first issued, he did not remember the contract of October 27, 1898. Now with reference to that point I should like to make a few observations about the general effect of section 38. That section is divided into two parts, and the earlier part says that "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify" the particulars of the contracts there mentioned. These contracts are very numerous, as stated. Now with regard to that part of section 38, noticing its imperative terms, I think it follows from it that a director who is settling and issuing a prospectus has a duty cast upon him to see that the provisions of this section are complied with—a duty at any rate to take reasonable care to comply with the section. When one comes to the second part of the section it is very general indeed so far as the mere wording is concerned, for it says that "any prospectus or notice not specifying the same"—that is, the dates and the names of the parties to the contracts above referred to—"shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." Now it will be observed that the second part of section 38 only speaks of "knowingly issuing the same"—that is to say, knowingly issuing a prospectus; so that, so far as the wording is concerned, the effect of that section might be very wide and far-reaching indeed if no limitation were put upon it, for a man who issues a prospectus of course "knowingly" issues it in one sense; and if the mere wording of the section were looked at it would follow that if the prospectus as issued, and knowingly issued, did not comply with the earlier part of the section, then it would be deemed fraudulent against the officer issuing it. But it was soon apparent to the Courts that the very large wording of the section, if I may so express it, in the latter part ought to receive some narrowing in order that justice might be

done. Take a typical example to shew this. Take the case of a director who really does his duty and tries to comply with section 38. Take it that he enquires into what contracts there are which might fall within section 38, and properly discharges his duty in seeking to ascertain what those contracts were in existence which ought to be set forth. But suppose that, having done his duty in that respect, the result is that he is not informed of and does not ascertain the existence of a particular contract. It could not be that the Legislature intended that he should be made liable merely because the prospectus did not set forth that particular contract under the circumstances indicated. Now I think that it was a consideration of cases like that which I have just mentioned which made the Judges in some cases, and particularly Chief Justice Cockburn in *Twycross v. Grant*,³ state that "knowingly issuing" in section 38 means issuing with a knowledge of the existence of contracts within the section, and intentional omission of them from the prospectus. But those statements must be taken with reference to the facts of the particular cases which the Judges who made those statements were considering; and I do not think that those statements are to be taken as giving a complete interpretation of the section applicable to all possible cases. Take, for example, the following case, to shew what I mean: Suppose that a director knows generally that there are contracts in existence which have been entered into by the company, and which may or may not fall within section 38, but does not choose, in the discharge of his duty under the earlier part of the section, to enquire into those contracts at all, so that he may truthfully say that he had no knowledge of any contracts in particular which ought to be set forth in the prospectus, would that absence of enquiry and consequent ignorance excuse him from liability under section 38 if it turned out that some of the contracts of which he had a general knowledge were contracts which ought to have been set out, and which he would have ascertained if he had taken the trouble to make proper enquiries and to discharge

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his duty under section 38? In my opinion, he would not be so excused. I think that, after such a neglect of his duty to endeavour to comply with the earlier part of the section, he could not say that he had no knowledge of the existence of the contracts in question, which were not set out, so as to hold him free from liability under the section.

Those general considerations bring me now to consider the circumstances and evidence in the present case. It is clear that the defendant knew there were contracts made by the company which it might be material to set forth in order to comply with section 38. What did he do under those circumstances? The conclusion which I have come to upon the evidence is that in substance he made no enquiry as to what those contracts really were. He left it to the solicitor of the company to say which of the contracts in question were material to be set forth and to see them sufficiently and properly set forth in the prospectus. He really took no other trouble in reference to section 38. It is to be noticed that when he attended the meeting of May 12, when the prospectus was considered, he had not previously made any enquiry into the details of the proposed prospectus, and at the meeting he did nothing to discharge his duty with regard to section 38 except to ask the solicitor, or to hear the solicitor asked by the other co-directors, whether he, the solicitor, had taken care to see that all contracts that ought to be set forth in the prospectus were there properly set forth. [His Lordship referred to the evidence of the defendant, and continued:] Under these circumstances his allegation of not remembering appears to me to be a mere irrelevant and useless excuse. The fact is, he made no enquiry into the contracts, and that was the reason why this contract was not set forth. If he had enquired into the contracts for the purpose of complying with the earlier part of section 38, and doing his duty, there is no reason, so far as I can see, for believing that this contract of October would not have been brought to his attention for consideration in connection with that section, even if it had not been previously present to his

memory. But the fact was that he thought everything should be left to the solicitor, and accordingly he never exercised his memory one way or the other—he never tried to remember. He can no more be said to have ceased to remember this particular contract of October 27, 1898, than to have ceased to remember any other of the contracts. His want of memory in this respect had nothing to do in fact with the form this prospectus took with reference to the provisions of section 38. He left it to the solicitor entirely, and if the solicitor did, as may be the case, after conferring with Mr. Whitaker Wright, choose improperly to keep that contract out of the prospectus, this defendant cannot say that he was excused by the action of the solicitor under the circumstances. It appears to me that this defendant “knowingly issued” this prospectus within the meaning of those words as used in section 38 and is responsible for it, and that his present and particular excuse wholly fails. I think therefore that his special point does not avail him.

COZENS-HARDY, L.J.—This appeal raises all the questions which have been dealt with in *Trechmann v. Calthorpe* and *De la Cour v. Clinton*, but, in addition, one point was strenuously argued. The defendant MacLeay, the appellant, was actively concerned with Mr. Whitaker Wright in the negotiations which resulted in the taking over by the Standard of some companies of which he was director. He was one of the first directors of the Standard. He was present at the first meeting of the board in October, 1898, when the Austin Friars contract was approved and adopted on behalf of the Standard. He was also present at the second board meeting at which the 40,000 shares, the consideration for that contract, were allotted to the London and Globe or its nominees. He was present at the third meeting—namely, on May 12—at which minutes of the previous meeting were read and confirmed, but he says that, although undoubtedly at one time he knew of the Austin Friars contract, he had in truth and in fact forgotten all about it when the prospectus

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was approved on May 12, and that therefore he is not liable, because he did not "knowingly issue" the prospectus. He relies upon a passage in the judgment of Chief Justice Cockburn in *Twycross v. Grant*³: "'Knowingly issuing' means neither more nor less than issuing with a knowledge of the existence of contracts within the section, and the intentional omission of them from the prospectus." That statement of the law was entirely adequate for the case before the Court, though it may not be an exhaustive definition. I do not think that the word "intentional" can be regarded as strictly accurate if it imports that a director cannot be liable unless his attention is deliberately and consciously directed to a particular contract which he there purposely omits to mention. I accept the judgment of Byrne, J., in *Watts v. Bucknall*⁴ as correct. The evidence satisfies me that the defendant, who unquestionably knew there were some contracts which ought to be mentioned, left all matters relating to the contracts to Mr. Simmons, the solicitor. He made no enquiry about the contracts. He did not attempt to discharge the statutory obligation imposed by the first part of section 38. He simply abstained from enquiry. In other words, he knowingly issued the prospectus without addressing his mind to the consideration of the question what contracts ought to be noticed. A man cannot properly be said to forget a matter to the existence of which he has not directed his attention. I think, therefore, that Mr. Justice Kekewich's judgment should be affirmed in substance and the appeal dismissed with costs.

[The judgment of Kekewich, J., was modified in some other respects not material to this report, but the Court declined to interfere with the order of the learned Judge as to costs.]

Solicitors—Gilbert Robins; Lesser & Danger.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. } HERTFORDSHIRE
1904. } COUNTY COUNCIL v.
July 14, 15, 16. } NEW RIVER CO.

Highway—Bridge—Liability to Maintain—New River Company—Approaches to Bridge—Liability to Repair Highway for 300 feet from each end of Bridge—Statute of Bridges, 1531 (22 Hen. 8. c. 5)—New River Company's Act, 1606 (3 Jac. 1. c. 18).

By the common law, where a person cuts through a highway, even although empowered to do so by statute, there is an obligation imposed upon him, even if the statute is silent on the subject, to make a bridge for the passage of the King's subjects and to maintain it for all time. The Statute of Bridges, 1531, which imposes upon the person liable to maintain a bridge the liability to maintain the highway also to the extent of 300 feet from each end of the bridge, applies to a case where the county at large is liable to repair the bridge, and where a party is liable to do so by prescription, or ratione tenuræ, but the Court will not extend the operation of the statute to a case where the obligation to make and maintain the bridge is imposed by the statute which enables the interference to be made with the highway.

The New River Company's Act, 1606, empowered the corporation to interfere with the highway by making cuts across it, but required them to make and maintain convenient bridges and ways:—Held, that the expression "bridge," as used in the statute, did not necessarily mean a bridge with the approaches defined by the Statute of Bridges—namely, a bridge and approach to the extent of 300 feet from each end.

Action by the County Council of Hertfordshire for a declaration that the defendants, the Governors and Company of the New River, were bound to repair and keep in repair three bridges carrying highways over the New River at Broxbourne, Stanstead St. Margarets, and Wormley respectively, and the arches and other parts thereof and approaches thereto, including the highways adjoining as lay within 300 feet next adjoining the ends of such bridges.

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The Lord Mayor, commonalty, and citizens of the City of London, who were the predecessors in title of the defendants, were by 3 Jac. 1. c. 18 empowered to make a new trench, cut, or river ten feet wide, to convey the water from Chadwell and Amwell springs, in the county of Hertford, to the north parts of the City of London, and for that purpose to acquire the necessary land in manner therein provided, and it was thereby enacted (section 6), "That the mayor, commonalty, and citizens of London and their successors for ever, shall make and maintain at their costs and charges from time to time, convenient bridges and ways for the passage of the King's subjects, and their cattle and carriages, over or through the said new cut or river, in places meet and convenient." By 4 Jac. 1. c. 12, the Mayor, commonalty, and citizens of London were empowered to make and maintain a trunk or vault of brick or stone instead of an open trench, for the passage of the said water where they thought meet.

In 1620 a charter was granted incorporating the assignees of the corporation under the name of the Governors and Company of the New River, and providing that they and their successors "at all and every tyme and tymes hereafter shall well and sufficiently maintaine repair preserve and scour the said new river and stream and all the bancks and bridges of and belonging to the same as now it is."

In exercise of their statutory powers the New River Company had erected the bridges which were the subject-matter of this action, and had repaired them, but had not repaired any part of the approaches to the said bridges, which approaches formed part of the adjoining highways, which were main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13, and had been repaired by the plaintiffs as the local authority.

The plaintiffs contended that under the Statute of Bridges (22 Hen. 8. c. 5)¹

(1) The Statute of Bridges provides as follows:

Section 1: "Be it enacted . . . That the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at

the defendants were liable to repair the highways to the extent of 300 feet from each end of the bridge. The defendants denied that they were liable to the extent asserted by the plaintiffs, but admitted that they were liable to repair the approaches to the bridges, including therein so much of the highway as for the purposes of the bridge had been raised or interfered with.

Danckwerts, K.C., Micklem, K.C., and Lailey, for the plaintiffs.—The Statute of Bridges was declaratory of the common law and defined the distance along the least, whereof one to be of the quorum, shall have power and authority to inquire, hear, and determine in the king's general sessions of peace, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment afore them for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the king's justices of his bench use commonly to do, or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges."

Section 9: "Forasmuch that albeit bridges decayed were amended and repaired according to the tenor of this act, yet nevertheless, if speedy remedy for the amendment of the ways next adjoining to every of the ends of such bridges should not be had and made, the king's subjects should take little or none avail or commodity in many parts of this realm by the making of the bridges: (2) in consideration whereof, be it enacted . . . That such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining to the ends of any bridges within this realm, distant from any of the said ends by the space of three hundred foot, be made, repaired, and amended as often as need shall require; (3) and that the justices of the peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, shall have power and authority to inquire, hear, and determine in the king's general sessions of peace, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges within this realm, distant from any one of the ends of such bridges three hundred foot, and to do in everything and things concerning the making, repairing, and amending of such highways, and every of them, in as large and ample manner, as they might and may do, to and for the making, repairing, and amending of bridges, by virtue and authority of this present Act."

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the highway for which the approaches to the bridge were repairable—namely, 300 feet. *Prima facie* the county is liable to repair the approaches unless it can be shown that some one else is bound by prescription or tenure to repair the same—*Rex v. West Riding of York (Inhabitants)* [1806].¹ But the principle is well established that where any one for his own benefit cuts through or interferes with a highway lawfully and under the authority of an Act of Parliament, then it is always implied, if not expressly provided, that he must supply a bridge, and it is a continuing condition that he should keep the bridge in repair—*Rex v. Kent (Inhabitants)* [1811],² *Rex v. Kerrison* [1815],³ *Rex v. Lindsey (Inhabitants)* [1811],⁴ *Reg. v. Isle of Ely (Inhabitants)* [1850],⁵ and *Bury Corporation v. Lancashire and Yorkshire Railway* [1888]⁶; and whoever is bound to repair the bridge is bound also to repair the highway to the extent of 300 feet from each end of the bridge—*Rolle's Abr.*, vol. 1, p. 368, *Reg. v. Lincoln Corporation* [1838],⁷ and *Reg. v. South-Eastern Railway* [1875],⁸ even though the 300 feet at one end may be in a county other than the county which is liable to repair the bridge—*Rex v. Devon (Inhabitants)* [1811].⁹ The decision of Lord Ellenborough in *Rex v. Kent (Inhabitants)* [1814],¹⁰ as was pointed out in *Reg. v. Isle of Ely (Inhabitants)*,⁵ was founded upon a record which was not in fact the correct record of the decision cited in *Rolle's Abr.*, vol. 1, p. 368. The liability to repair the approaches to the extent of 300 feet flows not from jurisdiction, but from the liability with regard to the bridge. The Statute of Bridges was a general statute applicable to all bridges.

Eve, K.C., and *Vaughan Hawkins*, for the defendants.—The only question is

whether the 300-foot limit applies. In this case the statutory width of the river is ten feet, and as it is not used for navigation, but merely for the passage of water, there is no need for raised arches. In the recent case of *Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Railway* [1894]¹¹ the defendants were held liable to maintain the bridge and approaches, but only to an extent of 180 feet, not 300. If "bridge" really includes the approaches to the extent of 300 feet at each end, it is hardly likely that counsel would not have used that argument in that case. In *Rex v. Staffordshire and Worcestershire Canal Co.* [1901]¹² the question of the 300-foot limit was raised, but not determined; and it must not be taken as settled law that the obligation to repair a bridge carries with it the obligation to repair 300 feet of the highway at each end. The reason of the Statute of Bridges does not extend to a modern Act. Why go back to an old statute when the repair of the bridge and the approaches will be sufficient to satisfy the common-law liability? The Statute of Bridges was not applied in *Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Railway*.¹¹

Danckwerts, K.C., replied.

SWINFEN EADY, J.—The question for decision in this action is whether the defendants, the New River Company, are liable to maintain and keep in repair the roadway at either end of their bridges to the extent of 300 feet adjoining the ends of such bridges, or whether the defendants are only liable to maintain the bridges and the approaches, leaving the question what the extent of the approach is to be dealt with as a matter of fact in each case. The defendants admit the latter liability, but they deny that they are liable in every case to maintain 300 feet measured from each end of the bridge. The plaintiffs base their contention on the Statute of Bridges. [His Lordship referred to the New River Company's Acts and charter, and continued:] Now upon these facts it is contended that upon the true construction of the Statute

(1) 7 East, 588; affirmed, [1813] 5 Taunt. 284.

(2) 13 East, 220.

(3) 3 M. & S. 521.

(4) 14 East, 317.

(5) 19 L. J. M.C. 223; 15 Q.B. 827.

(6) 57 L. J. Q.B. 280; 20 Q.B. D. 485. In H.L.: 59 L. J. Q.B. 85; 14 App. Cas. 417.

(7) 7 L. J. Q.B. 161; 8 Ad. & E. 65.

(8) 32 L. T. 858.

(9) 14 East, 477.

(10) 2 M. & S. 513.

(11) 71 L. T. 430.

(12) 65 J. P. 505.

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of Bridges the defendants are liable for maintaining the 300 feet from each end, and the case is put in this way: By the common law, where a person cuts through a highway, even though empowered to do so by statute, there is an obligation imposed upon him, even if the statute is silent on the subject, to make good the passage for all the King's subjects—as good as it was before he interfered with the highway. That, therefore, requires him to make a bridge for the passage of people and carriages, where it is a carriage-way, and to maintain it for all time. Then it is said that the liability at common-law being to maintain the bridge and its approaches, the statute fixed the extent of the approaches by a hard-and-fast line to govern every case, instead of it being left to be determined as a matter of fact in each case what the extent of the approach is which the bridge builders are liable to maintain. The Statute of Bridges itself does not in terms contain any such provision; but that statute has been the subject of judicial interpretation from time to time, and the contention is that, having regard to that interpretation, it is within the intent and provision of the statute that persons and corporations becoming liable to repair the bridge, whether *ratione tenuræ* or by prescription or otherwise, including a case like the present where they have cut through a highway, should be bound by the rule laid down in the statute.

Numerous cases have arisen from time to time upon the construction of the statute. In 1806 there was a case of *Rex v. West Riding of York (Inhabitants)*,¹ in which it was determined that where the inhabitants of a county, or of a division or riding of a county, are liable to the repairs of a public bridge, they are liable also to the repair, to the extent of 300 feet, of the highway at each end of the bridge; and if indicted for that non-repair, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. The bridge in that case, called the Tame Water Bridge, was a bridge erected long after the Statute of Bridges. It was the third of three Tame

Water Bridges; the first two had been swept away, and a dispute arose with regard to the non-repair of the third bridge. All of the bridges were erected some time in the eighteenth century, the first about the year 1750 or shortly afterwards.

Then cases arose where bridges had been made by navigation companies under statutory powers, and those cases divide themselves into two classes. The first is where the Act requires the navigation company to place a bridge in as convenient a place and so as to make the highway as convenient as before they interfered with it; and the second where the statute is silent with regard to any substituted provision, and the company is bound by the common law. An instance where a navigation company was required to make bridges by the Act which gave them power is *Rex v. Kent (Inhabitants)*.² There the Medway Navigation Company were empowered under a local Act to make the river Medway navigable, to take tolls, and then the words of the Act were: "and 'to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room.'" It was held in that class of case that the liability to repair is upon the navigation company, and not upon the inhabitants of the county at large. An instance of the second class, where the Act is silent as to this liability, was *Rex v. Kerrison*.³ In that case certain persons were appointed commissioners for making navigable the river Waveney from Beccles to Bungay, and they were authorised to cut the soil of any persons for making a new channel, and so on; and by virtue of their powers they made a cut through a highway, rendering it impassable, and a bridge was built over the cut, over which the public passed, and it was held that the proprietors of the navigation were the persons who were liable to repair the bridge. Mr. Justice Le Blanc said, "The proprietors had right to make a cut through the highway, and so far were not wrongdoers: but if they had left it so, I conceive they would have been wrongdoers, and might have been indicted." To take another illustration, in *Reg. v. Isle of Ely (Inhabitants)*,⁴

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where the question was whether the Commissioners of Bedford Level or the inhabitants of the Isle of Ely were liable to repair a bridge, the defendants had put in a plea raising the question, to which the Crown demurred. Mr. Justice Patteson said, in delivering judgment: "As the first count has shewn the defendants liable *prima facie*, the question on this plea will be, whether it shews any other party really liable. . . . Now the plea shews a highway interrupted, and an artificial drain or river made across it, for the use, profit and advantage of the Adventurers, the necessity for a bridge thereby created, and the bridge in consequence constructed on the line of the former highway by them, and the former highway thenceforward and now carried upon the bridge." Then later on he said, "It appears to us that, when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by commissions of sewers or other power vested in them, was done for their own use, benefit and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge as convenient for the public as the old one; that the public were in truth no gainers by the change; they were by this hypothesis merely placed in the same situation as before; and that the condition which was necessary to legalise the first cutting of the drain was and is a continuing one: the instant it is broken, the indefeasible rights of the public revive, and the cut becomes a nuisance." The Court held that the plea was good, and on the facts being proved the inhabitants of the Isle of Ely would be exonerated from the repair of the bridge. It will be observed that in these cases to which I have last referred no question was raised with regard to the extent of the liability, whether it was a liability to repair the bridge and approaches, or 300 feet from either end. So far as can be gathered from the report of those cases, no reference was made to the 300 feet.

Then there is another case in which reference to the 300 feet was made, and that is *Reg. v. Lincoln (Corporation)*.⁷ There was a question of the

liability of the Corporation of Lincoln to repair by prescription a certain bridge, and it was held in that case that where a party is liable by prescription to repair a bridge he is also *prima facie* liable to repair the highway to the extent of 300 feet from each end, and it was so adjudged.

So far, the decisions upon the Statute of Bridges shew that the statute applies to a case where the county at large is liable to repair a bridge, and where a party is liable to do so by prescription, and I think the reasoning would also obviously extend to a case where the party is liable *ratione tenuræ*. Still, the question remains open whether, where a party is liable under an Act of Parliament subsequent to the statute of Henry 8, his liability still extends to the 300 feet. The question has twice been raised in modern times. In *Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Railway*¹¹ there was a Special Case stated to determine the question whether the railway company were liable to repair the approaches to a bridge. In the Special Case, after putting forward the contention that the company were bound to repair the approaches, the plaintiffs added: "It is further contended by the plaintiffs that the defendants are by common law bound to repair the highway for a distance of 300 feet from each end of the said bridge." The defendants admitted their liability to repair the bridges, but contended that they were not liable to maintain or repair any other part of the raised approaches. There the question submitted to the Court was whether the defendants were legally liable to maintain and repair the raised approaches. No question was in form submitted as to whether the defendants were liable to repair to the extent of 300 feet. The Divisional Court (Mr. Justice Mathew and Mr. Justice Kennedy) held that the railway company were liable to repair the approaches as part of the bridge. Mr. Justice Mathew said: "the particular bridge which was made over the canal was on a higher level than the highway leading up to the spot in question, and so it became necessary to carry the bridge over

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the canal, and to do that, and for the convenient passage, it was necessary to provide approaches of a higher level than the former, of 180 feet on the south side of the canal and 174 feet on the north side. That was the bridge perfected and made under the provisions of the Act of Parliament." Then the Court considered upon whom was the obligation of repairing those approaches, and the conclusion was that the defendants were liable. That case is rather against the plaintiffs than in their favour. True it is that the point was not decided in terms, and although mentioned in the Special Case was not formally raised in the question submitted to the Court; but if the defendants were liable to repair to the fixed limit of 300 feet from each end of the bridge, it would not have been necessary to consider the limits of the raised approach, or whether it in fact formed part of the approaches to the bridge. If the present plaintiffs' contention was right, the short answer to the case would have been: "It is within the fixed limit of 300 feet from each end of the bridge, and, therefore, under the Statute of Bridges you are bound to maintain it. It is to be treated as part of the bridge, and it is not necessary for us to consider any of the facts with regard to it." The point was raised again in *Rex v. Staffordshire and Worcestershire Canal Co.*¹² by the indictment. But Mr. Justice Wright expressly stated that he did not mean to decide it, and the indictment was amended so as not to raise the question. That case, therefore, is not a decision either way.

Under these circumstances I have to determine whether the defendants are liable to repair to the extent alleged. This is a case in which the liability to erect a bridge is not left to the common law, but is imposed by statute. It is not like one of the cases to which reference was made, where the word in the statute was that the company were "authorised" to make a bridge. The Court doubted whether the words authorising them to make a bridge would be sufficient to impose upon them a liability to make it. But that is not the language of this statute. This statute enacts that "the Mayor, com-

monalty, and citizens of London," the predecessors of the defendants, "and their successors for ever, shall make and maintain at their costs and charges from time to time, convenient bridges and ways for the passage of the King's subjects, and their cattle and carriages, over or through the said new cut or river, in places meet and convenient." In my opinion, where a statute passed so recently as the time of James I empowers a company to interfere with the highway by making cuts across it, but requires them to make and maintain convenient bridges and ways, the expression "bridge" as used in the statute does not necessarily mean a bridge with the approaches defined by the Statute of Bridges—that is to say, a bridge and approach to the extent of 300 feet from each end. In my opinion, the liability of the defendants in the present case is to be measured by the terms of the statute. Their liability is imposed by section 6, and according to the true construction of that section I am of opinion that the company is bound to maintain for ever convenient bridges and ways, but is not under an obligation to maintain the approaches for the full distance of 300 feet as determined by the Statute of Bridges. It would be a modern extension for which no precedent is to found in the books, so far as search has been made, of the Statute of Bridges to hold, as practically I should have to hold, in order to decide in favour of the plaintiffs, that wherever a subsequent statute has imposed upon a company or person the obligation of making and maintaining bridges over the highway, it has *ipso facto* imposed upon them the obligation of repairing the approaches to the extent of 300 feet on either side. From the time of Henry 8 to the present time it has never been so held; and I am of opinion that I am not entitled so to extend the operation of that ancient statute in a case where the obligation to make the bridge is imposed by the statute which enables the interference to be made with the highway. I must decide that the defendants are bound to repair and keep in repair the bridges and arches, and other parts thereof and approaches thereto, the extent of which must be determined as a matter of fact

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in each case if in dispute; but they are not bound to repair the highway to the extent of 300 feet on either side.

Solicitors—R. A. Read, agent for C. E. Longmore, Hertford, for plaintiffs; Thompson & Debenham, for defendants.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 14.

CHRISTY & Co.
v. TIPPER.

Trade Mark—Registration—"Invented word"—Rectification of Register—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64, sub-s. 1—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 10, sub-s. 1.

The word "Absorbine" used in connection with a veterinary preparation, which professed to absorb and remove certain equine ailments is not an "invented word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 10, and therefore is not properly registered as a trade mark, and should be expunged from the register.

Decision of JOYCE, J. (73 L. J. Ch. 212; [1904] 1 Ch. 696), affirmed.

Appeal from decision of Joyce, J.

The plaintiffs, Thomas Christy & Co., were a firm of wholesale druggists in London, and the plaintiff Wilbur Fenelon Young was a manufacturing chemist carrying on business in Massachusetts, in the United States of America. Thomas Christy & Co. acted as the sole agents in England of W. F. Young for the sale of a medicinal preparation for veterinary purposes, manufactured by him and identified by the name and trade mark "Absorbine." This had been sold in the United Kingdom for a number of years under that name, and was also well known in America.

On November 21, 1900, W. F. Young obtained registration in England of the word "Absorbine" as a trade mark in class 2 in respect of "chemical substances used for agricultural, horticultural, veterinary and sanitary purposes," and in class 3 in respect of chemical substances prepared for use in medicine and pharmacy. He disclaimed any claim to the exclusive use of the word "absorb." The plaintiffs used the word "Absorbine" solely in connection with and as a designation of a liquid preparation professing to be "especially prepared to absorb and remove the wind puff, capped hock, thoroughpin, shoeboil, enlarged glands, soft splint, big knee, thick cord, knotted tendons, big ankle, collar puffs, and tumors."

The defendants Messrs. B. C. Tipper & Son were manufacturers and vendors in Birmingham of veterinary preparations, and had previously made and sold an ointment under the name of "Tipper's Absorbent Ointment," for application in cases similar to those for which the plaintiffs' liquid remedy was advertised to be specially prepared. At a date practically contemporaneous with the plaintiffs' application for their trade mark "Absorbine," the defendants changed the title of their "Absorbent" ointment to "Absorbine," but without any knowledge of what the plaintiffs were doing. The defendants then sold their preparation under the title of "Absorbine Tipper's."

On discovering this, the plaintiffs commenced their action on March 30, 1903, and asked for an injunction to restrain the defendants from selling or offering for sale any veterinary preparation not of the plaintiffs' manufacture under the name of "Absorbine" or under any other name which, by reason of colourable imitation thereof or otherwise, was calculated to represent or lead to the belief that such preparation was a preparation of the plaintiffs', and to restrain the infringement of the plaintiffs' registered trade mark; and the plaintiffs claimed an injunction to restrain the defendants from passing off or enabling others to pass off their veterinary preparation as used for a preparation of the plaintiffs.

The defendants moved to expunge the word "Absorbine" from the register of

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trade marks, on the ground that the registration of the word was improper, inasmuch as it was not an "invented word" within the meaning of the Patents &c. Act, 1888. The action and motion to rectify came on together, and Joyce, J., held that the word "Absorbine" must be expunged from the register of trade marks as not being an "invented word" within the meaning of the Patents, Designs, and Trade Marks Acts, 1883, s. 64, as amended by the Act of 1888, s. 10.

The plaintiff Young appealed.

Neville, K.C., and *Sebastian*, for the appellant.—"Absorbine" is an "invented word," and is properly on the register. An invented word may, according to the latest decision, be registered under the Patents, Designs, and Trade Marks Act, 1883, s. 64, as amended by the Act of 1888, s. 10, although it may have reference to the character or quality of the goods—*Eastman Photographic Materials Co. v. Comptroller-General ("Solio")* [1898].¹ In *Burroughs, Wellcome & Co.'s Trade Marks, In re* [1904],² the word "Tabloid" was held to be "a distinctive fancy word not in common use" under section 64, sub-section 1 (c) of the Patents, Designs, and Trade Marks Act, 1883. The word "Absorbine" is not an infringement of any one's right to the use of the English language. In the *Solio Case*¹ Lord Herschell expressed himself to the effect that he would have been inclined to consider "Satinine" a good trade mark, and said that if the word is "invented" the *quantum* of invention is immaterial. The real question in cases of this sort is whether anything is taken which the public have a right to. The practice of the Patent Office since the decision in the *Solio Case*¹ has been to register words ending in "ine," and a large number of trade marks have been so registered, which, if this decision stands, must be treated as invalid.

[*ROMER, L.J.*—I object to consider the practice of the office. We are not going to give a decision of principle. Each case must be judged by itself.]

(1) 67 L. J. Ch. 628; [1898] A.C. 571.

(2) 72 L. J. Ch. 475; [1904] 1 Ch. 736.

"Absorbine" is intended to describe something which is a novelty. The word is "invented."

Younger, K.C., and *E. P. Hewitt*, for the defendants, were not called upon.

VAUGHAN WILLIAMS, L.J.—I do not think we shall be depriving the trade of any advantage on which they counted by holding that this word "Absorbine" is not an "invented word." In each case you must look at the word itself and decide whether it is an invented word or not. In my opinion "Absorbine" is a mere variation of the word "absorb," and is used in precisely the same sense and with the same effect. It is obviously used with the intention of indicating that this preparation which the plaintiffs sell does absorb and effects its cure by absorbing. I do not decide that, if we could say that it was a word derived from some other word, that would be sufficient to prevent our holding that it was an invented word. We have not to decide that. In the present case I am of opinion that there is no invention whatsoever in this word "Absorbine." I may mention that, so far as "Solio" is concerned, the case is obviously different. "Solio" may have been derived from "Sol," but there is no word in the English language of which one could say "Solio" was a mere variation. Under the circumstances, I think the judgment of Mr. Justice Joyce is correct, and the appeal must be dismissed with costs.

ROMER, L.J., and *COZENS-HARDY, L.J.*, agreed.

Appeal dismissed.

Solicitors—*L. E. Townroe*, for appellant; *Belfrage & Co.*, agents for *T. W. Robinson*, Birmingham, for respondents.

[*Reported by A. J. Spencer, Esq., Barrister-at-Law.*]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 16, 17.

JONES

v.

HUGHES.

Local Government—National School—Teacher Appointed by Managers under Trust Deed—Notice of Dismissal before “appointed day”—Expiration of Notice Afterwards—Consent of Local Education Authority—Parties to Action—Education Act, 1902 (2 Edw. 7. c. 42), s. 6, sub-s. 2; s. 7, sub-s. 1 (c); s. 11, sub-s. 1 and 6.

The plaintiff was in July, 1899, appointed teacher at a National school by the then managers under the trust deed, by an agreement, one of the terms of which was that his engagement should be determinable by three months’ notice. On May 6, 1904, the then managers gave the plaintiff notice that they would not require his services as master after August 9, 1904. On July 1, 1904, the Education Act, 1902, came into operation in the county in which the school was situated, that being the “appointed day” in that county. The county council, the local education authority, refused to consent to the plaintiff’s dismissal.

Under section 7, sub-section 1 (c), in the case of a non-provided school maintained by the local education authority the consent of the authority is required to the dismissal of a teacher except in the case there mentioned:—Held, that on the day when the Act came into operation the plaintiff was being employed for a term which ended on August 9, 1904, when the term came to an end by the expiration of the time fixed by the previous notice, which was validly given in accordance with the terms of the contract; that the managers had not to give any further notice, or do anything which would amount to a dismissal within the meaning of the Act; and that section 7, sub-section 1 (c) of the Education Act, 1902, had no application to the case.

The action was brought for an injunction restraining the defendants from preventing the plaintiff from exercising his duty as teacher. The defendants were the four persons who were “foundation managers” under the Education Act, 1902. They were not the persons with whom

the plaintiff made his contract, neither were they the whole body of managers under the Act:—Held, that the action was not properly constituted.

Appeal from decision of Kekewich, J.

The action was brought for an injunction to restrain the defendants from preventing the plaintiff from exercising his duty as master of the Gwaenysgor schools, in Flintshire, and for a declaration that the plaintiff was master of the said schools until his engagement had been duly terminated by a properly constituted authority.

The plaintiff was appointed headmaster of the Gwaenysgor National School by the managers, by, as he alleged, a written agreement on July 3, 1899. The terms of the agreement were that he should receive by way of emoluments a salary of 20*l.* a year, the fee grant, and 2*l.* of the aid grant, and all the other Government grants except 10*l.*, which the managers retained for school expenses, and that his engagement should be determinable by three months’ notice.

The site of the school was by deed-poll dated May 31, 1875, under the Schools Sites Act, 1841 (4 & 5 Vict. c. 38), and the School Sites Act, 1844 (7 & 8 Vict. c. 37), conveyed to the minister and churchwardens of the parish of Gwaenysgor and their successors, to hold the same unto and to the use of the minister and churchwardens and their successors for the purposes of the said Acts. The trusts were to permit the premises and all buildings thereon to be appropriated and used as and for a school for the education of children and adults or children only of the labouring, manufacturing, and other poorer classes in the parish, and as a residence for the teacher or teachers of the school, and for no other purpose whatever, such school to be always in communication with and conducted upon the principles and in furtherance of the ends and designs of the National Society; and it was provided that the management of the school and the appointment and dismissal of the school teachers should be vested in a committee consisting of the incumbent for the time being, his licensed curate if the incumbent should appoint

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him a member, and of the churchwardens, and three other persons being members of the Established Church and subscribers to the funds of the school of not less than 10s. annually; and that any vacancy on the committee should be filled up by the appointment of a subscriber qualified as aforesaid, such appointment to be vested in the incumbent for the time being.

The trust deed was in the form contained in section 10 of the Schools Sites Act, 1841, as varied by section 4 of the School Sites Act, 1844.

The managing body by whom the plaintiff was appointed consisted only of the then rector and churchwardens of the parish. No written agreement relating to his appointment was produced, but he stated in his affidavit that the terms of his appointment were as stated above.

On May 6, 1904, the managers of the school gave the plaintiff notice that they would not require his services as master after August 9, 1904. The managers who gave this notice were the then rector and churchwardens of the parish, who were not the same persons as in July, 1899. On July 1, 1904, the Education Act, 1902, came into operation in Flintshire, that being the appointed day in that county, and the Flint County Council thereupon became the local education authority for the county. An application was made to the county council not to consent to the plaintiff's dismissal, and on August 24, 1904, the education committee of the council resolved that they would not consent to his dismissal. Under section 6, sub-section 2 of the Act of 1902, the managers of the school after the passing of the Act were four "foundation managers," who were the rector and churchwardens of the parish and one other person, and two other persons appointed by the local education authority. The plaintiff hearing that the managers were taking steps to appoint a master in his place issued the writ in this action, and he moved for an interim injunction. The defendants to the action were the four foundation managers. The material sections of the Education Act, 1902, are set out below.¹

(1) Education Act, 1902, s. 6, sub-s. 2: "All public elementary schools not provided by the

Bigham, J., sitting as Vacation Judge, on August 31, 1904, granted an injunction extending over the Vacation, restraining the defendants from preventing the plaintiff from exercising his duty as master of the Gwaenysgor schools.

The plaintiff applied by motion before Kekewich, J., that the interim injunction might be continued until the trial of the action. Kekewich, J., dismissed the motion.

The plaintiff appealed.

Low, K.C., and *Lynn*, for the plaintiff.

—The plaintiff was, as a fact, master on July 1, 1904, when the Act of 1902 came into force, and he was recognised as such by the county council, and was paid by them out of the rates. After that date

local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act, together with a number of managers not exceeding two, appointed—

"(a) Where the local education authority are the council of a county, one by that council and one by the minor local authority:—"

Section 7, sub-section 1: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:— . . .

"(c) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school;—"

Section 11, sub-section 1: "The foundation managers of a school shall be managers appointed under the provisions of the trust deed of the school. . . ."

Sub-section 6: "The body of managers appointed under this Act for a public elementary school not provided by the local education authority shall be the managers of that school both for the purposes of the Elementary Education Acts, 1870 to 1900, and this Act, and, so far as respects the management of the school as a public elementary school, for the purpose of the trust deed."

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the consent of the county council to his dismissal was essential under section 7, sub-section 1 (c). They have not consented. The notice given by the old managers did not necessarily become ineffectual on July 1, but something else had to be done after that date—namely, the consent of the county council obtained.

[ROMER, L.J.—The county council could not make a new contract with the plaintiff by themselves. The persons to make a new contract were the managers, with the consent of the county council.]

The plaintiff does not say that a new contract has been made with him; but if, when the new education authority comes into existence, there is a person actually teacher, he is entitled to remain until the county council consent to his dismissal. The county council are his paymasters after the Act comes into force.

[ROMER, L.J.—This man's employment came to an end by reason of a dismissal given before the Act. Does the Act apply at all?]

It applies to a dismissal which was not effective until after the Act came into operation. The dismissal here was on August 9, not on May 6. There is a provision in clause 16 of the Second Schedule to the Act providing for the transfer of officers to the new authority, but that only applies to provided schools. There is no provision which transfers the officers of the old managers of non-provided schools to the new body. The old managing body ceased to exist on July 1, so the plaintiff could not continue to be their servant, but as he remained teacher his tenure of office must be subject to the new conditions.

Section 24 of the Education Act, 1902, incorporates the definition section (section 3) of the Elementary Education Act, 1870. The plaintiff was within the definition of "teacher" when the Act came into force.

P. O. Lawrence, K.C., and *Nutter*, for the defendants.—The Education Act, 1902, is silent as to what is to be done in a case like this; but it is submitted that it does not interfere with contracts entered into by managers of voluntary schools with their teachers. Under the Act of 1902 the new managers become managers under

the trust deed. That seems to be the effect of sub-section 6 of section 11, and clause 12 of Schedule II. throws some light on it. They take the place of the old managers, and any contract entered into by the managers *qua* managers is not invalidated in any way by the change in the *personnel*. Both the contract and the dismissal in this case are altogether outside the Act.

The plaintiff contracted with the managers *qua* managers. The persons whom he has made defendants are not the persons with whom he actually contracted in 1899, neither are they the present body of managers. The action, therefore, is wrong in form.

Low, K.C., in reply.—The other two managers were not made defendants, because they are friendly to the plaintiff, and do not approve of what the "foundation managers" are doing, but the plaintiff will make them parties if necessary.

Assuming the defendant's view of the continuity of the management to be correct, the question is, When did the managers purport to dismiss the plaintiff? It was on August 9. The material thing then was the consent of the local education authority, and that has been overlooked. The result is that the plaintiff has not been properly dismissed.

VAUGHAN WILLIAMS, L.J.—The plaintiff has presented to us his statement of claim, which is, to my mind, ill-conceived; and it seems to me, that, whatever his rights may be under the statute, this action brought against these four persons, who are members of the management as it exists under the Act of 1902, is an action which ought not to have been brought. These gentlemen are not the original contracting parties, and they are not the whole of the body of management under the Act of 1902. I think that the action therefore is ill-conceived. Counsel for the plaintiff say that we ought to allow them to amend. One good reason for not amending is that the case that they say they would present, if there was an amendment, would in my judgment fail. There is therefore nothing to gain by an amendment.

I thought when this case was first

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presented to us that, inasmuch as it was a case arising in respect of a teacher of a school governed by the Education Act, 1902, it was desirable in the case of an Act of that importance that, before we delivered our judgment, we should have called to our minds what was the frame of that Act, and what were the provisions which chiefly affected the relations of the management to the teachers; but I agree with counsel for the plaintiff that a great deal of the information that we asked for, or rather that I personally asked for, does not really affect this case at all.

The plaintiff's claim is based upon a contract; and he says that the notice that was given on May 6, two months before the appointed day under the Act, is ineffective. It is admitted that at the moment when that notice was given it was an effective notice, and that the effect of it was that at the termination of the three months mentioned in the notice the contract would come to an end by the effluxion of that time. We, unfortunately, have not the written contract before us; but the plaintiff in his affidavit tells us what the contract was, and as against him that is sufficient. We learn from the affidavit that the contract could be terminated by three months' notice on either side. The three months' notice was given, and thereupon it would seem to follow that, if the plaintiff is basing his claim on that contract, he must take it as a whole, and he must take it that the contract was determined at the end of the three months limited by the notice. He says that that is not so by reason of the provision in section 7, sub-section 1, clause *c* of the Act of 1902. It is said that the managers are dismissing this plaintiff at a date since the appointed day, and that they are so doing without the consent of the local education authority. It seems to me that the answer to that is this—that the term of service of the plaintiff came to an end on August 9, which was the day when the time ran out, by reason of a previous notice having been given for the determination of the contract in accordance with its terms. If that is so, it seems to me that clause *c* of sub-section 1 of section 7 has no application to such a case at all.

I wish to guard myself from being supposed in this judgment to express any opinion as to what is the position of the managers in respect of contracts which were made by the persons who were managers before the Act came into force. I say nothing as to how far the managers, under the Act of 1902, are or are not bound by such contracts, or are or are not entitled to enforce the terms of such contracts. I say nothing as to who would be the proper parties in litigation, either as plaintiffs or defendants, if a question arose as to the enforcement of a contract made by the managers before the arrival of the appointed day when the Act came into force. I wish also to say that I am expressing no opinion as to what the position of the new board of management would be if they continued to employ a schoolmaster who had been the schoolmaster before the appointed day, and continued to pay him with moneys provided by the county council, the county council knowing at the time when they provided the moneys who was the schoolmaster in fact, and that he was paid out of these moneys. As to what the effect of that might be I say nothing; I do not know. That is not the case which is presented to us. The case presented to us is based entirely upon the assumption that the contract made by the old management is the only contract which is material in this case. That being so, it seems to me that the term of service under that contract is determined by the effluxion of time under a proper notice, and that the case of a contract so determined does not fall within the operation of clause (*c*) of sub-section 1 of section 7 of the Education Act, 1902.

I think that this appeal must be dismissed, and dismissed with costs.

ROMER, L.J.—Apart from the question as to parties, with which my Lord has dealt, I am also clearly of opinion that the grounds on which the plaintiff's application is made are insufficient, and the claim entirely fails.

The plaintiff was employed under a contract made between him and the old managers of the school. Those managers while still managers, and before the Act

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of 1902 came into operation in the district in which the school is situate, gave him notice determining his service at the end of a certain period. It is not in dispute that that was a perfectly valid notice; and the consequence was that, inasmuch as the notice was given before the Act came into operation, and terminated afterwards, the plaintiff was at the time when the Act came into operation being employed for a term which would end at the expiration of the notice. Now, whatever be the effect of the Act upon the contract, it appears to me that the plaintiff's case must fail. Take, first, the view that by the operation of the Act the contract was rendered binding upon the new managers, and that the new managers took over the existing contracts as they stood. The only contract in that case which they took over here was a contract to employ the plaintiff till the expiration of the notice. On the expiration of the notice his term ceased. In that case the new managers had to give no further notice; they had to do nothing which could be held to be a dismissal within the meaning of the phrase as used in the Act of 1902; all that they had to do was, when the term of office came to an end, according to the notice, to appoint some person whom they thought fit to fill up the vacancy. In that they would be doing nothing which was wrong, to my mind—nothing of which anybody could complain—neither the county council nor the plaintiff.

Now take the other view of the Act of Parliament—that upon the Act coming into operation the original contract terminated. It is common ground that no fresh contract was expressly made between the new managing body and the plaintiff. Assuming, then, that matters went on as they did, and that we are to imply some contract with the assent of the county council, if that be necessary, the only contract that should be implied was a contract to continue to employ the plaintiff until the end of his term. When that term came to an end he ceased to be teacher, and the managers had to appoint a new master in his place. Again they had to do nothing which would amount on their part to a dismissal

within the meaning of the Act. Again, there would be nothing that either the plaintiff or the county council had any right to complain of. Whichever view, therefore, is taken of this Act of Parliament, it is clear to my mind that the plaintiff in this case has no right whatever as against the new managing body; and that this action, even if the defect as to parties were cured, wholly fails.

COZENS-HARDY, L.J.—I am of the same opinion, and I should be content not to add anything except for one circumstance. I desire to state that in my view it is not necessary to express any opinion, and I do not express any opinion, on many of the points which have been argued before us. The question whether contracts entered into before the appointed day with the old managers are enforceable by and against the new body of managers created by the Act is one upon which we have heard a great deal said. I desire to keep an entirely open mind on that question if and when it is necessary for the Court to decide it, but in my view it is wholly unnecessary to go into that matter here. If the rights under the old contract can be enforced by the plaintiff against the new managers it seems to me plain that they can be only the rights which were in existence on July 1 when the Act came into operation; and on July 1 the only contract which was in existence was a contract for a term expiring on August 9. If, however, the rights under the old contract cannot be enforced against the new managers, still less can the plaintiff have any relief in this action.

There is the further ground, to which I am not able to see any answer—that the plaintiff has brought the wrong defendants before the Court, and on that ground also he cannot obtain any relief.

Appeal dismissed.

Solicitors—Baker & Nairne, for appellant;
Crawley, Arnold & Co., for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

FARWELL, J. } OLIVER'S SETTLEMENT,
1904. } *In re*;
Nov. 14, 17. } EVERED v. LEIGH.

Settlement — Realty — Legal Estate in Trustees—Trust for Children of Marriage—No Words of Limitation—Intention—Equitable Fee — Life Estates — Limited Power — Exercise by Will—Perpetuities—Void Limitations—Gifts to Persons Entitled in Default of Appointment—Election—Illegality—Refusal of Court to Assist.

Real and personal estate were vested in the trustees of an ante-nuptial settlement, their heirs, executors, and administrators, upon the usual trusts in favour of the intended husband and wife and the children of the marriage. The trusts of the settlement contained apt words referable to the real estate, a power of advancement in the ordinary form, and an ultimate gift over to the settlor on failure of children of the marriage, but words of limitation had been omitted from the trust for the children in default of appointment, an event which happened:—Held, that there was sufficient on the face of the deed to shew an intention that the children should take the equitable fee-simple, and not merely life estates.

Tringham's Trusts, In re; Tringham v. Greenhill (73 L. J. Ch. 693; [1904] 2 Ch. 487), followed.

Where a testator has by will exercised a limited power of appointment in such a way as to contravene the rule against perpetuities, and has also given benefits out of his own property to the persons entitled in default of appointment, the limitations in the will being illegal and void cannot be used to raise any case of election. The Court is bound on finding illegality to refuse to assist in carrying it out.

Wollaston v. King (38 L. J. Ch. 392; L. R. 8 Eq. 165) and Warren's Trusts, In re (53 L. J. Ch. 787; 26 Ch. D. 208), followed; and Handcock's Trusts, In re (23 L. R. Ir. 34), approved.

Bradshaw, In re; Bradshaw v. Bradshaw (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed.

Adjourned summons.

By the settlement dated May 24, 1831, made upon the marriage of John Oliver and Sarah Chard, certain freehold here-

ditaments were granted by William Chard the elder unto William Chard the younger and his heirs to the use of the said W. Chard the younger, his heirs and assigns, for ever, nevertheless upon the trusts thereafter declared, and it was thereby agreed and declared that the said W. Chard the younger should stand seised and possessed of certain mortgage debts amounting to 1,800*l.* therein mentioned and of the said freehold hereditaments upon trust for W. Chard the elder, his heirs, executors, administrators, and assigns respectively, until the solemnisation of the said intended marriage, and afterwards upon the trusts therein declared in favour of the said John Oliver and Sarah Chard and the survivor of them during his or her life, and from and after the decease of the survivor "then if there shall be any child or children of the said John Oliver by the said Sarah Chard his intended wife upon trust that he the said W. Chard the younger his executors administrators or assigns do and shall release and convey pay transfer and assign all the said trust estate monies stocks funds and securities rents issues and profits and every of them to between or among such child or children and the issue if any of the same child or children who shall depart this life in the lifetime of the said John Oliver and Sarah Chard or of the survivor of them leaving issue then living in manner hereafter mentioned (that is to say) the same to become and be vested in such child or children or other issue respectively or in any one or more exclusively of the other or others of them and to be paid transferred or assigned to him or them respectively" at such ages, in such manner, shares, and proportions, as the said J. Oliver and S. Chard should by any deed or deeds jointly appoint, or as the survivor of them should by deed or will appoint, and in default of appointment "to between or among" such child or children in manner therein mentioned, the said trust moneys, stocks, funds, or securities, rents, issues, and profits, to vest in the case of a son or sons at the age of twenty-one years, and in the case of a daughter or daughters at the age of twenty-one years or previous marriage, and "to be paid transferred or

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assigned" to them, her, or him as therein mentioned. Then followed hotchpot and accruer clauses in the usual form, and power "to levy and raise any part or parts of the portion or portions intended to be hereby provided for such child or children as aforesaid not exceeding in the whole for any one such child one moiety or equal half part of the value of his or her then expectant portion of or in the said trust estates monies stocks funds and premises rents issues and profits notwithstanding the same shall not then have become vested and payable" for the advancement or benefit of any such child or children. The settlement further provided that if there should be no child of the said marriage who should acquire a vested interest "in the said trust estate and effects" the trustee should stand seised and possessed thereof "upon trust to pay convey and apply the same trust estates and premises and the interest dividends and produce rents issues and profits thereof" subject to the life interest of the said John Oliver and Sarah Chard unto and for the benefit of the child and children of the said W. Chard the younger as therein mentioned, and if there should be no child of the said John Oliver and Sarah Chard, or of W. Chard the younger, "then upon trust for the right heirs and for the executors and administrators of the said William Chard the elder according to the respective natures and tenures of the said trust estate and premises or otherwise as the said William Chard the elder shall by any deed or will direct or appoint."

Sarah Oliver (formerly Chard) died on February 10, 1884. There were five children of the marriage who lived to attain the age of twenty-one years, and the defendants Mrs. Leigh and Mrs. Frith were the two surviving children.

By his will dated September 10, 1886, John Oliver exercised his limited power of appointment over the 1,800*l.* mortgage moneys above-mentioned in favour of the defendants Mrs. Leigh and Mrs. Frith, and Mrs. Reynolds, a deceased daughter, and their respective children, in such a way as to contravene the rule against perpetuities, and by his will he gave benefits out of his own property to the

persons entitled in default of appointment. John Oliver died on November 13, 1888.

The freehold hereditaments above-mentioned went as in default of appointment, and the questions raised by this summons, which was taken out by the plaintiff as trustee of the settlement, were (*inter alia*) whether, under the trusts in default of appointment contained in the said settlement, the children of John and Sarah Oliver took interests in fee-simple or for life only in the real estate settled by the settlement; and whether, with regard to the exercise of the power by the testator's will in the circumstances above set out, any case of election arose under the will.

The question dealing with the children's estate in the freeholds was first considered by the Court.

Stafford Crossman, for the plaintiff.

W. Baker, for Mrs. Reynolds' children. —The children of the marriage take the equitable fee-simple, and not merely estates for life, as it is the manifest intention on the face of this deed that the fee should pass—*Tringham's Trusts, In re; Tringham v. Greenhill* [1904],¹ and *Pugh v. Drew* [1869].² Here the "trust estate" is to be "conveyed" in default of appointment, and the words "to between and among" are used throughout, indicating thereby an intention to pass the fee. Moreover, the hotchpot and advancement clauses would not be applicable if only life estates were meant to pass. Further, this is a marriage settlement, and ought therefore to be construed in favour of the children; it was executed in 1831, long before the decisions in *Holliday v. Overton* [1852],³ *Lucas v. Brandreth* [1860],⁴ and *Tatham v. Vernon* [1861].⁵

Elgood, for a representative of the settlor's heir-at-law.—*Pugh v. Drew*² could not have been decided otherwise than it was, and it has no express bearing on this point. Here this realty was

(1) 73 L. J. Ch. 693; [1904] 2 Ch. 487.

(2) 17 W. R. 988.

(3) 21 L. J. Ch. 769; 15 Beav. 480.

(4) 28 Beav. 274.

(5) 29 Beav. 604.

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settled by the wife's father, and it cannot be said that the draftsman did not know how to vest the fee in the children, for in the case of the realty settled by the husband the fee is vested by means of proper words of limitation. It was not intended that, in default of appointment, more than a life estate should pass. In *Bird's Trusts, In re* [1876],⁶ the rectification of the marriage settlement by the insertion of the word "heirs" was necessary in order to pass the fee. In *Irwin, In re; Irwin v. Parkes* [1904],⁷ Buckley, J., held that under an assignment to trustees (without the word "heirs") of equitable interest they only took an estate for their joint lives and the life of the survivor.

A. Smith, for other defendants in the same interest.

E. Ford, L. R. Ryland, and Sherrington, for other defendants.

FARWELL, J.—The law on this subject has been so recently and excellently stated by Mr. Justice Joyce in *Tringham's Trusts, In re*,¹ that it is not necessary for me to travel over it again. The gist of the decision is expressed in the head-note to the report as follows: "A limitation, in a deed, of a trust of real estate for A., without any words of inheritance, may confer the equitable fee upon him where the intention to do so is expressed or sufficiently shewn upon the face of the instrument." What I have to ascertain in the present case is whether there is sufficient on the face of this marriage settlement to shew that the equitable fee-simple was to pass. In my opinion there is. As counsel said, this is a marriage settlement, and, as such, to be construed in favour of the children of the marriage; and it is not construing it in their favour if they are to be held entitled to life estates only, rather than to the equitable fee-simple. Then the words of the trust are that the trustee shall (*inter alia*) "convey" "all the said trust estate"—and the use of those words is not immaterial. Then there is the power of advancement, which, to my mind, is almost conclusive.

(6) 3 Ch. D. 214.

(7) 73 L. J. Ch. 832; [1904] 2 Ch. 752.

It is not conceivable that the parties should have intended to make that power to apply to life estates. The strongest indication of all is, perhaps, the ultimate gift over, for there would have been no need of an ultimate trust for the settlor if the children were only to take life estates, because in that case there would have been a resulting trust for the settlor. Mr. Justice Joyce relied on the gift over, and I agree with him. On the construction of this deed, therefore, I have no hesitation in holding that the equitable fee passed.

The Court then considered the question of election.

W. Baker, for Mrs. Reynolds' children.—This is a case of election. In *Warren's Trusts, In re* [1884],⁸ the question was not argued before Pearson, J., and therefore the decision does not bear much weight.

[FARWELL, J.—You are asking me to give effect to an exercise of the power bad for perpetuity by applying the equitable doctrine of election.]

The doctrine of election was stated by Lord Cairns in *Cooper v. Cooper* [1874],⁹ where he cites Lord Talbot in *Streetfield v. Streetfield* [1735],¹⁰ who said "this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially, under it"; and again in *Codrington v. Codrington* [1875].¹¹ Lord Cairns stated the doctrine to be, "where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them." That applies to the present case. *Warren's Trusts, In re*,⁸ was not favourably commented on in *Wheatley, In re; Smith v. Spence* [1884],¹² and *Brooksbank, In re; Beauclerk v. James* [1886].¹³

(8) 53 L. J. Ch. 787; 26 Ch. D. 208.

(9) 44 L. J. Ch. 6; L. R. 7 H.L. 53.

(10) Ca. t. Talb. 176, 183.

(11) L. R. 7 H.L. 854, 861.

(12) 54 L. J. Ch. 201; 27 Ch. D. 606.

(13) 56 L. J. Ch. 82; 34 Ch. D. 160.

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[FARWELL, J., referred to *Handcock's Trusts, In re* [1889],¹⁴ a decision of the Irish Court of Appeal.]

That was referred to by Kekewich, J., in *Bradshaw, In re; Bradshaw v. Bradshaw* [1902],¹⁵ which is the latest authority on the question; and his Lordship did not agree with or follow the Irish decision, but held, in circumstances similar to those in this case, that a case of election arose.

[*Elgood* referred to *Bate v. Willats* [1877].¹⁶]

Cur. adv. vult.

Nov. 17.—FARWELL, J.—The testator in this case has exercised a limited power of appointment vested in him in such a way as to contravene the rule against perpetuities, and has by the same instrument given to the persons entitled in default of appointment benefits out of his own property. The question for my determination is, Does this raise a case of election? I reserved my judgment because there is a conflict of authorities on the subject by reason of Mr. Justice Kekewich's recent decision in *Bradshaw, In re*.¹⁵ I propose first to consider the question on principle, and then to examine the authorities.

The rule against perpetuities is a comparatively modern development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances. The rule is one of public policy, and it has always been considered to be the duty of all the Courts to uphold it, not to assist in evading it, and accordingly the maxim *Quodcumque prohibetur fieri ex directo, prohibetur et per obliquum* has on many occasions been applied so as to give full effect to it. It is sufficient to refer to the well-known case of *Marlborough (Duke) v. Godolphin (Earl)* [1759],¹⁷ where Lord Loughborough, and the Judges who advised the House of Lords, and the Lords, were unanimous in applying it. The testator in that case attempted to evade the rule by creating an estate tail with

powers in trustees to revoke the uses from time to time as tenants in tail were born, and to re-settle so as to make such tenants in tail tenants for life with remainders in tail, and a bill was filed for the execution of the trusts of the will, and it was unsuccessfully argued that, though estates could not be directly limited to the extent desired, yet that the Court of Chancery, "which professes to regard the intent of testators, will allow it to be done *arte vel ingenio, et per obliquum*."

The doctrine of election is a rule of equity by virtue of which the Court of equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. It is somewhat startling that this Court should be asked to extend it to illegal provisions, and to apply its doctrines for the purpose of enabling a testator to evade a rule of law founded on public policy. Lord Northington, in *Marlborough (Duke) v. Godolphin (Earl)*,¹⁷ puts it somewhat strongly. After referring to the various attempts that had been made at law to evade the rule against perpetuity, he says, "It seems to me most surprising, after these puerile attempts had been made upon the narrow, fettered, and technical reasonings of Courts of law, and been rejected and exploded with contempt and derision, that it could ever have entered into the head of man to think, that he could subvert the fundamental principles of property, by the aid of this Court." And the Master of the Rolls, in *Mainwaring v. Baxter* [1800],¹⁸ where another attempt at evading the rule against perpetuities was made, said that he adopted Lord Northington's words.

Mr. Justice Kekewich has said—and it is the basis of his judgment—that it is immaterial whether the appointment fails because it offends some rule of law, or because it offends the construction of the power. With all deference to him, the difference appears to me to be vital. In the one case the testator openly and avowedly breaks the general law, and asks the Court of equity to participate in his illegal act by giving effect to it; in the other he merely attempts to exceed

(18) 5 Ves. 458.

(14) 23 L. R. Ir. 34.

(15) 71 L. J. Ch. 230; [1902] 1 Ch. 437.

(16) 37 L. T. 221.

(17) 1 Eden, 404; affirmed in [1753] *Spencer v. Marlborough (Duke)*, 3 Bro. P.C. 232.

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the limits set to his power by the donor thereof in the particular case—limits which the donor might have extended without any breach of general law. Thus, limitations which infringe the rule against perpetuity are void on the face of the will, but a devise of Blackacre by a testator who has no interest therein is not illegal, nor is it void on the face of the will, but depends on an enquiry into the testator's title. It is the well-known distinction pointed out by Lord Westbury in *Cooper v. Phibbs* [1867],¹⁹ between the general law, for ignorance of which no one is excused, and private rights which depend on the ascertainment of particular facts.

In considering a will, this Court has first to construe the words, and then to apply to them such rules of general law (for example, the rule against perpetuity or the Thellusson Act) as may be appropriate—*Pearks v. Mosely* [1880].²⁰ If it thereupon appears that there is any infringement of such rules, the Court is bound to refuse to allow its process to be used to carry out such illegality, and that, too, whether any of the parties to the litigation raise the objection or not—*Evans v. Richardson* [1817].²¹ How is this compatible with the order that I am asked to make here, by which I should first declare the appointment illegal and void for perpetuity, and then give practical effect to it by putting in force the equitable doctrine of election? There is certainly no novelty in the statement that this Court will refuse to aid a testator to commit any breach of the law. Lord Hardwicke explains the refusal of the Court to marshal assets in favour of a charity by saying that he was “not warranted to set up a rule of equity, contrary to the common rules of the Court, merely to support a bequest which was contrary to law.”—*Mogg v. Hodges* [1750].²² Other instances will be found referred to in *Lindley on Partnership* (5th ed.), pp. 1, 114.

I have gone into this more fully than I should have otherwise thought necessary

out of deference to Mr. Justice Kekewich's judgment, the whole foundation of which is that it is immaterial whether the appointment fails for illegality or merely on a point of construction; and I can only say that on principle I am wholly unable to agree with him. But when I come to the authorities on the particular point before me, it appears to me that there is an overwhelming concurrence of judicial opinion against Mr. Justice Kekewich's view. The first case is *Wollaston v. King* [1869],²³ before Vice-Chancellor James. It is said that the Vice-Chancellor's statement is only a *dictum*. I doubt if it is so; it seems to me to be one of several reasons for his judgment. He says: “It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise.” But if it be a *dictum* only, it comes from a great Judge, and I desire to adopt it as in my opinion a correct statement. The next case is *Warren's Trusts, In re*,⁸ which is an express decision of Mr. Justice Pearson exactly in point. It is said that it was not argued, but I cannot regard the decision as of less weight because the Judge obviously thought the point unarguable, and I am not aware that the decision has ever before been doubted. But the case does not rest there, for the point has recently been before a strong Court of Appeal in Ireland in *Handcock's Trusts, In re*,¹⁴ and they unanimously approved *Warren's Trusts, In re*,⁸ and *Wollaston v. King*.²³ Their decision is not, of course, binding on the English Courts, but I cannot help feeling more confidence in the decision at which I have arrived when I find it shared by Lord Ashbourne, Lord Justice Fitzgibbon, Lord Justice Naish, and Lord Justice Barry, and similar reasons given. These reasons may be summarised from pages 47 and 48 of the report thus—that the Court refused to trench on the rule against perpetuity, a rule introduced on grounds of public policy, or to aid in

(19) L. R. 2 H.L. 149, at p. 170.

(20) 50 L. J. Ch. 57; 5 App. Cas. 714.

(21) 3 Mer. 469.

(22) 2 Ves. sen. 52.

(23) 38 L. J. Ch. 392; L. R. 8 Eq. 165.

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tying up trust property for a period beyond legal limits. They would not allow the Court to assist in carrying out an appointment of the settled fund in violation of the rule against perpetuity.

I must therefore decline to follow *Bradshaw, In re*,¹⁵ and I declare that the limitations in this will, being illegal and void for perpetuity, cannot be used to raise any case of election in this Court. It is perhaps hardly necessary to add that the fact that the limitations also exceed the limits of the power is immaterial. The Court is bound on finding illegality to refuse to assist in carrying it out.

Solicitors—Grubbe & Troughton, agents for Evans & Taylor, Bristol; Cameron, Kemm & Co., agents for C. D. Miller, Derby; Scott, Spalding & Bell, agents for Barham & Son, Bridgwater; Seymour, Williams & Co., agents for Lawrence, Williams & Watts, Bristol.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

WARRINGTON, J. } BEALES' MARRIAGE
1904. } SETTLEMENT, *In re*.
Dec. 1, 3.

Settlement—Power of Appointment—Exercise by Will—Limitations Void for Perpetuity—Bequest of Free Property—Election.

A case of election cannot be raised on an appointment void for remoteness by reason of the rule against perpetuities.

Bradshaw, In re; Bradshaw v. Bradshaw (71 L. J. Ch. 230; [1902] 1 Ch. 436), *not followed*.

Oliver's Settlement, In re; Evered v. Leigh (*ante*, p. 62), *followed*.

Adjourned summons.

By a settlement made on the marriage of John Beales and Frances Beales certain funds were settled upon such trusts (after life estates to husband and wife and a joint power of appointment) for the issue born in the lifetime of John Beales

and Frances Beales as the survivor should by deed or will appoint, and in default of appointment for the children of the marriage in equal shares at twenty-one as to sons and at twenty-one or marriage as to daughters.

There was no hotchpot clause.

There were three children of the marriage, all of whom attained twenty-one—John Day Beales, Frances Elizabeth Youngs, and Gertrude Lloyd Cummings.

Mrs. Beales survived John Beales, and by her will dated May 8, 1869, she purported to exercise the power in the settlement by appointing the fund, and she at the same time bequeathed her own estate upon trust, as to one-third for J. D. Beales, as to another one-third for Mrs. Youngs for her life and after her death for her children attaining twenty-one, and as to the remaining one-third on similar trusts for Mrs. Cummings and her children.

Mrs. Youngs had several children, all of whom were born in the lifetime of Mrs. Beales.

Mrs. Youngs died on August 16, 1904, and, the appointment of the one-third of the marriage settlement fund to her children after her death failing as offending against the law of perpetuity, that one-third went as in default of appointment.

The legal personal representative of John Day Beales (who was dead) thus became entitled to one-third of that one-third.

The question thereupon arose whether the legal personal representative of John Day Beales was put to his election as between the one-ninth of the marriage settlement fund and the share which he took in the testatrix's own estate.

Roll, for the settlement trustees.

G. H. Blakesley, for Mrs. Youngs' children.—The appointment after Mrs. Youngs' death is bad not only for infringing the rule of perpetuity, but also because the appointees are not proper objects of the power. The executor of J. D. Beales must be put to his election between what comes to him through the failure of the appointment and what he takes out of the testatrix's free disposable property. In *Bradshaw, In re; Bradshaw*

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v. *Bradshaw* [1902],¹ Kekewich, J., held that for the purposes of election there was no distinction between the case of a gift failing for remoteness and that of one failing for being in excess of the power. It is true that in *Oliver's Settlement, In re*; *Evered v. Leigh* [1904],² decided within the last few days, Farwell, J., declined to follow *Bradshaw, In re*,¹ but *Oliver's Settlement, In re*,² was a case of a gift void merely for remoteness, whereas here it extends to non-objects of the power.

[WARRINGTON, J.—Mr. Justice Farwell and Mr. Justice Kekewich are directly opposed. On a question of objects or non-objects of a power the Court can look at actual facts, and here all the children of Mrs. Youngs were born within the limit and so were in fact objects of the power; on a question of perpetuity, possibilities only can be looked at.]

Warren's Trusts, In re [1884],³ is against my clients, but the reasoning of that decision is wrong; Chitty, J., in *Wheatley, In re*; *Smith v. Spence* [1884],⁴ said he would not express an opinion whether it was rightly decided or not; and Kay, J., in *Brooksbank, In re*; *Beauclerk v. James* [1886],⁵ said he could not sit in judgment on it. James, V.C., in *Wollaston v. King* [1869],⁶ says that it is not for a Court of equity to aid, whether by the application of the doctrine of election or otherwise, an attempt to create a power in violation of the rules of law; but that is merely a *dictum*.

[WARRINGTON, J., referred to *Handcook's Trusts, In re* [1889].⁷]

The testatrix attempted by the appointment to give away J. D. Beales' property, which belonged to him in default of appointment, and he must elect.

T. R. Colquhoun Dill, for J. D. Beales' executor.

[WARRINGTON, J. — In *Handcook's Trusts, In re*,⁷ Lord Justice Fitzgibbon not merely followed *Warren's Trusts, In*

re,³ but expressed his own opinion in favour of it.]

There is no case for election here. Besides the authorities, the text-books distinctly state that the doctrine of election cannot be used so as to give effect to an appointment which would be void for perpetuity—see *Theobald's Law of Wills* (5th ed.), pp. 93, 94. The judgment of Farwell, J., in *Oliver's Settlement, In re*; *Evered v. Leigh*,² should be followed rather than that of Kekewich, J., in *Bradshaw, In re*; *Bradshaw v. Bradshaw*.¹ *Wollaston v. King*,⁶ *Handcook's Trusts, In re*,⁷ and perhaps *Oliver's Settlement, In re*,² were all cases in which the appointment was bad both for remoteness and for being in excess of the power.

Cur. adv. vult.

Dec. 3. — WARRINGTON, J., read a written judgment as follows: The question I have to determine is whether, when a testamentary appointment fails for infringing the rule against perpetuities, persons taking in default of appointment are put to their election between their interests in the settled fund and interests in the appointor's own property given to them by his will. [His Lordship, having stated the facts, continued:] It is admitted that the trust for Mrs. Youngs' children is too remote, and that her share goes in default of appointment in thirds between the legal personal representatives of J. D. Beales (who is dead) and Mrs. Youngs and the defendant Mrs. Cummings; but it is said the legal personal representative of J. D. Beales is put to his election between his interest in default of appointment and his share in the testator's own estate.

The case is covered by authority, but unfortunately the authorities are conflicting. In favour of the proposition that in a case where an appointment fails for remoteness, as distinguished from one in which it fails as being in favour of persons not objects of the power, a case of election is not rused, are the following authorities: *Wollaston v. King*,⁶ *Warren's Trusts, In re*,³ *Handcook's Trusts, In re*,⁷ and *Oliver's Settlement, In re*; *Evered v. Leigh*.² In *Wollaston v. King*⁶ it is said the passage which is relied upon is a mere

(1) 71 L. J. Ch. 230; [1902] 1 Ch. 436.

(2) *Ante*, p. 62.

(3) 53 L. J. Ch. 787; 26 Ch. D. 208, 219.

(4) 54 L. J. Ch. 201, 203; 27 Ch. D. 606, 611.

(5) 56 L. J. Ch. 82, 85; 34 Ch. D. 160, 164.

(6) 38 L. J. Ch. 392, 395; L. R. 8 Eq. 165, 175.

(7) 23 L. R. Ir. 34.

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dictum—see p. 395 of 38 L. J. Ch. and p. 175 of L. R. 8 Eq. It is, however, contained in a considered judgment, and may be taken to express the deliberate opinion of the very learned Judge Vice-Chancellor James. *Warren's Trusts, In re*,³ was a decision of Mr. Justice Pearson, and *Hancock's Trusts, In re*,⁷ was a decision of the Irish Court of Appeal. Finally, in *Oliver's Settlement, In re; Evered v. Leigh*,² Mr. Justice Farwell reviewed all these authorities and some earlier ones, and came to the conclusion that they should be followed rather than the decision of Mr. Justice Kekewich in *Bradshaw, In re; Bradshaw v. Bradshaw*.¹ This is the only authority on the other side, and it is undoubtedly a deliberate decision of that learned Judge after consideration of the several authorities other than *Oliver, In re*.²

In this state of things all I can do is to say that, in my view, the balance of authority is against raising a case of election, and I so hold accordingly.

An attempt was made to distinguish this case on the ground that the appointment fails as extending to persons not objects of the power. But to ascertain whether an appointment fails on this ground the Court looks at the actual facts, and not, as in the case of the rule against perpetuities, to possible facts—*Harvey v. Stracey* [1852].³ In the present case, on the actual facts no person not an object is included. Therefore the distinction does not exist.

Solicitors—White, Borrett & Co., for all parties.

[Reported by Arthur Lawrence, Esq.,
Barriater-at-Law.

KEKEWICH, J. }
1904. } HANCOCK, *In re*;
Nov. 4, 10. } HANCOCK v. PAWSON.

Election—Will—Compensation—Date for Ascertaining Amount—Testator's Death.

The amount of compensation to be made to the disappointed legatees by a devisee under a will, who elects to take a certain estate as against the will, must be ascertained as at the date of the testator's death, and not as at the date of election.

Under a settlement dated August 8, 1887, Mortimer Hancock was tenant for life of the Roxley Court estate, in Hertfordshire, with power of appointment among any one or more of his issue, with remainder in default of appointment to his eldest son, the defendant Mortimer Pawson Hancock, in fee-simple.

By his will dated July 7, 1901, Mortimer Hancock devised and bequeathed his residuary real and personal estate to trustees upon trust (after providing an annuity for his wife) for his three children in equal shares; and he requested his trustees to allocate to Mortimer Pawson Hancock as part of his share the Roxley Court estate.

The testator died on July 13, 1901.

The question arose as to how far this devise operated as an exercise of the power conferred by the settlement.

By an order of Kekewich, J., dated February 26, 1902, it was declared that the power of appointment conferred by the settlement of August 8, 1887, was not exercised by the will of the testator, and that the defendant Mortimer Pawson Hancock, who, in default of appointment, succeeded to the estate, was put to his election between the devise in his favour under the will and the Roxley Court estate. On July 8, 1903, Mortimer Pawson Hancock gave notice to the trustees of the will that he elected to take the estate as against the will. The delay in election arose from his being absent in Egypt with his regiment. In consequence of his election compensation had to be made to the other beneficiaries to the extent of the benefits taken by him under the will.

HANCOCK, IN RE.

The question was now asked by a summons whether the amount of compensation was to be ascertained as at the date of the death of the testator Mortimer Hancock or as on July 8, 1903, the date of the election.

Timins, for the summons.—The date of the election is the date at which the property is to be valued for the purpose of ascertaining the compensation to be made. The property increased in value between the date of the testator's death and that of the election. The date to be taken appears from the order in *Seton on Judgments* (6th ed.), vol. ii. p. 1590, form 7, made in *Howells v. Jenkins* [1863].¹ In that case the election was at bar, and the date of election was the date for the value to be ascertained. So also in *Streetfield v. Streetfield* [1735].² On principle this should be the correct view, because the form of order is that compensation is to be made in respect of what the beneficiaries under the will are deprived of. Until the election is made there is no right of compensation, and the amount should therefore be ascertained from the date when the claim arose. From the point of view of convenience and common-sense this is the proper date.

C. A. Bennett, for an infant in the same interest.

Cozens-Hardy, for the defendant.—The election is retrospective and refers to the date of the death. That is the date to be chosen, and it is according to the authorities and the forms in *Seton—Gretton v. Harvard* [1818],³ *Rogers v. Jones* [1876],⁴ and *Chesham's (Lord) Estate, In re; Cavendish v. Dacre* [1886].⁵ That is borne out by the form in *Seton*, vol. ii. p. 1579, form 6 (*Douglas v. Douglas* [1871])⁶, and at p. 1591, form 8. The text-books seem to avoid all reference to this subject with the exception of *Ashburner's Principles of Equity*, where, at page 673, it is stated that "the rights of the parties are fixed when the duty to elect arises"—that is, at the testator's death. It appears, there-

fore, to be the usual practice to value the property at the date of the testator's death when an election to take against a will has been made, as otherwise injustice might be done, having regard to the long delay which frequently arises before an election is in fact made.

Timins replied.

Cour. adv. vult.

Nov. 10.—*KEKEWICH, J.*, delivered the following written judgment: Under the will of the testator, who died on July 13, 1901, the defendant Mortimer Pawson Hancock takes a property called the Roxley Court estate and other benefits. The Roxley Court estate was already his own, and by an order of February 26, 1902, he was held bound to elect between the devise and bequest in his favour under the will and this estate. On July 8, 1903, he gave the trustees of the will notice of his election to take the estate under the provisions of a settlement which was his title to it, and against the will. Thereupon he became liable to make compensation to the disappointed legatees to the extent of the benefits which he takes under the will, and it has to be ascertained what they have lost. A question has been raised, and it is submitted by the summons, whether the amount of compensation is to be ascertained at the date of the death of the testator, or as on July 8, 1903, when election was made.

Cases of election and consequent compensation are of such common occurrence that one is startled to find this question treated as unsettled at the present day. Really there is no doubt about it. The principle on which the rule of the Court is founded has been stated again and again in plain language, but nowhere more clearly than by Lord Chancellor Talbot in *Streetfield v. Streetfield*:² "when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely, but not partially under it; as was done in *Noy's and Mordaunt's Case* [1706]:⁷ there being a tacit condition

(1) 32 L. J. Ch. 788; 1 De G., J. & S. 617.

(2) Ca. t. Talb. 176; 1 Swanst. 447.

(3) 1 Swanst. 409.

(4) 3 Ch. D. 688.

(5) 55 L. J. Ch. 401; 31 Ch. D. 466.

(6) 41 L. J. Ch. 74; L. R. 12 Eq. 617.

(7) 2 Vern. 581.

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annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made." The decree in that case is set out in a note at page 447 of 1 *Swanston*, and a study of that decree will shew that it was intended to work out the principle thus stated by the Lord Chancellor. It is also stated in equally clear language by Sir Thomas Plumer in *Gretton v. Howard*³: "The only remaining question is, on what terms must compensation be made? From what time is the estate at Nine Elms to be given up to the petitioner? The election is retrospective; reverting to the time of the will, the parties electing reject all that comes under it; consequently they have in the interval enjoyed the property of another; to retain the past rents and profits which they have received with no other title than that conferred by the will, would be to claim under it; renouncing the will, they admit that they have been in possession of an estate without title. There must be a retrospective account of rents and profits, and an account of sums expended for melioration of the estate, which must be reimbursed." The injustice of proceeding on any other basis than this becomes obvious when one reflects that it often happens (as has happened here) that after the liability to elect has been declared, a period is allowed for consideration and determination on the part of the person affected by such liability, so that the actual election is frequently not made until some time after the testator's death. And, according to well-settled rule, an infant bound to elect is generally, though not invariably, allowed to declare election within six months after attaining majority.

The forms in *Seton*, vol. ii. p. 1579, No. 6, and p. 1591, No. 8 proceed on these lines, and if it be possible, as it may be, to find orders framed differently, this may fairly be accounted for by supposing that there were peculiar circumstances to take the case out of the general rule. The difficulty of valuing property, especially real estate, as of a date long since passed, is always considerable, and the parties concerned might agree, and the Court itself might be of opinion, that it would be

more convenient to accept a valuation at a later date. The question submitted by the summons must therefore be answered by declaring that the amount of compensation must be ascertained as at the date of the testator's death. There will be an enquiry directed as to the value of the Roxley Court estate as at that date.

Solicitors—Nicholson, Patterson & Freeland;
Dimond & Son.

[Reported by G. Macan, Esq.,
Barrister-at-Law.]

FARWELL, J.

1904.

March 10, 11, 12, 14, }
June 14, 15, 16, } **MERCER v. DENNE.**
17, 25.

Custom—Fishermen of Parish—Private Land—Custom to Dry Nets—Variation in User—Validity—Time Immemorial—Impossibility of Custom—Onus of Proof—Recession of Sea—Accretion—Extent of Custom—Reputation—Evidence—Public Documents—Ancient Surveys and Reports—Maps and Plans—Admissibility—Prescription Act, 1832 (2 & 3 Will. 4. c. 71).

A custom, enjoyed from time immemorial and continued without interruption, for all the inhabitants of a parish, being fishermen, to dry their nets on a particular close adjoining the sea and the property of a private owner, at all times seasonable for fishing, is a valid custom. The custom, being for the benefit of the public, is not unreasonable because it happens to be prejudicial to the interests of a private individual; and variation in user arising from time to time by reason of the varying exigencies of the fishing industry and the requirements of improved nets will not render the custom void for uncertainty, notwithstanding that such variation entails longer periods for drying and an increase in the number and sorts of nets dried. The custom will also extend over the additional area added to the original close by accretion owing to the recession of the sea.

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Such a custom is not within section 2 of the Prescription Act, 1832. Mounsey v. Ismay (34 L. J. Ex. 52; 3 H. & C. 486) and Shuttleworth v. Le Fleming (34 L. J. C.P. 309; 19 C. B. (N.S.) 687) followed.

The claimants of the custom having proved user of the close for the purposes of the custom during living memory (extending over seventy years) and by reputation for many years before their birth, the onus is on the person denying the custom to demonstrate the impossibility of its existence in the time of Richard 1.

In matters of public and general interest ancient documents, such as surveys, estimates, and petitions of a private character, produced from the Record Office, but which have never been acted upon or been open to the public to challenge or dispute, are not admissible as evidence of reputation; confidential plans or reports made to the War Office, Board of Trade, or other official department are also inadmissible on the same grounds; and depositions of deceased witnesses in support of proceedings by the Crown in the public interest are not admissible against strangers as evidence of reputation unless they speak to matters of reputation and not to matters of fact.

A map produced from the British Museum, but not proved to have been made by a competent person, does not come from the proper custody in the sense in which that phrase is used in this Court, and a duplicate of the same map, although produced from the Admiralty, will not be admissible as evidence of reputation unless it has received the sanction of the Admiralty or been recognised by them as official.

Trial of action with witnesses.

The plaintiffs were inhabitants of the parish of Walmer, in the county of Kent, carrying on in such parish the trade or business of fishermen.

The defendant was the owner of the soil of a piece of ground covered with shingle situate near the sea and lying between the grounds of a house called Walmer Place on the north, the grounds of Walmer Castle on the south, the foreshore on the east, and Wellington Road on the west, and containing about eleven acres. The defendant had commenced operations with a view to developing this piece of ground

as a building estate. The plaintiffs, suing on behalf of themselves and all other persons carrying on the trade or business of fishermen in the parish of Walmer, claimed a declaration that the plaintiffs and all other inhabitants of the said parish carrying on the trade or business of fishermen were entitled as of right at all times necessary or proper for the purposes of the trade or business of a fisherman to dry their nets on the beach ground or any part thereof, and for that purpose to spread their nets upon the surface of the beach ground; and also an injunction restraining the defendant from building on the beach ground so as in any manner to interfere with such right.

The plaintiffs alleged that the beach ground had always from time immemorial been unbuilt upon and open and uninclosed, and also that from time immemorial there had been, and still of right ought to be, an ancient and laudable custom within the said parish of Walmer that all persons, inhabitants of the said parish carrying on the trade or business of fishermen might use and exercise, and that all such persons as aforesaid had from time immemorial used and of right exercised, the right and privilege at all times necessary or proper for the purpose of the trade or business of a fisherman to dry their nets upon the beach ground, and for that purpose to spread such nets upon the surface thereof.

The defendant denied that the custom claimed existed, or was or could be legal or enforceable, and alleged that it was uncertain and unreasonable, and that the user (if any) of the land as claimed by the plaintiffs was general and not limited to inhabitants in or fishermen of Walmer, and had been permissive and not of right, and that the land in question was not beach ground and was and had been above high-water mark, and did not form any part of the seashore or foreshore.

From the evidence at the trial it appeared that there were about eighty men, inhabitants of Walmer, who carried on the trade or business of fishermen. During the whole of living memory, extending over upwards of seventy years in the case of the plaintiffs' witnesses and by reputation for many years before their birth, the

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inhabitants of the parish of Walmer who were fishermen had used this piece of ground for the purpose of drying their nets. The practice had varied, however, during the time of living memory. There were three fisheries now practised at Walmer—namely, the mackerel, herring, and sprat fisheries. The mackerel season included the months of May, June, July, September, and October; the herring fishery lasted from October to Christmas; and the sprat fishery from November to March. Down to about thirty or thirty-five years ago the sprat nets were not spread on the piece of ground in question at all, but herring and mackerel nets were cutched or tanned and then spread out to dry on this piece of ground before being used for the season's fishing, and at the end of the season they were again spread out to dry on the same ground before being put away for the winter. About thirty or thirty-five years ago the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these latter nets were also spread on the same piece of ground to dry. Nets that have been oiled take longer to dry than nets which have been cutched, and sprat nets were now put on this ground at a period during which no nets had within living memory been placed there. This ground had always been used for drying nets, and at times its entire surface was covered with nets spread out to dry.

Upjohn, K.C., and *R. J. Parker*, for the plaintiffs.—The plaintiffs claim that from time immemorial this piece of ground has been used by the fishermen of Walmer for drying their nets. This is a good custom, and has been alleged and treated as such in the Year-Book 8 Edw. 4. 18, referred to in *Bro. Abr. "Custom,"* pl. 46; *Viner's Abr. "Customs,"* 183; and *Hale, De Portibus Maris*, 86, and translated by Holroyd, J., in *Blundell v. Catterall* [1821].¹ Buller, J., in *Fitch v. Rawling* [1795],² refers to the case of *Baker v. Brereman* [1635]³ as shewing it to be a good custom. In *Bacon's Abr. "Customs,"* p. 566, this

custom is referred to amongst customs which are good, and the author cites 5 Co. 84. It is also referred to in the *Case of Tanistry* [1608],⁴ citing 8 Edw. 4. 18 and 21 Edw. 4. 28, and it is treated as a stock instance in *Pain v. Patrick* [1690],⁵ *Lockwood v. Wood* [1841, 1844],⁶ and *Race v. Ward* [1855].⁷ In *Linn-Regis (Mayor) v. Taylor* [1884]⁸ the custom to dig ballast for ships, being *pro bono publico*, was held good, and the drying of nets on another's soil was instanced as a standard custom affording public benefit; so also in *Simpson v. Bithwood* [1690].⁹ The custom must be reasonable, from time immemorial, and continuous; and in *Tyson v. Smith* [1838]¹⁰ this very custom was regarded as not being unreasonable, inasmuch as it was for the benefit of the commonwealth. In the face of these authorities, it is merely a question of fact whether the custom exists or not.

Eve, K.C., and *Gatey*, for the defendant.—The right claimed by the plaintiffs is not within the Prescription Act. The word "custom" in section 2 does not apply to an alleged easement like this, and such an easement is not within the section—*Mounsey v. Iemay* [1865]¹¹; nor is an easement in gross—*Shuttleworth v. Le Fleming* [1865].¹² There can be no easement properly so called unless there be both a servient and a dominant tenement—*Rangeley v. Midland Railway* [1868].¹³ The claim must not be too wide or unreasonable—*Hammerton v. Honey* [1876].¹⁴ In this case it is too wide, and unreasonable. A declaration such as the plaintiffs claim might amount to a right to the fishermen to cover the whole of this piece of land with their nets at all times and for so long as there were any nets undried. This alleged custom, which was originally enjoyed for a period lasting from four to eight days, has been shewn to

(4) Davis, 28.

(5) 3 Mod. 289.

(6) 10 L. J. Q.B. 100; 13 L. J. Q.B. 365; 6 Q.B. 31, 60.

(7) 24 L. J. Q.B. 158; 4 E. & B. 702.

(8) 3 Lev. 160.

(9) 3 Lev. 307.

(10) 9 Ad. & E. 406.

(11) 34 L. J. Ex. 52; 3 H. & C. 486.

(12) 34 L. J. C.P. 309; 19 C. B. (N.S.) 687

(13) 37 L. J. Ch. 313; L. R. 3 Ch. 806.

(14) 24 W. R. 608.

(1) 5 B. & Ald. 288.

(2) 2 H. Rl. 893.

(3) Cro. Car. 418.

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have grown until it now extends over a period of two months. The old custom to which reference has been made does not cover the new and wholly different user which has arisen from the improvements and extensions resulting from the march of science, and is bad for uncertainty. A custom so far in excess of the old custom is wholly unreasonable and bad as precluding the ordinary uses of his property by the defendant—*Dyce v. Hay* [1852].¹⁵

[**FARWELL, J.**—On that question I must follow *Hall v. Nottingham* [1875],¹⁶ which is the latest case on the subject.]

That was a case of recreation, which stands on a different footing from user such as this. This custom also has not been continuous. The old custom was to cutch or tan the herring nets. That has been discontinued for years, and a process of oiling the nets has been substituted, entailing a longer period for drying. Any declaration in favour of the plaintiffs should be limited to such user as is established by the evidence.

[At the conclusion of their argument counsel for the defendant asked for leave to amend the defence by adding a plea that at some time prior to 1799 the piece of ground in question was below high-water mark, and subject to the flux and reflux of the tides, and was incapable of being used for the purposes of the alleged custom, and that it was formed by accretion, and was now above high-water mark, and did not form any part of the sea-shore or foreshore. Counsel for the plaintiffs objected, but asked that if leave to amend were given to the defendant they should also be allowed to amend their pleadings by adding a claim under the Prescription Act.]

FARWELL, J., gave leave to both parties to amend, and it was agreed that after the conclusion of the reply the case should be adjourned, and should come on for further hearing after the pleadings had been amended.]

Upjohn, K.C., in reply.—*Mounsey v. Imay*¹¹ is one of those cases in which the Judges thought that the Prescription Act was confined to easements *ejusdem*

(15) 1 Macq. H.L. 305.

(16) 45 L. J. Ex. 50; 1 Ex. D. 1.

generis with rights of way and water, but Lord Selborne in *Dalton v. Angus* [1881]¹⁷ dissented from that view, and the Court agreed with him in *Bass v. Gregory* [1890]¹⁸ and *Att.-Gen. v. Simpson* [1901].¹⁹ In *Shuttleworth v. Le Fleming*¹² the Court had only to deal with section 1 of the Prescription Act, and the Judges in that case differed from the Judges in *Mounsey v. Imay*¹¹ on the question whether easements in gross were within the Act. *Gateward's Case* [1607]²⁰ shews that if every inhabitant has a right to go on lands to a church, that is such an easement as would come within section 2. Lord St. Leonards' reference in *Dyce v. Hay*¹⁵ to the art of bleaching is directly applicable to the present case in connection with the alteration of user. The evidence shews that the plaintiffs have dried nets whenever they wanted to, and, that being so, they have established the right they claim, which is to dry nets—not such nets as were used before the time of legal memory. In *Fitch v. Rawling*² a custom for playing all manner of games in the plaintiff's close was held good. The particular game in that case was cricket, which, if it existed at all before the time of legal memory, was an entirely different game from what it was in 1795, or is now. The first known mention of "cricket" is in 1550; before that date it seems to have been known as "hand in and hand out," and to have been played with a hole in the ground for a wicket. Under the latter name it was forbidden in 1477 by 17 Edw. 4. c. 3, the object of which was to encourage archery. In 1365 football was forbidden for the same reason—*Encycl. Brit.* vol. 6, art. "Cricket"; vol. 9, art. "Football." These prohibitions were repealed by 33 Hen. 8. c. 9. Whether they were forbidden again or not by the same statute is doubtful, but in any case cricket was an unlawful game from 1477 to 1541 and football for a longer period, and by 1795 both had completely changed in character. *Fitch v. Rawling*² consequently disposes

(17) 50 L. J. Q.B. 689; 6 App. Cas. 740.

(18) 59 L. J. Q.B. 574; 25 Q.B. D. 481.

(19) 70 L. J. Ch. 828; [1901] 2 Ch. 671.

(20) 6 Co. Rep. 596; Cro. Jac. 152 (*sub nom* *Smith v. Gatewood*).

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entirely of the defendants' argument that this custom is bad because of its variation. Moreover, an easement of a carriage-way once established may be used for all purposes—*Cowling v. Higginson* [1838]²¹—provided the alteration in the user of the dominant tenement does not impose a largely increased burden on the servient tenement—*Wimbledon and Putney Commons Conservators v. Dixon* [1875].²²

Pursuant to the leave given by the learned Judge, the plaintiffs amended their statement of claim by alleging that the custom in question had existed from time immemorial, or alternatively for the full period of forty years next before the commencement of this action, or alternatively for the full period of twenty years next before such commencement. The defendant amended his defence by striking out the allegation that the land in question was not beach ground, and was and had been above high-water mark, and by alleging that in and prior to the year 1799 and for many years subsequent thereto the land in question was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and in fact incapable of being used for the purposes of the alleged custom, and that it was formed by gradual accretion and the receding of the sea, and was now above high-water mark, and did not now form any part of the seashore or foreshore.

Upon the case coming on for further hearing on June 14, his Lordship intimated that on the question of prescription raised by the plaintiffs' amendments he was bound by and would follow *Shuttleworth v. Le Fleming*¹² and *Mounsey v. Imsay*,¹¹ and that with regard to the amendments made by the defendant the burden of proof was on him.

Counsel for the defendant then tendered in evidence the following documents from the Record Office—namely:

1616. Survey taken at the command of the Lord Warden of the

Cinque Ports of the repairs necessary to be done to the Castles of Walmer and Deal.

1625. Note of reparations needful for His Majesty's Castle of Walmer.

1625. A note of the decays of the same Castle.

1626. Petition of Lysle and Byng (Captains of Walmer and Deal Castles) to Mr. Nicholas one of the clerks of His Majesty's Privy Council, stating the damage caused to the Castles by the sea and asking him to use his influence to get some money spent on the Castles.

1627. Petition by the same to the Rt. Hon. Sir John Cooke, one of His Majesty's Principal Secretaries of State.

1627. Petition of the same to Prince George, Duke of Buckingham.

1627. Petition of the same to the Privy Council.

1634. Estimates for the reparation of Sandowne, Deal, and Walmer Castles by Lt.-Col. J. Paprill, His Majesty's engineer for the fortification.

Jenkins, K.C., Gatey, and Stuart Moore, for the defendant.—The defendant's case is that the land in question was at one time under water and was really Crown land, but that by the recession of the sea accretions have been made to the manor, and this land has now become part of the manor. By means of the ancient documents tendered in evidence, the defendant proposes to shew that about 1636 the sea was up to the moat of Walmer and Deal Castles. Evidence of reputation is admissible respecting matters of public right, and the plaintiffs' claim is a quasi-public right, and has in analogous cases been treated as a matter to which reputation is applicable. These are all public documents coming from the Record Office and dealing with matters of public interest, and are admissible. The reports purport to be documents representing a record made by a public servant, and should be taken as true—*Price v. Tarrington (Lord)* [1703].²³

(23) 1 Salk. 285; 2 Ld. Raym. 873.

(21) 7 L. J. Ex. 26b; 4 M. & W. 245.

(22) 45 L. J. Ch. 853; 1 Ch. D. 362.

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[FARWELL, J.—The whole gist of the matter is the accessibility of the documents to the public—their publicity in fact—*Sturla v. Freccia* [1880].²⁴]

These are public documents produced from the proper custody, and containing statements by persons whose duty it was to report upon the matters in question.

FARWELL, J.—In my opinion these documents are not admissible in evidence. I adopt the ruling in the judgment of Lord Blackburn in *Sturla v. Freccia*,²⁴ where he says: "I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

The first of the documents now tendered is a survey taken by some one unknown, and presented to the Lord Warden of the Cinque Ports. It does not appear to have been acted upon, and I cannot see any ground upon which I can hold that that is either a public document or comes within *Price v. Torrington (Lord)*.²⁵ Supposing the present Lord Warden had a survey made for him which was never acted upon, never presented to Parliament, never paid for by anybody but himself, I cannot conceive how that could be said to be a public document. The test of publicity as put by Lord Blackburn is that the public are interested in it and entitled to go and see it, so that if there is anything wrong in it they would be entitled to protest. In that sense it becomes a statement that would be open to the public to challenge or dispute, and therefore it has a certain amount of authority. A mere report to the Lord Warden of the Cinque Ports in

1616 by an unknown surveyor is absolutely inadmissible.

The next two documents are of the same nature, and are equally inadmissible. They are headed "Note of reparations needful for His Majesty's Castle at Walmer in 1625," and "a Note of the decays of the same Castle" respectively. There is nothing to shew who made them or for what purpose they were made.

The next document is a letter written by the two gentlemen who are described as the Captains of Walmer Castle and Deal Castle respectively to Mr. Nicholas, who had already been called upon to attend the Honourable Board of the Privy Council. It seems to me to be a private letter by them asking him to use his influence to get some money spent on their castles, and cannot be admissible in evidence. The petitions by the same gentlemen to the Privy Council and to the Duke of Buckingham are evidence of the fact that there was a petition, but not of the truth of the statements therein contained, and are not admissible.

The last document is an estimate for reparations alleged to have been made by the King's engineer; but how such an estimate can be said to be evidence of the facts therein stated, I fail to see.

That disposes of all these documents, and I hold that none of them are admissible.

Counsel for the defendant then tendered in evidence an information brought by the Attorney-General in 1639, and the depositions of witnesses taken on commission in support thereof. The information was against certain persons who claimed to be entitled to the manor of Walmer for causing or suffering the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea. The depositions shewed that the sea at that time came close up to Walmer Castle.

Jenkins, K.C., for the defendant.—The issue here is, where was the high-water mark? That concerns the boundaries of the realm, of the Crown, of the manor, and the parish, and is a matter of public

(24) 50 L. J. Ch. 86; 5 App. Cas. 623.

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interest. The depositions were made in proceedings concerning a public matter, and are admissible against strangers as evidence of reputation in any case in which, as here, evidence of reputation is admissible. The information explains the depositions.

Upjohn, K.C., and *R. J. Parker*, for the plaintiffs.—These depositions are not evidence of reputation, but speak as to particular facts, and therefore are not admissible—*Reg. v. Bliss* [1837].²⁵ The information in respect of which they were made was to enforce a private liability, and there is no evidence which purports to speak of reputation. A mere fact which is a private fact is not evidence of reputation; it is the public notoriety that is the evidence of reputation—*Taylor on Evidence* (9th ed.), p. 400, pl. 617.

Jenkins, K.C., replied.

FARWELL, J.—I am of opinion that these depositions are not admissible. I will assume that this was in the nature of a public right which the Crown was attempting to enforce. It is not very easy to say whether the King in 1639 was attempting to enforce the private right of the Crown or whether he was really suing for the protection of the public, but I will assume that it was a public matter. The question is whether the depositions of witnesses taken in that suit are admissible in the present case on the question to what point the sea extended. The depositions of deceased witnesses in other actions are admissible against strangers, amongst other cases, if they relate to a custom where reputation would be evidence; but then those depositions must be depositions of matters of reputation, and not of matters of fact. It appears to me to be well settled now by the authorities which are referred to in *Taylor on Evidence* (9th ed.), vol. i. p. 546, pl. 617, that reputation as to the existence of particular facts is rejected, and the instances that he gives are very germane to the present case. Perhaps the most germane is *Ireland v. Powell* (not reported),²⁶ cited in *Reg. v. Bliss*.²⁵ In that

case the question was whether a turnpike stood within the limits of a town; and though evidence of reputation was received to shew that the town extended to a certain point, yet declarations by old people since dead that houses formerly stood where none any longer remained, was rejected, on the ground that those statements were evidence of a particular fact.

Now the depositions that I have seen in connection with the interrogatories shew that all the witnesses were speaking to particular facts, and were not speaking to reputation at all. They were not questioned as to reputation, nor did they answer as to reputation. The older witnesses spoke to the existence forty years before they made their depositions of a bank which had since been undermined by 'coney', and finally washed away by the force of the waves. The younger witnesses do not answer the interrogatory about this bank at all. The only evidence given is evidence of particular facts, and not of reputation at all, and therefore is not admissible.

Counsel for the defendant then tendered various War Office plans and reports made in 1740, 1741, 1794, 1810, 1851, and 1852, and also of various ancient maps and plans which were prepared by the directions of the Board of Ordnance in 1641, 1644, and 1647.

Jenkins, K.C., for the defendant.—The War Office plans were made at the direction of a public body for a public purpose, therefore they are admissible under the rules relating to public documents. The old Ordnance plans also are admissible as evidence of reputation—*Freeman v. Read* [1863]²⁷ and *Smith v. Brownlow (Earl)* [1870]²⁸—and the Court will have regard to where the maps come from, and assume that they were made by a competent person—*Smith v. Lister* [1895].²⁹

FARWELL, J.—With regard to the War Office plans, they are clearly within my previous decision. They are not public

(25) 7 L. J. Q.B. 4; 7 Ad. & E. 550.

(26) Peake Evid. (5th ed.), p. 16; 7 Ad. & E. 555.

(27) 32 L. J. M.C. 226; 4 B. & S. 174.

(28) 39 L. J. Ch. 686n; L. R. 9 Eq. 241.

(29) 64 L. J. Q.B. 154.

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documents. So far as they can be treated as evidence at all, they are evidence of particular facts, and not of reputation. The chief ground for not admitting these documents is that I think it would be most dangerous to admit confidential reports made to the War Office or to the Board of Ordnance of those days as evidence of public rights. The public had no voice in the matter, and the whole gist of the rule as to public documents is, that the publicity must be contemporaneous, and publicity means such publicity as would afford the opportunity of correcting anything that was wrong.

Certain plans and reports made to the Board of Trade in 1867 were then tendered on behalf of the defendant and rejected on the ground that they were confidential documents.

Two charts prepared by direction of the Admiralty were admitted without objection, the defendant's witnesses stating that it was the duty of persons preparing charts for the Admiralty to fix accurately the position on the land of such buildings as Walmer Castle.

Counsel for the defendant then tendered a map or chart made by Charles Labelye. On the face of it was the following inscription: "A map of the Downs much more correct than any hitherto published shewing the true shape and situation of the coast between the North and South Forelands and of all the adjacent Sands together with the soundings at low water plans of anchorage and all the necessary leading marks, by Chas. Labelye engineer, late teacher of the Mathematics in the Royal Navy. Published in March, 1837." There was also a statement on the chart to the effect that in taking the soundings Labelye had been assisted by several able pilots and by Mr. Phillips, master of the Royal Navy. A copy of this chart produced from the British Museum had been tendered in evidence previously, but was rejected upon the ground (*inter alia*) of the decision in *Hammond v. Bradstreet* [1854]³⁰—namely, that it did not come from the proper custody in the sense in which that phrase was used in this Court. It was

then discovered that the Admiralty had a copy of the same chart, and this copy was now produced and tendered on behalf of the defendant.

Jenkins, K.C., and *Gatey*, for the defendant.—Unlike the map that was rejected in *Hammond v. Bradstreet*,³⁰ this chart, which has been acquired and used by the Admiralty comes from proper custody and is admissible. It is the duty of the Admiralty to have special cognisance of maps and charts, and therefore a chart produced from their custody has a value which does not attach to a map produced from the British Museum.

FARWELL, J.—In my opinion this map is not admissible. I might perhaps admit it and say that it is valueless; but it comes to the same thing, and I think the true ground is that it is not admissible. It purports to be "a map of the Downs much more correct than anything hitherto published," and so on—I will not read it all over again. It was prepared for the purpose of shewing how a new harbour could be made between Sandown Castle and Sand- wich. The position of the intended harbour and cuts, and the high-water mark and the low-water mark at a moderate spring tide are given at the place where it is material for this purpose that they should be shewn. Walmer Castle, however, is far away, and there are no marks to shew, nor is it the least probable, that any measurements were made there. Further than that, the man making the map describes himself as an "engineer, late teacher of the Mathematics in the Royal Navy." On the face of it, therefore, he is not a person competent to take the measurements which would be necessary to ascertain the true high-water mark. The map also does not purport to be of his own unaided making, because, so far as the soundings are concerned, he states that he has been assisted by "several able pilots" and "Mr. Phillips, master" of the Royal Navy. The map was made *diverso intuitu*; it was not the least necessary to shew what the high-water mark was so far to the south as Walmer Castle. I could not place any reliance on it if I did admit it;

(30) 23 L. J. Ex. 332; 10 Ex. 390.

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but, in my opinion, it is not admissible, because it is not shewn to have been made by any person competent to make it *quoad* the high-water mark and low-water mark; and the fact that it comes from the possession of the Admiralty makes no difference; it is not an Admiralty chart, and it has not received the sanction of the Admiralty in any way. The Admiralty are in the habit of acquiring, either by purchase, or by gift, or, perhaps I might say, by *quasi*-inheritance, as from the East India Company, numbers of old charts and maps. That does not make them in any way official; and I have the less hesitation in ruling the map to be inadmissible because I think it would be absolutely worthless if I did admit it.

Two charts, one prepared by Spencer in 1795, and the other by Bullock in 1844, were tendered on behalf of the defendant and admitted in evidence. The result of the further evidence adduced by both plaintiffs and defendant at the second hearing sufficiently appears from the following judgment.

Jenkins, K.C., Gatey, and Stuart Moore, for the defendant on the whole case.—The evidence shews that for the last century the sea has been receding, and one of the witnesses put the distance at ninety feet in his time. This was an accretion to the land in question. The Prescription Act does not deal with an easement in gross, and so the plaintiffs have to shew custom from time immemorial. They have shewn that during living memory the custom has existed, and have so shifted the onus of proof on to the defendant. The further evidence which the defendant tendered related to the whole of the land in question; but as some of that evidence has been ruled out, he has been debarred from shewing that more than about three acres of the southern portion of the land was under water. Then comes the question of law whether there can be a custom which shall attach to land if and when it becomes suitable for the custom, or a shifting custom, or one which shifts with the ownership of the land. If there is to be a shifting custom, it must at any rate be reasonable

and certain; and if the custom attaches to the new land that has been added, the old land must be discharged from the custom; otherwise, if the sea had receded for a mile, as it has done at Sandwich, the custom would extend over an area stretching a mile inland, and that would be unreasonable.

R. J. Parker (Uppjohn, K.C., with him), for the plaintiffs.—The defendant has not made out his case, for he ought to have proved that the land was under water at the time of Richard I. All that he has proved, if he has proved anything, is that the custom was interrupted; but the interruption was not of such a nature as to amount to abandonment. The accretion being imperceptible, the boundary is a shifting one, and the custom shifts with the boundary—*Poster v. Wright* [1878].³¹

[*FARWELL, J.*, referred to *Salisbury (Marquis) v. Gladstone* [1861].³²]

Even though there may have been temporary denudations and accretions, the defendant has not made out his case. There is no defined boundary in this case, and the doctrine of accretion applies—*Hindson v. Ashby* [1896].³³

Jenkins, K.C., in reply.—The plaintiffs allege immemorial custom on the strength of fifty or sixty years' evidence; but if the land was in fact under water in 1844, as the evidence shews, the exercise of the custom as regards such land was a physical impossibility. When the land was covered with water it was Crown land, so that during the sixty years part of the land has been Crown land and part has been land of the manor according to the recession of the sea. If the alleged custom is to spread nets over a particular close, that will not include additions, because they are additions to certain adjoining land; and if the plaintiffs claim that the additions, *plus* the close, become subject to the custom, it becomes impossible to define the land affected by the custom, which consequently is bad for uncertainty. They must say that the top strip and the accretions become subject to the custom; so that—for instance, as at Sandwich—

(31) 49 L. J. C.P. 97; 4 C.P. D. 438.

(32) 34 L. J. C.P. 222; 9 H.L. C. 692.

(33) 65 L. J. Ch. 515; [1896] 2 Ch. 1.

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the custom might extend for a mile inland. If, on the other hand, they allege that the custom attaches to the strip next to the sea, then the old land ought to be released from the custom, so that it would be more like the right and *profit à prendre* in *Foster v. Wright*.³¹ This custom is all fiction. 11 Geo. 3. c. 31 is quite sufficient to account for a lawful beginning for such a custom as alleged. The accretion having taken place so as to affect the title of the two adjoining owners—the Crown and the lord of the manor—must be regarded as a permanent accretion for all purposes. As to the lower strip, there is no evidence from which it can be inferred that the custom has been exercised over it from time immemorial.

It may well be that with regard to *profits à prendre* and rights by contract and agreement they follow the servient tenement; but customs are in a different class.

The lower part of this land was sea in 1844, and has since become land. There is not any date at which the reasonableness of the custom must be ascertained.

In effect this custom would enable the plaintiff to acquire a title to the land against the defendant, and consequently is bad—*Truro Corporation v. Rowe* [1902].³⁴ The plaintiffs cannot have it both ways: they cannot claim to have the custom over the old piece and over the new piece as well. The defendant has shewn that fifty years ago the land was in such a condition that the custom could not have been exercised over it; that displaces the *prima facie* evidence of the plaintiffs, and the onus is on them to prove their case, but they have not discharged it.

June 25.—**FARWELL, J.**—The plaintiffs claim a declaration that they and all other the inhabitants of Walmer carrying on the trade or business of fishermen are entitled as of right at all times necessary or proper for the purposes of their trade or business to spread and dry their nets on a piece of shingle or beach lying just above high-water mark between Walmer Place and Walmer Castle, and an injunction restraining the defendant from building on the premises so as to interfere with their right. The piece of land in

(34) 71 L. J. K.B. 974; [1902] 2 K.B. 709.

question in this action is about eleven acres in extent, and is of little (if any) value except to the fishermen for drying their nets or to the defendant for building purposes—objects which are, unfortunately, inconsistent with one another. During the whole of living memory extending over upwards of seventy years in the case of the plaintiffs' witnesses (who were a body of honest and straightforward seafaring men, whose evidence appeared to me to be deserving of entire credit), and by repute for many years before their birth, the fishermen of Walmer (by which I mean the inhabitants of the parish of Walmer who are fishermen) have used this piece of ground for the purpose of drying their nets. The practice has varied somewhat during the last seventy years. There are three fisheries now practised at Walmer—the mackerel, the herring, and the sprat fisheries. The mackerel season is from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years ago herring nets and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the piece of ground in question, and at the end of the season the boats were brought up close to this piece of land and the nets were taken directly to it and spread out on it, or, if the weather did not permit of that, the nets were landed nearer the town and were then brought in carts to this piece of ground and spread out to dry before being put away for the winter, and this practice still remains with regard to the mackerel nets. Down to the same period the sprat nets were not spread on this piece of ground at all. About thirty or thirty-five years ago the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the same piece of ground to dry. The time required for drying after oiling is longer than was required for the earlier process, and sprat nets are now put on the land at a period during which no nets used to be put there so far as living memory goes. The fishermen

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have occasionally in former years dried their nets in different places along the beach; but this piece of ground in question is that which has always been used, and to the extent at times of covering its whole area, and has been known to the fishermen and their forefathers and spoken of amongst them as their own ground.

On these facts the plaintiffs claim to have established the existence of a custom for all inhabitants of Walmer being fishermen to dry their nets on this piece of ground at such periods as may from time to time be necessary for the due prosecution of their trade of fishermen according to the varying exigencies of the fishing industry and the requirements of improved nets. The defendant objects—first, that there is no reported case in which a custom for the fishermen of a parish to dry their nets on a particular piece of land has ever been decided to be good, and that such a custom ought not now to be held good; and secondly, that the custom for any variation from the ancient times of user or ancient kinds of nets is bad for uncertainty. I cannot find that the validity of a custom for the fishermen of a parish or town to dry their nets in a particular close has ever been expressly decided, but this is probably due to the fact that such validity has never been questioned. Although the case in the Year-Book 8 Edw. 4. c. 18, which is translated by Mr. Justice Holroyd in *Blundell v. Cuttler*,¹ is referred to as an authority on the point in several subsequent books, I think that the point was assumed, not decided, therein; and this is probably due to the fact stated by Professor Maitland in his admirable preface to the Year-Books now in course of publication by the Selden Society (Vol. XVII. p. xiv.), that the reports in the Year-Books were “instructions for pleaders rather than the authoritative fixation of points of substantive law.” The general law was assumed, the point of interest to certain “sad and grave men” who reported the cases was the form of pleading. Thus Hale (*de Portibus Maris*, published by Mr. Hargrave in 1786) says, at p. 86, “Look at the book of 8 Ed. IV., 18, for the custom of Kent, for fishermen to dry their nets upon the

land, though it be the soil of private men,” referring to the Year-Book as stating the existence of a well-known custom. In the *Case of Tanistry*,⁴ in James I's reign, it is stated at page 88 by counsel as an instance of well-known customs, “so to turn the plough on the headland of another in favour of husbandry, and to dry nets on the land of another in favour of fishing and navigation.” This passage is set out verbatim in *Rolle's Abr.* “Custom,” F. 2, as a correct statement of the law. In *Fitch v. Rawling*,² Mr. Justice Buller, in 1795, says: “With respect to the case in *Bro. Abr. Custom* (pl. 46), there the custom was holden to be bad, not because it was for the fishermen of Kent to dry their nets on the plaintiff's land, (which the case in *Cro. Car.* shews to be good,) but either because the digging in the soil, in order to pitch stakes to hang the nets upon, was unnecessary, or it tended to the destruction of the inheritance.” I am unable to verify the reference, for *Baker v. Brereman*³ appears to state only that inhabitants cannot prescribe for a *profit à prendre in alieno solo* “for fishermen to dry their nets for the public benefit or for easement,” and I can find no other case in *Cro. Car.* on the subject. In *Pain v. Patrick*⁵ the Court, in holding that the custom in that case was well alleged, said, “This may be as well alleged as a custom to turn a plow upon another man's land, or for a fisherman to mend his nets there.” In *Bacon's Abr.* “Custom,” p. 566 (the first edition of which was published in 1736), this custom is given as good, “So, a custom to dry nets upon the land of another; for this is in favour of fishing and navigation.” I have failed to find the marginal reference which he gives as his authority—5 Co. 84—and which is also given by Chief Justice Tindal in *Lockwood v. Wood*,⁶ but the Lord Chief Justice treats the custom as of known validity in 1844. He says: “A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. . . . Thus a custom for

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all fishermen within a certain district to dry their nets upon the land of another might well be a good custom." In *Tyson v. Smith*¹⁰ the same Lord Chief Justice says, "Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation." In *Race v. Ward*,⁷ Lord Campbell, in speaking of the right of the inhabitants of a district by custom to go on the soil of another and take water, says that in 15 Edw. 4. 29a Mr. Justice Catesby treats it as good and likens it to a custom for all the fishermen, inhabitants in a particular vill, to dry their nets on a particular close.

Although, therefore, I have failed to find any express decision, there are so many opinions in favour of the validity of the custom expressed by so many eminent lawyers that it would be impossible for me to disregard them, and on principle the custom is, in my opinion, good. A custom must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. It is not unreasonable because it is prejudicial to the interests of a private individual if it is for the benefit of the commonwealth, because such benefit renders its lawful commencement reasonably probable. As Lord Cranworth says in *Salisbury (Marquis) v. Gladstone*,³² "In truth, I believe, that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom." This has considerable bearing on the argument of counsel for the defendant that the custom alleged in this action is uncertain; his contention is, in effect, that the custom must be to dry nets not for the purposes of fishing generally, but at particular times and for particular fish. But this is to discard

the kernel for the shell, and might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests. If the fishermen of Walmer may dry their nets only on the condition of fishing for such fish and at such times and with such nets as the fishermen in the reign of Richard 1 used to do, all improvements and progress are debarred. But there is no authority or principle for any such contention. A custom is not uncertain because it is not invariable in every part. Thus, a custom to pay a year's improved value for a fine on a copyhold is good; though the value is a thing uncertain, for the value may at any time be ascertained (*Steph. Comm.* 14th ed. vol. i. p. 28). Again, the very statement that a custom may be well laid in the inhabitants of a town shews that the number of persons entitled to enjoy it will vary from time to time. In *Abbot v. Weekly* [1665]³⁵ a custom for all the inhabitants of a vill to dance on the plaintiff's close at all times of the year was held good; and this was followed in *Hall v. Nottingham*,¹⁶ where it was held that a custom for the inhabitants of a parish to enter upon certain land of the plaintiff and erect a maypole thereon and dance round it and otherwise enjoy on the land any lawful and innocent recreation at any time of the year was held good. In *Dyce v. Hay*¹⁵ Lord St. Leonards says that "there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." Counsel for the plaintiffs, in his ingenious reply, pointed out that this is fully borne out by the case of *Fitch v.*

(35) 1 Lev. 176.

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Rawling,² where a custom for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of A at all seasonable times of the year was held to justify the defendants in playing cricket there, although it is reasonably certain that cricket was unknown until long after the time of Richard 1 (see *Strutt's Pastimes*, ed. 1801, pp. 83 and 84), and that, if it came within the description of any of the newly imagined games in the Act of 17 Edw. 4. c. 3, it was made illegal by that Act, which was not repealed until the reign of Henry 8. It is clear from that Act, and the Act of 12 Rich. 2. c. 6, that the number and nature of the games that were lawful varied from time to time, but it has never yet been suggested that such variations rendered the custom to play all lawful games void for uncertainty; and I can see no reason for holding that a custom to dry nets at all times seasonable for fishing is bad, although the periods and numbers and sorts of nets may vary.

During the trial the defendant desired to set up a plea that the beach in question, or a great part of it, had come into existence of late years, and to contend that it followed therefrom that no custom to dry nets thereon could have existed for the requisite period. I accordingly allowed the trial to stand over, and gave both parties liberty to amend and to adduce further evidence. With regard to the plaintiffs' amendments, I am bound by and follow *Shuttleworth v. Le Fleming*¹² and *Mounsey v. Iremay*.¹¹ The defendant has amended by adding these allegations: "In and prior to the year 1799 and for many years subsequent thereto the beach ground was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and, in fact, incapable of being used for the purposes alleged by the plaintiffs, and was formed by gradual accretion and the receding of the sea, and is now above high-water mark and does not now form any part of the seashore or foreshore"; and I have had a considerable amount of evidence relating thereto. I have rejected a number of plans as inadmissible, but as I was told that the

case was likely to go to the Court of Appeal, I have taken evidence concerning them as though I had not excluded them, and I can only say that if I had not rejected them as inadmissible I should have discarded them as worthless. [His Lordship reviewed the evidence, and continued:] I find the facts to be as follows: The beach in question is a ridge, which from time immemorial has acted as a barrier against the sea for the protection of the land behind it. That land is on so low a level that but for the beach it must have been submerged, but it has never been so during historic times. This appears by the nature of the subsoil, as proved by the contractor who excavated part of it to a depth of five feet in making sewers, and by the discovery of a Romano-British burying-place in the grounds of Walmer Lodge. I find, also, that the coast in this neighbourhood has for the last century, at any rate, been subject to fluctuations by way of increase by accretion and of decrease by demolition owing to the action of the winds. When the prevailing wind blows on shore for a cycle of years, the process of accretion goes on, but the prevailing winds alternate over long series of years, and consequently the actual line of high water varies according to the duration of such prevailing winds and their aggregated action. The actual ascertainment with certainty of high-water mark at a given date is a matter of difficulty and time, and cannot be effected by a mere survey. No ancient plans or maps can be relied on as shewing high-water mark, and no charts prior to 1795. The two charts which have been put in are Spencer's of 1795 and Bullock's of 1844, both of which are trustworthy. But with regard to Spencer's chart there is a difficulty in ascertaining which of the three lines shewn on the coast is intended to be high-water and which low-water mark. I accept the opinion of Commander Jarrards, who was called on behalf of the plaintiffs, that the two dotted lines represent them—partly on his authority and partly for these reasons—that if the thick black line is taken, the area between high and low water would be 590 feet, an area much too large to be appropriate to anything but the

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beach generally, and one of the two dotted lines would be unaccounted for. Adopting these two charts, I find that in 1795 high-water mark was approximately in the same place as at present, that in 1844 the sea had advanced fifty or sixty yards, and that at the present time this amount of beach has been regained. The defendant has therefore proved that in 1844 a considerable portion of the beach in question (say three acres) was below high-water mark, and was therefore inappropriate for drying nets; and he argues that he has thereby shewn that to the extent of that portion the custom must have commenced since the time of Richard I. A defendant may no doubt defeat a custom by shewing that it could not have existed in the time of Richard I; but he must demonstrate its impossibility, and the onus is on him to do so if the existence of the custom has been proved for a long time, as was done, for instance, in *Simpson v. Wells* [1872],³⁶ where the claim of a custom to set up stalls at the statute sessions for the hiring of servants was defeated by shewing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward 3. But no such impossibility is shewn in the present case. If the beach was of its present extent in 1795, why am I bound to infer that it cannot have been the same in 1186 from the mere fact that between 1795 and 1844 the extent diminished and has since again increased? The mere non-user during the period that the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession, and "an interruption of possession only for ten or twenty years will not destroy the custom"—1 *Bl. Comm.* 77; *Co. Litt.* 114b. Not only ought the Courts to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that it is reasonably possible to presume in favour of such a right—see *Goodman v. Saltash Corporation* [1882].³⁷ I see no reason why I should not presume that

this beach was in substantially the same state in 1186 as now. The inland limit is fixed by geological considerations and the Romano-British burying-place; in the reign of Henry 8 the Castle of Walmer was built as a defence for the coast; it must have been near but safely above high-water limit when built, and I see nothing to compel me to infer any substantial difference in this piece of beach in 1186.

It was next argued that the variations in the beach shewn by the two maps of 1795 and 1844 and the present state of things render it impossible to define with sufficient certainty the land affected by the custom, and therefore render the custom bad for uncertainty. But it cannot be necessary to define the limits of land affected by a custom more clearly than those of land comprised in a grant for the same purpose. I think that the same principle must apply, the difference between custom and prescription being only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation; but the rules affecting the subject-matter are in each case the same, and I have no doubt that a grant of land which in fact adjoins the sea would be well defined by reference to high-water mark as one of its boundaries. It is said that it is uncertain whether this means high water as it was in 1186 or high water now; but I have evidence of usage and that the nets have been spread down to high-water mark for the time being. This is quite sufficient. Thus in *Bennington v. Taylor* [1700]³⁸ dean and chapter prescribed for toll for a double stall "et pro fundo sive solo prope et juxta eandem stallam"; and the third objection taken was that it was uncertain, and so void, but the objection failed, "for that shall be ascertained by the common usage of the fair." The argument of the defendants on this point savoured rather of the *Agri Limitati* of the Roman (*Digest* 41, 1, 16) than of anything known to the English law.

Then it is said that it is unreasonable, because the sea may recede for a mile or more, as at Sandwich, and it is impossible to suppose that any such extent of ground

(36) 41 L. J. M.C. 105; L. R. 7 Q.B. 214.

(37) 52 L. J. Q.B. 193; 7 App. Cas. 633.

(38) 2 Lutw. 1517.

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could ever have been intended to be appropriated to such a custom. It is enough for me to say that, as the event has not happened for upwards of seven hundred years, I cannot see the unreasonableness. The period for ascertaining whether a custom is reasonable or not is its inception. The point is dealt with by Chief Justice Tindal in *Tyson v. Smith*,¹⁰ where he says: "But it is said the number of these virtualles may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. . . . But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription for the fair being a reasonable prescription: it is an objection only as to the mode of exercising the rights so claimed, whether under the custom or the prescription." I say in this case, as Lord Cranworth said in *Salisbury (Marquis) v. Gladstone*,³² "I find it impossible to say that such a custom as that here alleged might not have resulted from an agreement between the lord and his tenants before the time of legal memory." But the plaintiffs have raised this further and interesting point—they say that, even assuming that these three acres did not exist in the time of Richard I, but have been added since by accretion, this would not affect their right, inasmuch as both sides must agree that these three acres have arisen by small and imperceptible degrees (and they must so agree in order to exclude a claim by the Crown), and these added acres are an accretion to the defendant's land and became subject to the same custom to which the land to which they were added was subject. There is no authority exactly in point, but I have come to the conclusion on principle and on the authority of an analogous case that this contention is well founded. *Blackstone Comm.* ii. p. 262 states the law to be that, "if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible

gain is, therefore, a reciprocal consideration for such possible charge or loss." In *Att.-Gen. v. Chambers* [1859]³⁹ Lord Chelmsford quotes this passage, and proceeds: "I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron Alderson, in the case of *Hull and Selby Railway, In re* [1839],⁴⁰ 'That which cannot be perceived in its progress is taken to be as if it never had existed at all.' And as Lord Abinger said in the same case, 'The principle' as to gradual accretion 'is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.' It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the seashore." This reasoning applies with equal force to the persons entitled to exercise rights over a piece of land adjoining the sea. If it is washed away their rights are gone. If it increases, their rights ought to extend over the increased area. It is said that it would be absurd to apply this to a case where the sea has receded for a mile or more; but that is not this case. It is sufficient for me to say (following Baron Alderson) that this accretion is to be treated as though it had occurred in 1186. If there was now a mile or more of such accretion, it would hardly be possible to find evidence of actual user over more than the fringe near the sea, and the extent of the custom could be limited by such user; or, even if any such user could be shewn, the landowner's right of free

(39) 4 De G. & J. 55, 68.

(40) 8 L. J. Ex. 260; 5 M. & W. 327.

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enjoyment would only be limited by a reasonable exercise of customary rights, and it would probably be held unreasonable to insist on drying nets over a large tract of land. Further, I have the authority of the analogous case of *Foster v. Wright*.³¹ In that case the river Lune had gradually changed its bed. The plaintiff had a free fishery in the ancient river. The defendant owned lands which originally did not abut on the river, but had, by means of the alteration in the river bed, become the river bank. The question was whether the plaintiff's exclusive right of fishing extended over so much of the water as flowed over land which was identified as formerly part of the defendant's property; and it was held that it did. Mr. Justice Lindley said, "I am wholly unable to see upon what principle a change in the course of a river, so gradual that it cannot be perceived until after the lapse of a long interval of time, can affect the rights of those entitled to use it, whether for fishing or any other purpose: nor is there any authority for holding them to be affected thereby." And Lord Coleridge, C.J., held that the plaintiff was entitled to a several fishery, and said: "and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case." Further, the opinions of text-writers, dealing with the analogous cases of accretion to copyholds and wastes of manors, are to the same effect. Thus, *Hall on the Sea Shore* (2nd ed.), p. 113 (p. 789 of Mr. Stuart Moore's edition), concludes that the land which has accreted to the lord as freehold must be subject to the copyhold interest of the tenant of the land to which it has been added, or, if waste, to the local customs, commons, &c., prescribed for by the tenants in respect of such waste. The late Mr. Phear (*Rights of Water*, p. 43n.) conjectures that "the land which gradual accretion gives to adjoining lands assumes their character, i.e., becomes freehold or copyhold, and in the latter case waste or tenanted accordingly." I hold, therefore, that the land which has been added by accretion takes the character of the land to which it has been added, and is subject to the same customs as affected such land. The result

is that the plaintiffs succeed, and I grant the injunction as asked. The defendant must pay the costs of the action.

Solicitors—Hare & Co., agents for F. W. Hardman, Deal, for plaintiffs; Mowll & Mowll, agents for Mowll & Mowll, Dover, for defendant.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

[IN LUNACY.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Oct. 31. Nov. 7.

E. V. WALKER
(a lunatic so
found), *In re*.

Lunatic—Power of Disposition—Deed made in Lucid Interval—Validity—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116 to 130.

A lunatic so found is, until the inquiry has been superseded, absolutely incapable of making a valid deed disposing of his property even in a lucid interval, as such a deed would conflict with the rights and powers of the Crown and of the committee over the lunatic's property.

Sir Benjamin Wright, *Ex parte* (1 Vern. 155), considered.

Appeal from order of the Master in Lunacy.

The above-named Eleanor Vause Walker was a lunatic so found by inquiry in the year 1869. George Thornton was in 1899 appointed committee of her estate. She was entitled to large personal property.

On June 14, 1904, she applied to the Master in Lunacy by George Thornton, her committee and next friend, for liberty to execute a deed-poll disposing of her property, and that on the execution of the deed-poll she might be at liberty to commence an action in the Chancery Division against the Attorney-General for a declaration that the deed-poll was valid.

The evidence in support of the application stated that E. V. Walker was illegitimate, and being fifty-six years of age was desirous of making a will or disposition of

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her property in such a form as would with the greatest certainty secure that her property should after her death be disposed of according to her wishes among certain persons related to her by blood, and that evidence should forthwith be obtained which would establish the validity of such disposition of her property. It was also stated that E. V. Walker had no insane delusions that influenced her intended disposal of her property, and that she had a grasp and intelligent understanding of the documents, and was fully competent, so far as her mental condition was concerned, to execute a declaration of trust or will.

On July 6, 1904, E. V. Walker executed a deed-poll disposing of her property after her death with a power of revocation in her own favour. Two medical men who witnessed her execution of the deed deposed that she was at the time perfectly capable of executing a disposition of her property by deed or will, and that she had no insane delusions that influenced her in her intended dispositions. The Master made no order on the summons except as to costs.

The lunatic by her committee and next friend appealed, asking that the order of the Master might be discharged, and that she might be at liberty to commence an action by her next friend for a declaration that the deed-poll was valid and that such other directions might be given as might be proper for the institution of proceedings for establishing the validity of the deed.

The question was referred to the Lords Justices in Court.

Upjohn, K.C., and *MacSwinney*, for the committee.—This application is for the benefit of the lunatic. It is almost identical with *Sir Benjamin Wright, Ex parte* [1683].¹ As the lunatic can make a will in a lucid interval, so she can make a deed—*Hall v. Warren* [1804].²

[*VAUGHAN WILLIAMS, L.J.*—In that case the lunatic had not been so found.]

In *Elliott v. Ince* [1857]³ the Lord Chancellor said he felt a difficulty in holding the deed of a lunatic to be void, con-

sidering that a lunatic might make a valid will if proved to have been made in a lucid interval. See also *Beverley's Case* [1603].⁴ It is doubted if an action can be brought to perpetuate testimony in respect of a will during the testator's lifetime. It is therefore asked to perpetuate testimony in respect of a deed. The case of a deed falls exactly within the cases that a will may bind a lunatic if made during a lucid interval. It may be that a lunatic can only deal with his property after inquiry, subject to the jurisdiction of the Court; but the proposed deed is so framed as to raise no conflict with the powers of the committee. The part of the Lunacy Act beginning with section 116 which deals with the powers of the committee of a lunatic's estate is headed "Management and Administration." This is purely a question of administration. It is not like the case of a bankruptcy, where all the bankrupt's property becomes vested in the trustee. After inquiry the property is not vested in the committee, but remains in the lunatic. The deed can take effect subject to the committee's powers of management and administration. Why should this lady not make a deed if she is of sound disposing mind? The costs of a bill to perpetuate testimony may be allowed—*Taylor, In re* [1871].⁵

[THEIR LORDSHIPS intimated that they desired to have the record in *Sir Benjamin Wright, Ex parte*,¹ examined, so that it might be ascertained exactly what was decided. A transcript of the record was accordingly made.⁶]

(4) 4 Co. Rep. 123b.

(5) L. R. 6 Ch. 416.

(6) The following transcript of the Record in *Sir Benjamin Wright's Case*, and notes by the Chief Clerk, were supplied to the Court:

A

Registrar's Minute Books (Chancery).

Mr. Registrar Devenish Vol. 373.

Lord Keeper. Lune 16th die April 1683.

Re Benjamin Wright. } Mr. North would have a
reinspeccōn of Sir Ben: hee
is now better and there is a settlem^t. to be
made on the sonn.

Mr. Attorney Generall: The King doth only take care and is not otherwise concerned and there must bee a method of trying it.

Cūr. Let there bee a plea put in to the inquisition and Mr. Attorney Generall to joine

(1) 1 Vern. 155.

(2) 9 Ves. 605, 610.

(3) 26 L. J. Ch. 821; 7 De G. M. & G. 475.

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The Attorney-General (Sir R. B. Finlay, K.C.) and A. J. Parker, for the Crown.—

issue in it and let it be tried as soon as may be and then will give further direction.

B

Registrar's Minute Book (Chancery).

Mr. Registrar Devenish Vol. 388.

Lord Keeper. June 16 Aprilis 1683.

& Ben Wright. } Mr. North: This comes upon the point of lunacy we pray that it may be put in some way that may plead to the Inquisicio. Mr. Attorney Cur: plead to the Inquisicio lett Mr. Attorney joine issue and if any settlement to be made the fine and recovery shall be in open Cort in the Cort of Com. Pleas.

(*Re Sir Benjamin Wright Bart: a Lunatic.*
Notes by the Chief Clerk in Lunacy of Result of search of Record Office)

23 Sep. Commission de lunatico
33 Car. II [1681] inquirendo.

3 Oct. " " Inquisition finding him a lunatic for one month last past with lucid intervals. (His estates in Essex mentioned and Son Nathan aged 20 years and upwards.)

27 March Deed made between Sir
35 Car. II (1683) Benjamin Wright of the one part and Nathan Wright his only son and heir apparent of the other part whereby Sir Benjamin conveyed the Manor of Wokenden Episcopi and other Real Estate in Essex to Nathan Wright who covenanted to convey the same to Trustees therein named upon Trust to pay 400l. a year during the joint lives of Sir Benjamin and Dame Jane his wife to such person as Dame Jane alone without her husband should appoint by writing and if Sir Benjamin survived his wife to pay the annuity to him and to permit Nathan Wright to receive the residue of the rents.

2 April 35 Car. II. Deed acknowledged in
Wright. Chancery by Sir Benjamin

25 April 35 Car. II. Deed enrolled.
(1683)

16 April do. (do.) Two Minutes A & B of
Hilary Term Mr. Registrar Devenish not identical in terms.

Easter Term
35 Car. II (1683) Fine levied
Between the Trustees of the deed
of 27 March 1683 Plaintiffs
and

Sir Benjamin Wright Dame Jane Wright
and Nathan Wright Defendants.

Trinity Term
35 Car. II 1683 Recovery suffered Nathaniel Wright arm' voc.
qui voc. Benj Wright bar

The further direction referred to in Minute A

In *Mansfield's Case* [1615]⁷ a fine levied by an idiot was held unavoidable; but there had been no inquisition there, and after inquisition no fine could be levied. The Crown has a prerogative which is not exhausted by the Lunacy Acts, and after office found it asserts its prerogative, which cannot be interfered with until *supersedas*. In *Sir Benjamin Wright, Ex parte*,¹ as appears from the record, the Lord Keeper was asked to allow the lunatic to execute a deed, and he refused; but he said the fact of the lunacy might be put in issue on an application for a fine. If it were found that he was not lunatic, the lunacy would be superseded—*Collinson on Lunatics*, vol. i. pp. 116 and 117, where the forms of ancient writs are stated. After office found the whole disposition of the property of a lunatic is taken away from him. If this proposed deed is valid, it makes this lady a trustee, but she is unfit to be a trustee, and could be removed. No action can now be taken to test the validity of the deed. There is no party at whose instance the perpetuation of testimony could be obtained.

MacSwinney, in reply.—The reports of Chancery visitors would not be available to prove the sanity of the lunatic if she made a will in a lucid interval—*Roe v. Nix* [1892].⁸ In *Beverley's Case*⁴ the propositions laid down, which are opposed to our contention, were purely *obiter dicta*. We rely on *Elliott v. Ince*,³ where Lord Cranworth considered the questions of a will and of a deed of a lunatic to rest on the same footing. If the question here had been of rents and profits of land, the Statute of Prerogatives (17 Edw. 2) would have been in our way, but that statute does not deal with goods and chattels—*Pope on Lunacy*, p. 26.

Sir Benjamin Wright, Ex parte,¹ is directly in our favour. In the fine levied there the trustees of the deed were plaintiffs, and Sir Benjamin Wright and the beneficiaries were parties. If in the

has not been discovered nor can any order drawn up on that minute or any subsequent be found. No trace of the plea of the Attorney General has been discovered or any entry of the appointment of a Committee or of the taking off the file or vacation of the Inquisition.

(7) 12 Co. Rep. 123.

(8) 62 L. J. P. 36 1893] P. 55.

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present case an action were brought by the beneficiaries under the deed against the lunatic as trustee, it would enable its validity to be established. No public policy will be served by preventing this lady from dealing with her property.

VAUGHAN WILLIAMS, L.J. — This is an appeal from the order of the Master, made on July 25, 1904. There was an appeal from the Master to Lord Justice Mathew, who was the Lord Justice acting in lunacy, and he referred the matter to this Court. The application to the Master was that Eleanor Vause Walker, a lunatic so found, might be at liberty to commence an action by her next friend in the Chancery Division against one or more of the other beneficiaries under the deed-poll exhibited to the affidavit of George Thornton of July 12, for a declaration that the deed-poll was valid, or that such other directions might be given as might be proper for the institution of proceedings for establishing the validity of the said deed-poll, or, alternatively, that such directions might be given as might be proper for the institution of proceedings to have the said deed set aside. The Master refused that application, and what we have to consider in this case is whether he was right in so doing. This lady was found a lunatic on an inquisition as long ago as 1869. We were told she was not born in wedlock, and is therefore a *nullius filia*, and can have no kin. We were also told, in the course of counsel's opening, that there have been various examinations of this lady both by the Lord Chancellor's visitors and by other doctors qualified to form an opinion as to her mental condition, and we were told that the view of these gentlemen was that generally this lady, apart from the unfortunate delusions which resulted, and, I must take it, properly resulted, in her being found a lunatic, is of such mental capacity that she could generally be expected to deal with her property in a reasonable and sensible manner. We were told that the object of the deed was to make a reasonable provision for the children and other relations of her mother and of her father—in fact, a provision suitable for the condition in life of these people. We were

also told that, there being a very large sum of money to which this lady is entitled, even after making this provision for these people, who are not her relations in law, whatever they may be in blood, there would be a considerable surplus; and I rather gathered that this deed disposed of the surplus by giving it to hospitals or other charitable institutions. Under these circumstances, the state of mind of this lady being that which we have been informed, and the provisions of the deed being such as I have mentioned, we are asked to say that the Master was wrong in refusing this application, which was for the purpose, to put it shortly, of testing the validity of this deed thus executed by the lady. The deed gives nothing away during her lifetime, but only disposes of her estate after giving her the benefit of it for the whole of her life.

Now we have to ask ourselves whether we ought to recognise that deed in any way—that is to say, to recognise it sufficiently to justify us in making some order by which the validity of this deed and the present mental capacity of this lady can be immediately determined. The conclusion that we have come to is that we ought not to do so. We think we ought to treat this deed as being absolutely void and of no effect whatsoever. It was suggested in the course of the argument of counsel for the applicant that, even although we might not think we had jurisdiction to make such an order as that which is suggested in the notice of appeal, yet we might make some order for the perpetuation of testimony. I may say, once for all, that we are of opinion that, if we take the view which we do take, that this deed is absolutely void, it follows (and I need not go into the authorities upon it) that we ought not to make any order for perpetuation of testimony.

In order to judge whether we ought to recognise this deed in this Court at all we have had to consider what is the position of the Crown with reference to lunatics so found. The Lunacy Act, 1890, makes a number of provisions with regard to persons who are not lunatics so found, but who are incapable of managing

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themselves and their property. This case is one of a lunatic so found, and I only propose to deal with such a case; but it must not be supposed that by so doing I mean to limit my reasoning entirely to such a case. It may very well be that when one comes to look at the provisions of the Act of 1890 in the case of a person not a lunatic so found, but who has been made subject to an order under this Act, the same reasoning which brings the Court to the conclusion that it has done with regard to a lunatic so found might bring one to the same conclusion with reference to a person who is subject to an order under the Act who is not a lunatic so found. But I say nothing about that one way or the other. [His Lordship read the terms of that portion of section 120 which deals with powers exercisable by a committee over the property of a lunatic under the order of the Judge.] When one looks at section 341 of the Lunacy Act, 1890, which is the definition section, one finds that "Property" includes real and personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest, and any undivided share therein." I thought it convenient to refer to those provisions of the Act of 1890 before I said anything about the relation of the Crown to lunatics. Generally it may be taken that the Crown is the custodian of the property of a lunatic so found. It may be said in general terms that property only passes out of the control of the lunatic and comes under the control of the Crown for the purpose of the lunatic having the protection to which a lunatic is entitled from the Crown. Therefore, when one has to consider the question as to whether this deed is void, one cannot dispose of it by saying that that which was the property of the lunatic has ceased to be the property of the lunatic, and has become the property of the Crown. But during the whole period of history of which we have reports the Crown has always had the prerogative, although it was not always defined as it was later by statute, of dealing with and controlling the real and personal property of a lunatic. It is quite sufficient, it seems to me, to dispose of this case

to say that the Crown has such control, as distinguished from property, because the moment one sees that the committee, as representing the Crown, has the rights which I have just referred to in section 120 of the Lunacy Act, 1890, it is perfectly plain that those rights cannot be effectively exercised by the Crown in the interest and for the benefit of the lunatic if some one else is to have the control during the same period of time of the same property. In such a case there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of the Crown's rights, which have been delegated to him. It is said against this that it is plain that, if a lunatic is of sufficient mental capacity to execute a will, he can execute a will, and that that will can be proved if the Court before whom the application for probate is made is of opinion that the lunatic at the time of the making of the will was of testamentary capacity and understood what he or she was doing. As to that there is no doubt. Then, it is said, if a lunatic has this capacity to make a will which can be proved after her death, why should not the lunatic also have the power to execute a deed which, on the face of it, is only to take effect upon her death, and only creates reversionary interests arising after the death of the lunatic. It does seem a little inconsistent at first sight that the law should recognise the capacity of the lunatic to make a will, and refuse to recognise the capacity to execute a deed which is intended to take effect only after the death of the lunatic. But the answer to this is, that the beneficiaries under the will have no interest, and no *locus standi* whatsoever, until the death of the testator, or testatrix, as the case may be. The will is ambulatory, and may be revoked by the maker of it at any time before death, and the result of that is that the execution of a will gives no immediate interest whatsoever to the beneficiaries. It gives neither interest in possession, nor interest in reversion. It is of no effect whatsoever until the death of the maker of it, and the consequence of that is that the making of a will does not give rise to any conflict of control whatsoever. The beneficiaries

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under the will cannot, when orders are being made in respect of the lunatic's property, or in respect of the property the subject of an alleged deed like the present, come forward and claim to interfere in any way; whereas those claiming under a deed could insist upon a *locus standi* to be heard and successfully insist upon it, and immediately, therefore, the conflict of jurisdiction would arise. It is said that this deed is in such a form that that could not arise—I do not think we ought to look at the deed; but it is suggested hypothetically that it might be in such a form as in substance to make any rights given under it subject to the rights of the Crown; but even that would not take away the *locus standi* of those claiming under the deed to be so heard. They would have a voice, for instance, in the appointment of a trustee if the grantor made herself the trustee under the terms of the deed. Under those circumstances it seems to me that the argument which is based upon the state of the law being such that a lunatic's will would be given effect to if it turns out that she executed the will during a lucid interval, and was of sufficient testamentary capacity, does not carry us to the conclusion that because a lunatic has such a testamentary power the lunatic ought also to have power to deal with property by a deed *inter vivos*.

I really do not think that it is necessary for me to say much more with regard to the present motion than that we ought not to recognise this deed in any way, and the Court ought to treat it as entirely void on the plain and simple ground that the execution of it is inconsistent with the control which the Crown has the right and duty of exercising over the property of a lunatic, and that that itself is sufficient reason for the conclusion to which the Court has come.

But then it is said that, although it is inconsistent with the powers which the Crown has always exercised in reference to lunatics—powers and duties which are recognised by the Legislature by the statute of 1890—there is authority to shew that, notwithstanding the fact that the Crown has such control, custody, and

power, and notwithstanding the fact that the Crown has the right to exercise, and has constantly exercised, the power of selling and disposing of the property of a lunatic, both real and personal, for the benefit of the lunatic, yet the Court ought to recognise this deed, however inconsistent [with the powers of the Crown, because the authorities bind us to do so. I do not propose to go through the authorities at any length, but I may say generally of *Beverley's Case*⁴ that, having regard to the passage which counsel for the Crown read to us with regard to lunatics as distinguished from idiots, it does not favour the argument of those who presented this motion, but rather favours the proposition of the Attorney-General that such a deed is absolutely void. But it is said that although *Beverley's Case*⁴ is against the propositions which have been urged in support of the motion, *Sir Benjamin Wright's Case*¹ is an authority for the proposition that if a lunatic so found does between the date of the inquisition and his death—that is to say, during the continuance of life—execute a document, the Court ought, and is bound, to make such an order as will result in the issue of the sanity of the lunatic, or the capacity of the lunatic at the moment of the execution of the document in question, being tried and disposed of, and put on record in some shape or other. One would be glad to arrive at any conclusion which might mitigate the sorrows of the position of a lunatic so found. No one can doubt but that many a lunatic, properly so found, chafes very much under the restrictions which prevent him from dealing with property and doing other acts which his mental capacity would probably suffice to enable him to do, and to do reasonably; but if it is necessary for the protection of lunatics generally that they should be debarred from the exercise of such powers, one must, however regretfully, refuse to accord them to lunatics who are under the protection of the Crown. Still, if the Court could have found a means of allowing it consistently with what is essential for the protection of lunatics, it would have been glad to do so. We have not found any such

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means; and when one examines *Sir Benjamin Wright's Case*¹ I do not think that we should be justified in saying that it is an authority for the proposition that the Court ought to decide upon the validity of a deed *inter vivos* executed by a lunatic so found, and while the inquisition still stands unvacated or unsuperseded. The report is a very short one. It states: "A motion was made that a man, who was found to be a lunatic, being now by his confinement become of sound mind, might be inspected, and might make a settlement of his estate. But the Lord Keeper refused to make any order in it; but directed them, that if he made any settlement of his estate, the same should be done before the Justices of the Common Pleas by fine, that so they might examine him, and inspect him. And directed, that for as much as now he was found a lunatic on record, they should reply to it, that he was now restored to his understanding; that so issue might be taken upon it and tried in the Common Pleas." We have had the opportunity of examining the original record in the Record Office with regard to this case. The request was made by the Court to the Record Office that they would supply us with copies of all documents which might throw any light upon *Sir Benjamin Wright's Case*,¹ so that we might be informed at once of what really was the meaning of the order in that case. I want to take this opportunity of saying how extremely carefully and well and quickly those in the Record Office have made the necessary search and provided us with every document throwing any light upon the matter. We have got these documents now before us, and with them in our hands we can follow pretty well (I do not say with absolute certainty) what was done in the case. It is plain upon the report in *Vernon* that it is consistent with either of two possibilities. An issue was to be tried of some sort. What was the issue? It may have been an issue as to whether the soundness of mind of Sir Benjamin Wright had been restored so that the inquisition ought to be vacated or superseded, or it may have been an issue, as those who support this motion say that it was, to try the question of the

capacity of Sir Benjamin Wright to execute this particular settlement. It may have been the intention to direct an issue to try that question which was consistent with the continuance of the inquisition finding Sir Benjamin Wright a lunatic. When one looks at these documents one finds that the commission seems to have gone in 1681. The inquisition finding Sir Benjamin Wright a lunatic is dated October 3 in that year, and runs thus: "Inquisition finding him a lunatic for one month last past with lucid intervals." Now it is possible that, so far as the report in *Vernon* is concerned, the object of the issue was to try whether the deed was executed in a lucid interval. Then on March 29, 1683, the settlement seems to have been executed by the lunatic, Sir Benjamin Wright, and it conveyed the manor of Wokenden to Nathan Wright, who was the son of the lunatic, who covenanted to convey the same to trustees upon certain trusts. That deed was acknowledged on April 2, 1683. On April 25 the deed was enrolled. On April 16, in Hilary term, there were two minutes made by Mr. Registrar Devenish, which minutes are marked for our convenience A and B. I do not know that there is very much difference, if any, in the effect of them. A runs thus: "Mr. North would have a reinspeccōn of Sir Ben: hee is now better and there is a settlement to bee made on the sonn. Mr. Attorney Generall: The King doth only take care and is not otherwyse concerned and there must bee a method of trying it." "It" may mean either the question of the lucid interval, to put it shortly, or the question of the general sanity of Sir Benjamin. Then it goes on by the Court: "Let there bee a plea put in to the inquisition and Mr. Attorney Generall to joine yssue in it and let it bee tryed as soon as may bee and then will give further direction." It does not appear that any record of the further direction after the trial of the issue can be found anywhere in the Record Office. Then Minute B runs thus—it is of the same date, and is obviously the same order: "Mr. North: This comes upon the point of lunacy wee pray that it may be put in some way that

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may plead to the Inquisiciō. Mr. Attorney Gūr : plead to the Inquisiciō lett Mr. Attorney joyne issue and if any settlement to be made the fine and recovery shall be in open Co't in the Co't of Com. Pleas." I rather gather from this that the issue was to be tried in the Common Pleas. There is nothing to shew that the issue was an issue upon what I call for shortness the lucid-interval point. The objection to holding that the inquisition as to the state of mind generally of the lunatic Sir Benjamin Wright could not be tried in the Court of Common Pleas in these proceedings of fine and recovery was met by counsel for the Crown saying that you would, as a result of those proceedings, have a finding of record, and it might be that that finding would go to the general condition of the mind of the lunatic at that time, and that if the Attorney-General was present, and that state of mind was put on record, it would be sufficient record to enable the Crown and its officers to deal with the Crown's office, or office and title, whatever it may be called; and if the finding in the Common Pleas of such a record was favourable to the sanity of Sir Benjamin Wright, then the Crown could thereupon order that the inquisition should be vacated or superseded. I am not prepared to say that that is not sound. It is not, of course, the same thing as the commission which originally issued, upon which the finding in lunacy was based. There has been in such a case no second inquisition with a finding thereon justifying a superseding or vacation. But still there would or might be in the proceedings in the Common Pleas a finding of record that might be sufficient to determine the state of mind of the lunatic and to enable the original inquisition to be vacated or superseded at the instance of the Crown.

It is sufficient that I should say about this case that, now we have all the particulars we have been able to get of it, it is not possible to say that it is a clear authority for the proposition which is put forward by those who are making this motion, that if a deed is executed by a lunatic so found the Court ought to recognise that deed sufficiently for the

purpose of determining and putting on record either the decision of the validity of that deed or a finding as to the capacity of the lunatic executing it at the date of the deed. Under those circumstances I can only say that we are bound in this state of authority to refuse to recognise this deed, even for the purpose of testing its validity; and we are bound to treat it as void, and to make no order for any trial to test its validity or for the perpetuation of testimony in view of any future action.

The appeal will be dismissed; and unless the Attorney-General makes some objection, I think, having regard to the present estate, that the costs should come out of the estate.

ROMER, L.J.—I also think that this application ought not to be acceded to.

It is admitted on behalf of the appellant that the Court cannot be asked to approve the provisions of the so-called deed which is in question before us, nor can the Court be asked to sanction the committee on behalf of the lunatic executing that deed or a similar deed. But it is said on behalf of the applicant that the Court ought to sanction or recognise the document to the extent of authorising some proceedings on the basis of it by which either evidence could be preserved or an issue found in favour of the lunatic having at the date of the document either testamentary power or some power of dealing with her estate to a certain extent.

I cannot see my way to accede to that suggestion. The lady is a lunatic so found with a committee appointed. An application of this kind is a mere attempt, and I think, had there been any real ground for it, we should have had some authority to justify such an application. To my mind, there are two fatal objections to this appeal. In the first place, having regard to the rights of the Crown and the provisions of section 120 of the Lunacy Act, 1890, it is clear to me that this so-called deed purporting to bind the lady's property as from its date and pending the lunacy is wholly inoperative and void, and ought not to be recognised by us in any way. In the second place, I cannot see how any

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practicable and proper proceedings could be sanctioned by us which would have the effect desired by the applicant. I can see how certain collusive proceedings could be taken; but those certainly the Court could not sanction. On those grounds I think the application fails.

I will only add one word with regard to *Sir Benjamin Wright's Case*.¹ That case is not satisfactorily reported nor easy to follow, but at any rate it is to my mind no authority which we can recognise as justifying this application. I cannot help thinking that case only shews that the Court at that date—1683—adopted the course it did in order to allow an issue to be in effect tried whether the lunatic had wholly ceased to be so, and ought no longer to be treated as one—in other words, as a method of obtaining a *supersedeas*. Fine and recovery being hypothetical proceedings and of record, it appears to have been considered that a finding of sanity in those proceedings might have had the desired effect of superseding the finding of the inquisition, which is also of record, and could of course only have been affected by matters of equal force. In the present case it is open to the lunatic to take the recognised proceedings by way of *supersedeas* if she thinks fit to do so. In that case, if she took those proceedings and succeeded, then, of course, she would be able to deal with her property in any way she thought fit. But she has not taken those proceedings, nor, indeed, do I gather that it is considered that she could do so successfully. At any rate she has not taken them, and I cannot think that the present application, the lunacy remaining as it does in full force, ought to be in any way or on any ground acceded to, and it must accordingly fail.

COZENS-HARDY, L.J.—I am of the same opinion. We are bound to treat the deed executed by this lady as absolutely void and of no effect. I can see no answer to the argument which counsel for the Crown presented to us derived from *Beverley's Case*,⁴ which seems to me to be a clear authority. Lord Coke, after dealing with the case of an idiot from birth, and pointing out that his alienation is absolutely void both of lands and of

goods and chattels, proceeds to say there is a difference in the case of a lunatic after office found. He says, "and therefore after the office found thereof, the alienation, gift, &c. of him who is *non compos mentis* are in equal case with the alienation or gift of an idiot." Then he goes on to say, "So that it appears that in judgment of law, *fatus et idiota* include as well *non compos mentis*, as *idiot a nativitate*, and therefore they are in the same case, as to the alienation of their lands and tenements, goods and chattels."

Now, is there any authority to the contrary of that? *Sir Benjamin Wright's Case*,¹ to which we have devoted a good deal of attention, seems to me to be only a suggestion by the Lord Keeper as to a mode of deciding the issue whether Sir Benjamin Wright was or was not of sound mind—whether, in short, in some subsequent proceedings a *supersedeas* could be granted. Our attention has been called to various authorities in which the Courts have directed an issue whether a deed executed by a person of unsound mind was or was not valid. But when the cases are examined, it will be found that in every single case the deed in question was one executed before inquisition found, and not after inquisition found.

That being so, there was not that conflict of control which in point of principle enables us to decide this case. It cannot be right that the Crown, or the committee representing the Crown, should have the control and management of this estate, and at the same time that the lunatic should have power to dispose of her estate as she thinks fit.

I think this deed ought to be treated as absolutely null and void.

Appeal dismissed.

Solicitors—Ridsdale & Son, agents for J. H. Simpson, Dewsbury, for applicant; Solicitor to the Treasury, for Crown.

[Reported by A. J. Spencer, Esq.,
Barrister-at-Law.]

WARRINGTON, J. }
 1904. } MANSER, *In re*;
 Oct. 26. } ATT.-GEN. v. LUCAS.

Will — Charitable Gift — Society of Friends — Burial Grounds Provided for Members — Bequest to Keep in Order such Grounds — Advancement of Religion.

A gift of money for the purpose of providing or of keeping in good order a burial-ground, although that burial-ground may not be a parish churchyard, and although it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may be supported as a good charitable gift as being one for the advancement of religion. A bequest, therefore, of money for the purpose of keeping in good order certain burial-grounds provided for the Society of Friends, and in particular the grave of the testator's late wife, which was in one of the grounds, is a good charitable gift. The direction as to the grave of the testator's wife only imposes a special obligation ancillary to the repair of the graveyards, and does not create a separate trust.

Income Tax Commissioners v. Pemsel (61 L. J. Q.B. 265; [1891] A.C. 531) applied.

Vaughan, In re; Vaughan v. Thomas (33 Ch. D. 187), considered and explained.

By his will Alfred Manser, a member of the Society of Friends, commonly known as Quakers, after giving certain legacies gave, devised, and bequeathed all the rest, residue, and remainder of his estates and effects, both real and personal, to his executors E. Lucas and G. B. Gripper upon trust, amongst other legacies, "to pay to the Hertford and Hoddesdon Preparative Meeting the sum of 1,000*l*. I direct that the meeting shall appoint five of their members to receive and give a receipt for the same and that the same shall be invested by the five members and the interest applied by them under the order of the said Preparative Meeting for the sole purpose of keeping in good order the existing burial-grounds under the care of the meeting and in particular the grave of my late wife." By a codicil to his will

the testator gave his ultimate residuary property to his brother Henry Manser.

The testator died on October 27, 1902, and H. Manser died on January 31, 1904.

The Hertford and Hoddesdon Preparative Meeting had under their care the following existing burial-grounds: Cottered, now disused, which by the will dated December 9, 1710, of John Exton was given unto all Christian people to bury their dead frank and free without money and without price so long as the world should endure, and which was devised to trustees upon trust to see that the burying-place was kept and preserved in a Christian and decent manner; Hoddesdon, a piece of land which, with a meeting-house built thereon, was in 1829 conveyed to trustees upon trust for sale, and in the meantime for such purposes as the persons for the time being assembling at the monthly meetings of Friends, commonly called Quakers, for the town of Hertford, should direct, and subject as aforesaid upon trust to permit the premises to be used as a meeting-house and burial-ground for the use and accommodation of the Society of Friends, but subject to regulations to be made by the meeting; Hertford, a piece of arable land which in 1784 was, together with a meeting-house thereon, conveyed to trustees upon trust at all times to suffer the land, then used as a burial-place by the people called Quakers, to be kept and used as a public burying-place for the Quakers inhabiting in or near the town of Hertford in such manner as the same had been theretofore kept and used; and Ware, a piece of land which, with a meeting-house thereon, was in 1728 conveyed to trustees upon trust to permit the same to be used as a place of burial for the Society of Protestant Dissenters, called Quakers, residing in and near the town of Ware, now disused. The testator's wife was buried in one of the aforesaid burial-grounds.

The Preparative Meeting duly appointed five of their members to receive the legacy, but the executors of the will, having been advised that the bequest was in all probability void, declined to pay the legacy. After some considerable

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correspondence between the parties, the Attorney-General, who had been certified by the Charity Commissioners in reference to the legacy, took out this originating summons, which asked for an order on the executors to pay the legacy to the Preparative Meeting.

E. Beaumont, for the Attorney-General.—The testator has created a valid charitable trust. It is immaterial that some of the burial-grounds have been established for the benefit of the members of a particular society, and not for the benefit of the community at large. Although there has been no decision dealing with the case of a burial-ground provided for the benefit of Dissenters, the principle applicable is clearly indicated in the reported cases. It is almost impossible to say which charities are public and which are private—*Att.-Gen. v. Pearce* [1740].¹ A bequest is none the less a charitable bequest merely because it is intended for the benefit of a limited class of persons—*Att.-Gen. v. Lawes* [1849].² Trusts in favour of a parish or parishioners—*Att.-Gen. v. Webster* [1875]³; in favour of the inhabitants of a borough—*Goodman v. Saltash Corporation* [1882]⁴; of the occupiers of a class of houses—*Christchurch Inclosure Act, In re* [1888]⁵; and in favour of the children of deceased railway servants—*Hall v. Derby Sanitary Authority* [1885]⁶—have respectively been upheld on the ground that they are charitable trusts. In *Att.-Gen. v. Blizard* [1855]⁷ a gift of land for a workhouse and cemetery and for the employment and support of the poor of a particular parish was held to be a good charitable gift. Land purchased under statutory authority for the purpose of an additional burying-ground for the use of a parish was decided to be a charity—*St. Pancras Burial-Ground, In re* [1866].⁸ Even if the bequest should be held to be void as regards the grave of the testator's

wife, that will not affect the validity of the disposition so far as concerns the burial-grounds—*Rogerson, In re; Bird v. Lee* [1901].⁹ A gift of money to keep in repair a church, or even the ornaments in a church, is valid. A gift to keep in repair the churchyard or "God's acre," as it is called, in distinction to the church or "God's house," is also valid—*Vaughan, In re; Vaughan v. Thomas* [1886].¹⁰ Any burial-ground ought to be regarded as sacred, and not merely "God's acre." The fact that certain of the burial-grounds in question have become disused does not alter the case. Nothing could be more painful than the thought that they should fall into neglect.

H. Terrell, K.C., and Tyssen, for the persons interested in the residuary estate.—A trust, in order to be good as a charity, must come under one of the heads enumerated by Lord Macnaghten in *Income Tax Commissioners v. Pemsel* [1891].¹¹ One of the divisions is trusts for purposes beneficial to the community; and to come within that branch they must be public general trusts and not private trusts. The question here is whether this is a public or a private trust. Not every trust that is indirectly for the benefit of the community or a class of the community is a public trust. There must be a direct benefit to a section of the community. The decision in the case of *Christchurch Inclosure Act, In re*,⁵ that a trust in favour of the inhabitants of certain cottages was a public trust, is perfectly consistent with, and logically follows, the cases in which it has been held that trusts in favour of a parish and of the inhabitants of a parish are public general trusts. There may be a trust within a limited area, but within that area it must be public trust. A friendly society exists for purposes beneficial to the community, for the purpose of assisting the poor members of the particular society. It is not, however, a charitable institution—*Clark's Trust, In re* [1875].¹² These two cases indicate the

(1) 2 Atk. 87.

(2) 19 L. J. Ch. 300; 8 Hare, 32.

(3) 44 L. J. Ch. 766; L. R. 20 Eq. 483.

(4) 52 L. J. Q.B. 193; 7 App. Cas. 633.

(5) 57 L. J. Ch. 564; 38 Ch. D. 520.

(6) 55 L. J. M.C. 21; 16 Q.B. D. 163.

(7) 25 L. J. Ch. 171; 21 Beav. 233.

(8) 36 L. J. Ch. 52; L. R. 3 Eq. 173.

(9) 70 L. J. Ch. 444; [1901] 1 Ch. 715.

(10) 33 Ch. D. 187, 192.

(11) 61 L. J. Q.B. 265, 290; [1891] A.C. 531, 533.

(12) 45 L. J. Ch. 194; 1 Ch. D. 497.

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principle. In the one case all the public within a limited area are entitled to the benefit of the charity, and it is consequently a public charitable trust. In the other case only certain individuals, members of the society, are entitled to benefit, irrespective of the place in which they live, and therefore there is no public charity. The relief of poverty does not make it a public purpose. Every parishioner is entitled to be buried in the parish churchyard. Here the right is limited to the members of a voluntary society formed of certain persons.

Money for the erection of a meeting-house has been held to be a good charitable gift as being for the advancement of religion. A burial-ground is not for the advancement of religion. In old days the Society of Friends objected to the churchyard because they did not like consecrated ground. The present case is not within *Goodman v. Saltash Corporation*,⁴ but is within *Clark's Trust, In re*.¹² In *Yeap Cheah Neo v. Ong Cheng Neo* [1875]¹³ a devise of two plantations, in which the graves of a family were placed, and which were directed to be reserved as the family burying-place, was held to be void as a perpetuity.

[WARRINGTON, J.—That was a private burial-ground.]

There is no distinction between a burial-place for members of a family and one for Quakers. No authority is to be found in which a burial-ground for Dissenters has been held to be a good public charity.

If the contention for the Attorney-General is right, there was no necessity in *Vaughan, In re*,¹⁰ to refer to the statute 43 Geo. 3. c. 108. The gift there was for the repair of two tombs, and of the parish churchyard in which they were situated. The Court decided that the gift was good because its object was to benefit the churchyard, which was of general public use because all the parishioners were entitled to be buried there.

A trust for the repair of a tomb in God's house is good; but one for the repair of a tomb in God's acre is void. The preamble to the statute of 43 Eliz. c. 4 enumerates amongst charitable objects "the repair of bridges, ports, havens,

(13) L. R. 6 P.C. 381.

causeways, churches, sea-banks, and highways." These are all clearly matters in which the general public are interested. There is nothing about burial-grounds in the statute. In *Vaughan, In re*,¹⁰ churchyards are brought under the statute of 43 Geo. 3. c. 108, which applies only to churchyards of the Church of England.

Under the Public Health (Interments) Act, 1879 (42 & 43 Vict. c. 31), a local authority may acquire, construct, or maintain a cemetery which is under the Burial Acts a public cemetery. There is nothing in the testator's will to connect the burial-ground at Cotteder with the Quakers at all; they have no legal right to the exclusive use of that ground. The other burial-grounds in question are, in the eye of the law, club property. The Burial Act, 1855 (18 & 19 Vict. c. 128), s. 15, provides for the repair of closed burial-grounds at the cost of the rates. But that statute is confined to parish burial-grounds, and there is no provision in it for disused denominational burial-grounds—*Reg. v. Bishop Wearmouth Burial Board* [1879],¹⁴ *Reg. v. St. John's, Westgate, and Elswick Burial Board* [1861].¹⁵

As to the cases cited on behalf of the Attorney-General, in every one of them the gift was held to be a good charitable gift either as being for the relief of the poor, or for the benefit of the public, or the advancement of learning and religion.

In *Rogerson, In re*,⁹ there were two gifts—one for the repair of a tomb, which was held to be invalid, and the residue, subject to the invalid gift, was for the poor, and, being so, it was held to be good.

In *Att.-Gen. v. Lawes*² the gift was for the purpose of providing ministers, and it was upheld on the ground that it was for the advancement of religion. In the present case the gift has nothing to do with religion, so that it must fall under the head of general public purposes. In *Att.-Gen. v. Blizzard*⁷ the gift was for the poor of the parish; in *St. Pancras Burial-Ground, In re*,⁸ the gift was to the parish. There is no authority against our contention, not even a *dictum*.

(14) 5 Q.B. D. 67.

(15) 31 L. J. Q.B. 15; 1 B. & S. 679. Affirmed in Ex. Ch.: 31 L. J. Q.B. 205; 2 B. & S. 703.

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Further, the gift in the present case is for keeping in repair of existing burial-grounds, and two of the grounds are now disused. Therefore the question is limited to the existing grounds, which are confined to the Society of Friends; and consequently, even if the gift is a public general charitable trust, there must be an apportionment.

Cann, for the executors.

M. Romer, for the Preparative Meeting of Friends.

No reply was called for.

WARRINGTON, J.—The question I have to decide here is as to the validity of a legacy contained in the will of Alfred Manser. [His Lordship read the bequest in the will, and continued:] The effect of that bequest, though it has a good many words in it, is simply to give a certain sum of money to trustees, to be applied by them under certain directions for the purpose of keeping in good order certain burial-grounds, “and in particular the grave of my late wife”—which, I suppose, was situated in one of the burial-grounds.

The question I have to determine is whether that is a good charitable gift. It simply turns on this: Is a gift of money for the purpose of providing a burial-ground a good charitable gift?—because, if it is, it seems to me that a gift of money for the purpose of keeping such a burial-ground in order would be a good charitable gift. It has to be borne in mind that in this particular case the burial-grounds were provided as burial-grounds for the Society of Friends. I am aware that I am not quite accurate in what I said, because one of the burial-grounds referred to in the evidence was provided for the burial of “all Christian people”; but I would put that particular burial-ground out of the question as if it did not exist; and I therefore repeat that, for the purpose of the question which I have to decide, the burial-grounds, for the keeping in good order of which this legacy was given, are burial-grounds provided for the benefit of the Society of Friends.

Now, is a gift of a burial-ground for the benefit of the Society of Friends a good charitable gift? In my opinion it is. I think it may be supported as a gift

for the promotion or encouragement of religion. But before I say that, I had better read what Lord Macnaghten says in the case of *Income Tax Commissioners v. Pemsel*.¹¹ After referring to the popular meaning of the word “charity” and its legal meaning, Lord Macnaghten goes on to say: “How far then, it may be asked, does the popular meaning of the word ‘charity’ correspond with its legal meaning? ‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.” Then he continues: “The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.” In my opinion, a gift of money for the purpose of providing, or, as in this case, for the purpose of keeping in good order a burial-ground, though that burial-ground may not be a parish churchyard, and though it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may be supported as a good charitable gift, as one for the advancement of religion. It has been argued as if a gift of money for this purpose was merely a gift of money to certain individuals as a club associated for some purpose of their own; but I do not regard it in that light. There can be no doubt whatever that a gift of money to be invested in the purchase of land or in the purchase of a building to be used as a chapel or meeting-house for the purposes of a certain Christian denomination would be a good charitable gift, as would also money to be expended in the maintenance or “keeping in good order”—to use the words in this will—of such a building. The same with regard to ornaments of that building. The same with regard to furniture or things necessary for the celebration of worship of whatever form conducted in that building. It seems to me that it is impossible to distinguish between money given for any

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of those purposes, and money given for the purpose of a burial-ground or the keeping in repair of a burial-ground, which I think most people would regard as ancillary to the building devoted to religious purposes, in the way I have mentioned. I think one naturally connects the burial of the dead with religion. One may be wrong in that view; but that is the view that I take, and I think this gift could be supported in that way. Now it is said that that is not so—that there is no authority in support of that view, and that, so far as there is any authority, it tends the other way. That argument is supported by the case of *Vaughan, In re; Vaughan v. Thomas*,¹⁰ before Mr. Justice North. That was a case of money given for the repair of a churchyard, and the question arose whether money so given was validly devoted to charitable purposes. Mr. Justice North held that it was. He found a good reason in his mind for so holding in the words of the Church Building Act (43 Geo. 3), and he decided it on the words of that Act. The Act afforded a clear ground, and he went upon that ground. It does not at all follow that, if he had been driven to do it, he would not have decided in the same way on other grounds; and I cannot see, therefore, that the case is any authority against the view which I have just expressed. But I think that he did decide it on the broader ground. If one looks at the passage which counsel for the Attorney-General referred to, where he sums up what he had been saying in reference to the Church Building Act, I think one can see what his true view was. He says, "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it which is often called 'God's acre.'" That is the ground on which I think this case, as I have already said, can be decided in favour of the legacy in question; and I think Mr. Justice North took the same view. What really was the effect of the Church Building Act as applied by him? I think it was only this: that the Legislature, dealing with gifts for the purpose of pro-

viding churches and, amongst other things, churchyards, regarded the persons who were providing the money for that purpose as charitably disposed. I do not think it was anything more than that. I do not think Mr. Justice North regarded it as an enactment that the purchase or provision of a churchyard should be regarded as a charity. He merely took it that the Legislature, expressing the popular view of what would be the disposition of such people, treated those people as charitably disposed; and I think he only regarded the Act as supporting the view which he put in those words which I have read, summing it up—namely, that he could see no difference between a gift to keep in repair a church and a gift to keep in repair a churchyard. If that is so, there is no question about it; for it is admitted that a gift to keep in repair a Quakers' meeting-house would be a perfectly good gift. And so, on this view, a gift to keep in repair a burial-ground would be a perfectly good gift.

I need not go into any general considerations as to the necessity or as to the pious object of providing burial-grounds. That is a matter about which one need say nothing. I decide this case on the ground I have expressed, and I do not think, therefore, it is necessary to consider whether this is a general public trust or not. I think it comes within the now very wide definition of "charity," and in particular that branch of it which is concerned with the advancement of religion. I think, therefore, the gift is good.

With regard to the minor points that have been taken, I really do not think they arise, because it is common ground that there are burial-grounds now existing under the control of the Preparative Meeting. If at any time it turns out that the money is not wanted for application in the way in which the testator has prescribed, it does not affect the present question, and it will have to be the subject of an application later on.

There was one point which I did not deal with, and which I forgot for the moment, and that is with regard to the words "in particular the grave of my late wife." I regard those words as nothing

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more than a special obligation ancillary to the repair of the graveyard, and not as a separate trust at all.

[His Lordship then made a declaration that the bequest was a valid legacy, and directed the same to be paid with interest at 4 per cent. from a year after the testator's death to five members of the Preparative Meeting, the costs of all parties to the application as between solicitor and client to be paid and retained by the trustees of the will out of the testator's estate.]

Solicitors — Treasury Solicitor; Horsley & Weightman; R. C. Swaine, agent for H. S. Hawks, Hertford.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.]

[IN THE CHANCERY DIVISION AND
IN THE COURT OF APPEAL.]

FARWELL, J.

1904.

Oct. 31.

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

Nov. 23.

HOWARD v.
THE PRESS
PRINTERS,
LIM.

*Practice — Motion for Injunction —
Undertaking by Defendant — Cross-under-
taking in Damages.*

Where on an interlocutory motion for an injunction an undertaking is offered by the defendant and accepted by the plaintiff, there is no general practice that a cross-undertaking as to damages by the plaintiff is to be implied.

Decision of FARWELL, J., reversed.

This was an action by the plaintiffs to restrain a nuisance in which the plaintiffs gave notice of motion to restrain the defendants until judgment or further order from using or working on their premises, 70 to 86 Long Acre, any engine or machinery in such manner as by reason of the vibration or noise caused thereby to injure the plaintiffs' premises known

as Broad Court Flats and Broad Court Chambers, Covent Garden, or to interfere with the use or enjoyment by the plaintiffs of the said flats or chambers, or in any way so as to cause a nuisance to the plaintiffs or an injury to the said flats, or that such further or other order might be made as the Court should think fit.

On August 5, 1904, the motion was mentioned to the Court, but stood over for a short time to see whether the parties could arrange an undertaking. The respective solicitors then left the Court, and in the presence of one of the plaintiffs agreed to the following terms, which were written out by the defendants' solicitor:

"5. 8. 04.

"Order for pleadings to be delivered. Statement of Claim by 11th inst., defence within 14 days thereafter to be delivered as of the 12th inst. Mutual discovery. Undertaking until trial not to run printing and folding machines after 7 P.M. and before 8 A.M. except during one night a week, viz. Tuesday, and one additional night in one week in September or October. All windows on south face of defendants' premises to be kept closed during running of printing machines."

On the solicitors returning into Court this document was shewn to the plaintiffs' and defendants' counsel, and signed by the respective solicitors, and the Court was informed that the motion had been settled on agreed terms.

The indorsement on the defendants' counsels' briefs contained a cross-undertaking by the plaintiffs to be answerable in damages; the indorsement on the plaintiffs' counsels' briefs did not.

The Registrar drew up the order in the following form containing such a cross-undertaking:

"Upon motion for an injunction, &c., and the plaintiffs by their counsel undertaking to abide by any order this Court may make as to damages in case it should hereafter be of opinion that the defendants shall have sustained any by reason of their undertaking which the plaintiffs ought to pay, and the defendants by their counsel undertaking until trial not to run printing and folding machines after 7 P.M. and not before 8 A.M. except

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during one night a week, viz. Tuesday, and one additional night in one week in September or October, and to keep all windows on the south face of their premises closed during the running of their printing machines, And this Court treating a summons for directions as if it were before this Court, Doth order "

[Then followed directions as to delivery of pleadings, discovery, and costs.]

The plaintiffs moved to vary the minutes by omitting the cross-undertaking as to damages. It was admitted that nothing had been expressly said on either side as to such a cross-undertaking. The plaintiff who was present when the terms were arranged deposed that he would have refused his assent and should have required the motion to proceed rather than give any such cross-undertaking. The plaintiffs' solicitor also deposed that he should never have agreed to such a cross-undertaking as part of the terms.

The defendants' solicitor deposed that he did not insert the cross-undertaking in the memorandum, knowing that it would follow as a matter of course; that the memorandum was merely intended to record the nature of the defendants' undertaking; and that he should not for a single instant have considered the suggestion that the defendants should give an undertaking having the same effect as an injunction, and which would seriously interfere with the carrying on of their business, except upon the usual terms as to damages. The undertaking by the defendants had been acted on.

Butcher, K.C., and *R. J. Parker*, for the plaintiffs.—The terms of settlement are silent about any cross-undertaking in damages, and no implication can be made that it was intended to be given. It is also in evidence that the plaintiffs' solicitor would not under any circumstances have consented to give the cross-undertaking. The terms were in the nature of a *modus vivendi*, and not equivalent to an injunction.

Upjohn, K.C., and *Whinney*, for the defendants.—An undertaking in damages is always required as the price of granting an injunction. Where an undertaking is substituted for an injunction, it should be

an implied term that a cross-undertaking in damages is given.

R. J. Parker replied.

FARWELL, J.—This is undoubtedly a matter of very considerable importance with regard to the practice of the Court. The motion was never opened at all. So far as the Court is concerned, it is simply embodied in the form of an order containing an undertaking that the parties arranged between themselves. Therefore on a motion to vary it is a little difficult for the Court to deal with a matter of this sort. On the other hand, it is not drawn up as a consent order.

When a plaintiff or a defendant comes here and moves for an interlocutory injunction, he knows that it is the settled practice of the Court that if the Court grants him an injunction, or an undertaking which, given to the Court, has the same force as an injunction, that involves his giving an undertaking in damages. And the practice is so well settled that, as stated in *Seton on Decrees* (6th ed.), p. 541, the Registrars are instructed always to insert it. It is a matter of invariable practice, so far as my Court is concerned, and has been the practice for the last thirty years. So far as counsel in Court are concerned, it is so well understood that I should say that nineteen times out of twenty the cross-undertaking in damages is not mentioned. If they mention it, it is because they have made some concession. But it is not usual to mention it.

This case, I am told, differs from others because the solicitors went outside and settled the terms of the order between themselves. Now the order as drawn up contains an undertaking by the defendants, which has the force of an injunction, as regards working during certain hours. That obviously puts the defendants under an onerous obligation, which, if the plaintiffs should ultimately turn out to be wrong, ought to be set right in damages. The Registrar has considered it to be his duty, according to the directions mentioned in *Seton* and the ordinary practice, to insert an undertaking in damages, and to that the plaintiffs object. In my opinion the Registrar was right.

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I think if parties go outside to settle terms for an order like this, they settle it on the understanding that the ordinary practice of the Court will be adhered to; and if they wish to exclude that practice, they must make an express bargain to that effect. If a man takes an undertaking, and does not wish to give a cross-undertaking, in my opinion it is incumbent on him to put it in the terms of settlement. If he does not do so, the Registrar would undoubtedly, as the Registrar has done here, draw up the order with the undertaking in damages. In fact, unless I was satisfied that the undertaking in damages had been negatived, I should not allow the Court to be made the vehicle for granting what is equivalent to an injunction without it. Here the difficulty is that three months have elapsed during which the defendants have been under this undertaking. The order, in my opinion, must be drawn up in accordance with what I consider to be the practice of the Court. If the plaintiffs now desire that it should not be drawn up, they may put an end to the undertaking and the cross-undertaking. But, so far as the past is concerned, I am of opinion that the order must be drawn up containing a cross-undertaking in damages.

The plaintiffs appealed by special leave obtained from the Court of Appeal.

Butcher, K.C., and *R. J. Parker*, for the appellants.—There is no general practice that a cross-undertaking as to damages is to be implied where an undertaking is volunteered by the defendant. The defendant in such a case must be taken to know what he is doing, and how far his undertaking will interfere with his business. The plaintiffs could not have asked for an injunction in the terms of this undertaking, and the implication of a cross-undertaking as to damages would, or might, impose on them a liability they never contemplated. The practice of the Court which insists on a cross-undertaking in damages as the price of obtaining an interlocutory injunction has no application to an undertaking voluntarily offered by the defendant—*Att.-Gen. v. Albany Hotel*

Co. [1896],¹ *Tucker v. New Brunswick Trading Co. of London* [1890],² and *Smith v. Day* [1882].³

Upjohn, K.C., and *Whinney*, for the respondents.—The case is the same as if the motion had been formally opened to the Court and the defendants' undertaking then given. Where an undertaking is thus given in lieu of an injunction, a cross-undertaking in damages is implied, and it is no more the usual practice to expressly mention the cross-undertaking than it is when an injunction is granted. The business of the Court on motion day will be seriously inconvenienced if the appellants are right, for defendants will no longer offer undertakings. An undertaking which is extorted by pressure of a motion cannot be said to be volunteered by the defendant. The undertaking is given to the Court and is enforceable accordingly.

[They cited *Costa Rica (Republic) v. Strousberg* [1879].⁴]

[*ROMER, L.J.*—There is no such general practice known to me in the case of an undertaking.]

[*COZENS-HARDY, L.J.*—Nor to me. Is there any authority for it?]

There appears to be no direct authority. No reply was called for.

VAUGHAN WILLIAMS, L.J.—I think that this appeal must be allowed, and that the undertaking of the plaintiffs to answer in damages must be struck out. It has been argued before us on behalf of the respondents that there is no difference, in respect of the matters which have been under discussion in this case, between an injunction and an undertaking. I do not agree with that argument. I think that an undertaking entered into with the Court is the equivalent and will have the effect of an injunction to this extent—that any infringement of the undertaking may be made the subject of an application to the Court to enforce it. But, apart from that, there is this essential difference between the two—an injunction is something that the Court orders—something

(1) 65 L. J. Ch. 885; [1896] 2 Ch. 696.

(2) 59 L. J. Ch. 551; 44 Ch. D. 249.

(3) 21 Ch. D. 421.

(4) 11 Ch. D. 323.

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that the Court compels; while, with regard to an undertaking, it cannot be seriously suggested that the Court can by its order compel an undertaking. I do not mean to say that in every sense of the word an undertaking is invariably voluntary. For instance, supposing an injunction has been granted by the Court of first instance, and there is an appeal against the order for an injunction, it is quite possible that upon the appeal coming on to be discussed the Court of Appeal might think that the injunction was too wide and might put to the appellants, "We will make an order absolutely dissolving this injunction, not limiting or amending it or anything of the sort, on you, the appellants, undertaking" in certain terms; and then the appellants might give an undertaking which would be a reasonable undertaking under the circumstances; but, generally speaking, it is a true proposition that the Court cannot order what we call an undertaking.

Now, that being so, it seems to me that the only question here is whether there is any practice in the Courts which could justify the Court in saying in this case that by necessary implication the plaintiffs, when they accepted the defendants' undertaking, consented to give an undertaking to answer in damages. In my opinion no such practice has been made out. Mr. Justice Farwell says in his judgment: "In my opinion the Registrar was right. I think, if parties go outside to settle the terms of an order like this, they settle it on the understanding that the ordinary practice of the Court will be adhered to; and if they wish to exclude that practice, they must make an express bargain to that effect. If a man takes an undertaking, and does not wish to give a cross-undertaking, in my opinion it is incumbent on him to put it in the terms of settlement." If that practice had been established to-day, then Mr. Justice Farwell would have been quite right, and we should have held that by implication the plaintiffs who took the undertaking consented to give a cross-undertaking. But in my judgment no such practice has been established. Counsel for the respondents have frankly said that they cannot produce any authority to that

effect. I do not profess myself to have any knowledge of what the practice in such matters in the Chancery Division may have been, but I have heard the statements which my brethren have made in the course of the argument, and I accept it that there is no such practice. Under these circumstances it seems to me that, without going the length of saying that there never could be a case in which the plaintiff by the acceptance of the undertaking of the defendant impliedly consented to give a cross-undertaking—although it was not mentioned—I see nothing in the circumstances of this case to lead me to that conclusion; and, speaking generally of the balance of convenience, I think, for the reasons given in the course of the arguments—amongst others, the circumstance that a defendant may express his willingness to give a very wide undertaking indeed, the effect of which might be that, if the plaintiff gave a cross-undertaking to be answerable in damages he might expose himself to considerable risk—it is much more convenient that if the defendant giving an undertaking wishes for a cross-undertaking he should expressly say so; and it is not to be taken as against the plaintiff that he assents to such a cross-undertaking unless he expressly excludes it. I think, therefore, that this appeal must be allowed, and the order must be amended in the way I have indicated.

ROMER, L.J.—I am of the same opinion. I do not say that a case may not arise in which, where an undertaking has been given by a defendant on a motion for an injunction, and nothing expressly has been said about an undertaking as to damages on the part of the plaintiff, such an undertaking may not be implied. There may be such a case. The question is whether in the present case such an undertaking as to damages can be implied. Now when I look at the arrangement come to between the parties, the wording of it, and the form of the order as drawn up, I must say, speaking for myself, that I cannot think that an undertaking as to damages ought to be implied. In the first place, my experience is that there is no general

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practice that whenever, on a motion for an injunction, a defendant offers to give an undertaking, a corresponding undertaking as to damages on the part of the plaintiff is in fact to be implied. I know of no such practice. There is a practice, and I have no doubt a right practice, that in cases where the Court grants an injunction it always makes it a term, whether it is expressed or not, that the injunction granted is on the terms of an undertaking by the plaintiff as to damages. In that case the reason why the undertaking is required is obvious. It may turn out at the trial that the order was wrong, as subsequent events have proved, and that the Court never ought to have made the order which it did; and therefore it is for the purpose of restoring in that case to the defendant the position he ought to have been in, by recompensing him as to damages, that the Court in the case of an injunction requires an undertaking as to damages. It is because it is an order of the Court enforcing a certain obligation upon the defendant, which he is protesting against, but which he is bound to obey. But in the case of an undertaking offered by the defendant on the hearing of a motion, that undertaking may be and generally is, so far as the Court is concerned, a voluntary act on the part of the person undertaking, and may go beyond any order that the Court would have made but for the undertaking, and go beyond anything that would have been asked for by the plaintiff if the defendant had not voluntarily given the undertaking.

Now in the present case what happened was this: The parties arranged terms; the defendant offered an undertaking; and it was because of that undertaking on his part that the Court, as it appears on the face of the order itself that is drawn up, expressly made no order on the motion. The Court was not asked to hear the motion, and did not hear it. The parties arranged that undertaking, and the Court, as I have pointed out, on its being drawn to its attention, took the undertaking, made no order, and did not hear the motion. Now in the present case, having regard to what the nature of the motion was—namely, a motion for an injunction to

restrain the nuisance alleged—and to the form of the undertaking given—which was an undertaking not to do certain work at all between certain hours of the night, except upon some day or days in the week—I cannot think that, if the defendants had not offered that undertaking, any such order would have been asked for by the plaintiffs to correspond with that contained in the undertaking, nor that the Court, if it had been asked, would have made an injunction in terms corresponding to the undertaking. On the contrary, I feel pretty certain that no such order would have been granted, and that no such order would have been asked for. Nor can I in the present case assume as against the plaintiffs that, if the defendants had said, “We will give this undertaking on the terms that you give a corresponding undertaking as to damages,” the plaintiffs would have given any such undertaking. On the contrary, I think it might have involved them in a risk which they might well have shrunk from incurring, even if they were right in the action. I do not see how, even if they were entitled to an injunction in respect of a nuisance, they could have been compelled to give an undertaking as to damages which might seem to make them responsible for the defendants not working their machines during the periods contained in the undertaking. Nor can I in this case infer that the plaintiffs must have known, or ought to be taken to have known, that the defendants were relying on any implied undertaking as to damages on the part of the plaintiffs, if in fact the defendants did rely on such an undertaking or thought about an undertaking as to damages at all. I think that the plaintiffs may well have thought that the defendants were willing to give the undertaking they did because they thought it would not substantially hurt them; and I do not think that in the circumstances of the case it is to be implied, as against the plaintiffs, that they were bound to assume that the undertaking was one which would injure the defendants, and that so far as it would injure them they would be responsible if they failed at the trial.

Under these circumstances, it appears to me that no undertaking in respect of

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damages can be implied as against the plaintiffs, and that the Court has no power to insert such an undertaking as it did on the motion to vary the minutes made before it in the Court below. I think, therefore, the order ought to be amended by striking out the undertaking as to damages. If the defendants have a case to be relieved from the undertaking, then all I can say is that they must apply to the Court, and make out such a case as would relieve them from their undertaking. I think that the appeal succeeds, and that the appellants ought to have the costs of the appeal and of the motion in the Court below.

COZENS-HARDY, L.J.—I entirely agree, and I agree so entirely that I should be content not to add a word were it not that we are differing from the decision of Mr. Justice Farwell. The history of undertakings as to damages is given by Sir G. Jessel in the case of *Smith v. Day*.³ It seems to amount to this—that the Court can say and does say, “We will not make an order upon imperfect materials granting a temporary injunction unless you give an undertaking in damages.” That is the term which the Court can impose as the price of an injunction. The Courts have gone a step further, and they now say that it is an implied term in every order of an interlocutory nature for an injunction—a term which everybody applying for and obtaining an interlocutory order for an injunction must be deemed to know of. But the Court cannot compel a person to give an undertaking. Even in the case of an injunction the Court can only say, “We will not grant an injunction unless you give an undertaking.” But it has been argued before us that cross-undertakings are to be implied in every case in which an undertaking is inserted in an order. Now for that proposition no authority whatever has been cited, and it seems to me to be inconsistent with the very idea of undertakings which are in their inception voluntary.

If these cross-undertakings are not to be inserted as of course in every order, then is there any ground for inserting such a cross-undertaking in the present

case? Is this an exceptional case? Here we have the terms in writing—terms which the parties themselves arranged; terms which were, I think, really in the nature of a *modus vivendi*, to use the language of counsel when the case was mentioned in the Court below, and terms on which it was reasonable that the parties should go on until the short period elapsed before the Court could finally adjudicate upon the matter. I see no ground whatever for enlarging in this case the terms of the written arrangement which had been made; and I confess I am very greatly impressed by the consideration which Lord Justice Romer has indicated, that the undertaking here is in a form and to an extent beyond that which the plaintiffs asked for by their notice of motion, and beyond anything that the Court could really have granted. To say that the plaintiffs are to be bound “to abide by any order that the Court may make as to damages if the Court shall hereafter be of opinion that the defendants shall have sustained any by reason of this undertaking,” is asking me to imply that which I think is contrary to the real bargain between the parties and contrary to anything which it is reasonable to suppose they can have entertained. The result is the appeal must succeed, with the consequences which my Lord has stated.

Appeal allowed.

Solicitors—Bircham & Co., for appellants;
Mayo & Co., for respondents.

[Reported by A. E. Randall
and A. Cordery, Esqs.,
Barristers-at-Law.]

[NOTE.—On December 9 Kekewich, J., stated that the Judges of the Chancery Division had had under their consideration the practice as to an undertaking in damages, where an undertaking is given in lieu of an injunction, and they had resolved that in future an undertaking in damages would follow as a matter of course without being mentioned, wherever there was an undertaking given in lieu of an injunction, unless there was an express stipulation to the contrary.]

WARRINGTON, J.) CHAYTOR, *In re*;
1904.) CHAYTOR v. HORN.
Nov. 16.

Administration—Tenant for Life and Remainderman—Trust for Conversion—Power to Retain Securities—Unauthorised but Non-wasting Securities—Income Pending Conversion.

Where there is an express trust for conversion and power to retain securities of every kind, authorised and unauthorised, and there is no gift either express or implied of the income pending conversion, the tenant for life is entitled to the income of authorised securities, but not to the income of unauthorised securities. As regards the latter he is only entitled to interest at 3 per cent. on their value at the testator's death. The rule applies to non-wasting as well as to wasting securities.

Thomas, *In re*; Wood v. Thomas (60 L. J. Ch. 781; [1891] 3 Ch. 482), and Woods, *In re*; Gabellini v. Woods (73 L. J. Ch. 204; [1894] 2 Ch. 4), applied.

Bulkeley v. Stephens (3 N. R. 105; 10 L. T. 225) not followed.

Statement in Theobald on Wills (5th ed.), pp. 480, 481, approved.

D'Arcy Chaytor, by his will dated July 23, 1895, appointed certain persons executors and trustees thereof and gave certain legacies. The will then proceeded: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto and to the use of my trustees upon trust to sell and convert into money the same with power to postpone such sale and conversion as long as my trustees shall think proper and to retain any investments subsisting at my death whether of the kind hereinafter authorised or not and out of the moneys produced by such sale and conversion and out of such part of my estate as shall consist of money to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and at the discretion of my trustees to invest the residue of the said moneys with power for my trustees from time to time at their discretion to vary such investments and to stand possessed of the residuary trust

moneys and the investments for the time being representing the same (hereinafter called 'the residuary trust funds') upon the trust following that is to say In trust to pay the income thereof to my said wife during her life if she shall so long continue my widow." After the second marriage or decease of the widow the trustees were to stand possessed of the residuary trust funds upon trusts for the benefit of the testator's children. The will contained the following investment clause: "All moneys liable to be invested under this my will may be invested in or upon any stocks funds or securities of or guaranteed by the government of the United Kingdom or India or any British colony or dependency or the United States of America or in or upon the bonds debentures or other securities or the debenture stock or preference or guaranteed or preferred stock of any railway or other public company in the United Kingdom or in India or in any British Colony or dependency or in the United States of America or at interest upon the securities of any municipal or other corporation or public body in the United Kingdom or in any British Colony or Dependency or in the purchase or upon mortgage of any freehold copyhold or leasehold property in the United Kingdom."

The testator died on July 23, 1903. At the time of his death he held, amongst other investments, 2,670 fully paid ordinary shares of 10*l.* each, and 1,602 fully paid preference shares of 10*l.* each, in the South Hetton Coal Co., Lim. The company had been incorporated in May, 1898, with the object, amongst other things, of taking over the business of another company, purchasing, leasing, and acquiring mines, and carrying on business as colliery owners. The capital of the company was 1,000,000*l.*, divided into 50,000 ordinary shares of 10*l.* each and 50,000 preference shares of 10*l.* each. The company paid large dividends; it held freehold and leasehold mines and other property, and had a reserve fund of upwards of 167,564*l.*

On the day of the testator's death the ordinary shares were officially quoted at 20½, and the preference shares at 10½. The trustees of the will, being of opinion that they ought not permanently to re-

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tain the whole of the shares, and that it was their duty to realise a portion of them as the opportunity arose, had sold 349 ordinary shares and 459 preference shares, and they proposed by degrees to sell further shares to the extent of one-half of the number originally held by the testator. While they did not allege that the shares were wasting securities, they considered that they were of a speculative nature. They declined to pay the testator's widow the full dividends received in respect of the shares retained by them, but paid her a sum equivalent to the income that would have resulted if the shares had been sold at the testator's death, and the proceeds had been invested in Consols. The widow now took out this originating summons for the determination of the questions whether the shares were such as the trustees were authorised to and might retain, and whether she was entitled to receive the full dividends on the same until conversion.

Carson, K.C., and *Waggett*, for the widow.—The preference shares are “preference stock of a public company” within the investment clause in the will—*Sharp, In re; Rickett v. Sharp* [1890].¹ Consequently the trustees can retain those shares, and the tenant for life is entitled to the full dividends on them so long as they are retained. There is no desire on the part of the widow to interfere with the discretion of the trustees, but she submits that, on the construction of the will, the income of the whole of the trust securities, whether authorised or unauthorised, is payable to her. The Court will always try and find a gift of income to the tenant for life wherever possible—*Thomas, In re; Wood v. Thomas* [1891].² But even if there is no express gift of income, there is an implied gift of the whole income to the widow. Although there is a trust for conversion, the trustees are authorised to postpone conversion of any of the securities. They can therefore retain the ordinary shares, which admittedly are not authorised by the will, but which are not of a wasting

character, and are not likely to fall in value. The effect of the proper exercise of the power of the retention of non-wasting investments is to give the tenant for life the whole income of such investments—*Bulkeley v. Stephens* [1863]³ and *Sheldon, In re; Nixon v. Sheldon* [1888].⁴

The power, to be properly exercised, must be exercised in the interests of the estate generally; the investments ought not to be converted merely for the benefit of the remaindermen—*Brown v. Gellatly* [1867]⁵ and *Porter v. Baddeley* [1877].⁶

The ordinary shares in question here are on the same footing as real property given on trust for sale, but without any express trust of the same or of the rents pending sale. So long as the property is retained unsold it is an unauthorised investment, but there is an implied trust of the rents and profits for the tenant for life until sale—*Hope v. D'Hedouville* [1893].⁷ *Casamajor v. Strode* [1809],⁸ *Spencer v. Harrison* [1879],⁹ and *Vigor v. Harwood* [1841].¹⁰ Consequently the widow is entitled to the dividends on the ordinary shares remaining unsold.

The rule in *Dimes v. Scott* [1828]¹¹ and *Brown v. Gellatly*,⁵ with reference to wasting securities, has no application in the present case.

Sheldon, for the trustees.

Rowden, K.C., and *Christopher James*, for the remaindermen.—The utmost that the tenant for life is entitled to in respect of the unauthorised securities is 3 per cent. on the value of the ordinary shares at the time of the testator's death—*Woods, In re; Gabellini v. Woods* [1904].¹² Unauthorised non-wasting securities are for the present purpose indistinguishable from wasting securities.

Bulkeley v. Stephens,³ which has been relied on as an authority for the distinction, is inconsistent with all the other cases, and ought not to be followed.

(3) 3 N. R. 105; 10 L. T. 225.

(4) 58 L. J. Ch. 25; 39 Ch. D. 50.

(5) L. R. 2 Ch. 751.

(6) 5 Ch. D. 542.

(7) 62 L. J. Ch. 589; [1893] 2 Ch. 361.

(8) 19 Ves. 390a.

(9) 49 L. J. C.P. 188; 5 C.P. D. 97.

(10) 12 Sim. 172.

(11) 4 Russ. 195.

(12) 73 L. J. Ch. 204; [1904] 2 Ch. 4.

(1) 60 L. J. Ch. 38; 45 Ch. D. 286.

(2) 60 L. J. Ch. 781; [1891] 3 Ch. 482.

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[His Lordship stopped the argument at this stage.]

WARRINGTON, J.—The only question I have to decide is whether the tenant for life in this case is entitled in specie to the income of certain unauthorised securities which the trustees are retaining at present until an opportunity of conversion arises, or whether under the trusts of the will which I have to deal with she is only entitled to interest at a certain rate on the value of those securities. [His Lordship referred to the will and stated the facts, and continued:] I will get rid of one point at once. Some of the shares are preference shares, and it has been conceded that preference shares of a company registered under the Companies Acts come within the definition “preferred stock of any . . . public company” in the investment clause of the will. Therefore they are authorised securities, and it is well settled that under such provisions as those in this will the interest on them is properly payable to the tenant for life. So far the contention of the tenant for life is right.

As regards the unauthorised securities, there is no express gift of the income of the funds or items of property forming part of the testator's estate during postponement of conversion, but I am invited by counsel for the plaintiff to find such a gift by construction in the will. In the first place, what is the general principle which is applicable in such a case as this, where there is an express trust for conversion and a power to retain securities of every kind, authorised and unauthorised, and there is no express gift of the income pending conversion? As I understand it, the general rule is that the tenant for life is entitled to the income of authorised securities, but is not entitled to the income of unauthorised securities. In the latter case he is only entitled to a rate of interest which is now fixed at 3 per cent. on their value at the testator's death. That certainly was the rule adopted by Mr. Justice Kekewich in *Thomas, In re*.² In the first paragraph of his judgment he says, “I am not prepared to hold that where there is a direction for conversion of personal estate,

followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion.” The rule is expressed in terms to the same effect in *Theobald on Wills* (5th ed.), pp. 480, 481, and in the most recent case on the subject—*Woods, In re*¹²—it is assumed to be the rule. The only point in which *Woods, In re*,¹² is distinguishable from the present case is that in *Woods, In re*,¹² the securities were wasting securities. That is the general rule. Is there anything to take this case out of that rule? In my judgment, so far from that, the words of this will are adverse to the contention of the tenant for life. The trustees are to sell and convert the real and personal estate. They may retain any investments subsisting at the testator's death as long as they think proper. The only trusts in favour of beneficiaries are trusts of the “residuary trust funds,” which are defined to be the “residuary trust moneys”—that is, the proceeds of conversion—“and the investments for the time being representing the same”—that is, representing the proceeds of conversion. I take that to mean that the tenant for life is entitled to the income of the trust moneys—that is, the proceeds of conversion—and the income of the investments made with those moneys. That, of course, includes the income of any authorised investments, which are retained, for that is the same as if the trustees had sold them and re-invested the proceeds of sale in the same securities, but does not include the income of investments which do not represent trust moneys at all, but are items of property which were retained by the trustees only until they could realise them. In order that the tenant for life should not lose income altogether, the Court steps in and says for the proper administration of the estate the value of these investments ought to be treated as the proceeds of sale (if they had been sold at the testator's death). As these unauthorised securities cannot be kept as

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part of the estate, the tenant for life gets the income of them as notionally converted at the testator's death. That seems to be the rule laid down with the object of preventing the discretion of the trustees from operating to the prejudice of the tenant for life or the remainderman. It is applied in both ways. That, in my opinion, is the true construction of this will.

Then I am asked, if I cannot find an express gift, to find an implied gift of this income to the tenant for life. There is no express gift—that is, there is no gift in terms of the income of these unauthorised securities—and I am unable to find an implied gift. But, whether I find a gift or not, it is said that the rule to be applied is not that, but a rule which distinguishes between unauthorised securities which are of a wasting nature and unauthorised securities which are not wasting. Many cases have been cited; but in all of them, in one form or another, what was given was the income of the estate, and not, as in the words of this will, the income of the residuary trust funds. It would seem that the distinction between those cases and this is that the question in those cases was whether the rule in *Howe v. Dartmouth (Earl)* [1802]¹³ ought to be applied. In this case there is an express trust for conversion, and the income of the proceeds is given to the widow. There is certainly one case—*Bulkeley v. Stephens*³—which has caused me some difficulty. If properly reported, that decision seems to have departed from the principle which I think covers the point. The case is not satisfactorily reported. The will is not set out at length, and, according to the facts, the precise question was not raised. The question was only as to part of the income, and for the first year after the testator's death. The case is not mentioned on this point in any of the text-books except *Seton on Judgments and Orders* (6th ed.), pp. 1688, 1689, and it is not cited in any of the recent authorities. It was decided before *Brown v. Gellatly*,⁵ but was not referred to in that case. It seems to me, therefore, that I am not bound to treat it as a binding authority, or one which would

force me to say that a different principle from that which I have stated is applicable. [After referring at length to the report in 3 N. R. 105, his Lordship continued:] That decision is not consistent with the result of the authorities, which is stated in *Theobald on Wills* (5th ed.), p. 480, and, in my view, accurately stated. He says: "Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled to such income as the estate would produce when converted and invested in accordance with the directions of the will"; and at p. 481: "Power conferred upon trustees to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman." I understand that to correctly represent the law. *Bulkeley v. Stephens*³ does not appear to be consistent with that statement, and I am not bound by it, for the question I have to determine is one of construction. I decline to follow it. It is now, I think, settled by the recent case of *Woods, In re*,¹³ that the widow must have interest at the rate of 3 per cent. out of the actual income received in respect of these unauthorised securities calculated according to their value at the testator's death. The rest of the dividends will have to be invested as capital, and she will have the income of those investments as well as the actual dividends on the preference shares.

Solicitors—Bompas, Bischoff, Dodgson, Cox
& Bompas; Stibbard, Gibson & Co.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.]

(13) 7 Ves. 137; 1 Wh. & Ta. L.C. (7th ed), 68.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 29, 30.

SAUNDERS v.
SHAFTO.

Power of Jointuring—Fraud on Power—Bargain between Husband and Wife—Appointment in Consideration of Payment by Wife to Husband—Validity of Appointment.

The exercise of a power of jointuring can be the subject of a bargain between a husband and wife; and so long as no part of the jointure itself is under the appointment to be received by any person other than the wife, the husband can exercise the power in favour of the wife in consideration of receiving some benefit out of her property, and the fact that the consideration given by her is the full actuarial value of the jointure annuity is immaterial.

*A tenant for life of real estate had a power to charge the estate with a jointure to his wife of 300*l.* a year. He married in 1868, and in 1882 he exercised the power to the full extent in favour of his wife in consideration of a sum of 50*l.* then paid to him by his wife out of her own money. He died in 1902. There was evidence of an actuary that 50*l.* was at the time the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and wife:—Held, that the execution of the power was not a fraud upon the power, and was valid.*

Baldwin v. Roche (5 Ir. Eq. R. 110) followed.

Whelan v. Palmer (57 L. J. Ch. 784; 39 Ch. D. 648) overruled.

Appeal from decision of Kekewich, J.

James Delaval Shafto, by his will dated August 8, 1851, and proved September 19, 1857, devised certain real estate in Northumberland to the use, in the events which had happened, of W. H. Shafto for life, and after his death to the use of his first and other sons in tail male, with divers remainders over. And the testator declared that it should be lawful for each tenant for life under the

said will, whether in actual possession of the said hereditaments or not, either in contemplation of marriage or after marriage, by any deed or deeds revocable or irrevocable, executed as therein mentioned, to charge the said hereditaments with the payment of any annual sum not exceeding 300*l.* to any woman whom he should marry, for her life, to be in bar of dower and freebench, with the usual powers of entry and distress for securing the payment thereof.

W. H. Shafto married the plaintiff (now Eliza Saunders) on January 4, 1868.

By an indenture dated August 28, 1882, made between W. H. Shafto and the plaintiff (then Eliza Shafto), W. H. Shafto as tenant for life under the will of James Delaval Shafto, and in pursuance of the power for that purpose given to him by the will, irrevocably charged the hereditaments subject to the uses of the will with the payment to the plaintiff, if she should survive him, for her life of the yearly sum of 300*l.*, payable as therein mentioned.

W. H. Shafto died on September 27, 1902, and the plaintiff on September 21, 1903, married her present husband, Mr. A. W. Saunders. The present tenant for life did not admit the plaintiff's right to the 300*l.* charge, and he refused to make her any payments in respect of it. She brought this action against the present tenant for life and the next tenant for life in remainder, claiming a declaration that under the will of James Delaval Shafto and the deed of August 28, 1882, she was entitled to the charge, an order to enforce the payment of the yearly sum of 300*l.*, and a receiver of the rents and profits of the estates.

W. H. Shafto had executed the deed of August 28, 1882, in consideration of a sum of 50*l.* then paid to him by the plaintiff out of her own money, and the defendants alleged that it was executed for the purpose of raising money and for benefiting W. H. Shafto, and not for the purposes designed by the testator, and was a fraud upon the power given by the will.

There was evidence that when W. H. Shafto executed the deed of August, 1882, he was living apart from his wife and was

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without means, and that the plaintiff was also in poor circumstances and in need of some provision, and that W. H. Shafto had previously stated in correspondence that he would only execute the power of jointuring in her favour if she paid him 50l.; and there was also evidence of an actuary that 50l. was the full value at the time of the annuity, having regard to the ages of the parties.

The plaintiff had in 1875 taken divorce proceedings against W. H. Shafto, but no decree absolute was made.

Kekewich, J., was of opinion that the arrangement was not for the benefit of the wife, but solely for the benefit of the husband, and that the bargain between the parties was a corrupt bargain in the sense that it was contrary to the intent of the power, and a fraud upon the power. He held that the appointment was invalid, and the jointure deed could not be enforced.

The plaintiff appealed.

Stewart-Smith, K.C., and *Martelli*, for the appellants.—The Judge below thought that as consideration moved from the wife to the husband the execution of the power was fraudulent and could not be enforced. But that involves a wrong view of the nature of a power of jointuring. It is not like a power of appointing a fund among a class of children, but is a power given for the benefit of the husband no less than the wife. It may benefit the husband in three ways: First, under the Statute of Uses (27 Hen. 8. c. 10) dower may be extinguished by a jointure; secondly, it enables the husband to provide for his wife, and thus incidentally to marry; and thirdly, it enables him to obtain a benefit out of his wife's property in return, which otherwise he would not be able to obtain. *Baldwin v. Roche* [1842]¹—approved in *Sugden on Powers* (8th ed.), p. 610, and *Farwell on Powers* (2nd ed.), p. 434—shews that this power was well executed.

If the power be executed in such a way that the wife is deprived of part of her jointure for the benefit of others, but not the whole, the execution will be declared void so far as it purports to

(1) 5 Ir. Eq. R. 110.

benefit other persons, but valid as regards her—*Lane v. Page* [1754],² *Tyrconnell (Lord) v. Ancastr (Duke)* [1754],³ *Aleyn v. Belchier* [1758].⁴ These cases were discussed in *Daubeny v. Cockburn* [1816],⁵ but that was a case of a power to appoint to children, and only illustrates the difference between the two powers—*Rowley v. Rowley* [1854].⁶ The inference drawn by Kekewich, J., that the power was not exercised for the benefit of the wife is not a just inference from the facts. It was exercised for the benefit of both the husband and the wife.

The view taken in *Baldwin v. Roche*¹ has been generally accepted as correct. The only decision to the contrary is the decision of Kekewich, J., in *Whelan v. Palmer* [1888].⁷ It is not unusual for a husband to get some benefit from his wife's property, and a post-nuptial settlement if he gets such a benefit is not voluntary within the meaning of section 47 of the Bankruptcy Act, 1883—*Macintosh v. Pogose* [1895].⁸

Warmington, K.C., and *Jarvis*, for the respondents.—The bargain was a corrupt bargain, and the appointment was not *bona fide* for the wife's benefit. In a question as to the exercise of a power the Court does not regard the form, but the substance.

As a general rule, a person who has a power to appoint for the benefit of others cannot exercise that power for his own benefit. He is not only a stranger to the power, but he is a trustee as regards the exercise of it. There are certain exceptions to this rule where the wife, on the exercise of a power of jointuring, has got a substantial benefit, but the execution will not be upheld if its object is really to give a substantial benefit to the husband—*Sugden on Powers* (8th ed.), p. 609, par. 7. The importation of a person as the object of the power who was not intended by the testator is a fraud

(2) 1 Amb. 233.

(3) 1 Amb. 237.

(4) 1 Eden, 132; 2 Wh. & T. L.C. (7th ed.), 308; *Sugden on Powers* (8th ed.), App. p. 952.

(5) 1 Mer. 626.

(6) 23 L. J. Ch. 275, 278; Kay, 242, 259.

(7) 57 L. J. Ch. 784; 39 Ch. D. 648.

(8) 64 L. J. Ch. 274; [1895] 1 Ch. 505.

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upon the power. The husband takes the benefit of the jointure if he gets the money value of it just as much as if he got the actual jointure.

[ROMER, L.J.—The wife gets the jointure, although the husband may get some other benefit.]

True; but the power in that case is not exercised solely for the benefit of the wife. It becomes a transaction of vendor and purchaser. That vitiates the whole appointment, for *non constat* that the husband would have appointed to the wife at all if she had not agreed to the proposed terms—see *Sugden on Powers* (8th ed.), p. 612.

It is a strong thing to say that the power may be exercised for the husband's benefit, provided that he does not take part of the actual jointure, and there is no authority to support it except *Baldwin v. Roche*.¹ The difficulty in maintaining such a proposition was recognised in both *Daubeny v. Cockburn*⁵ and *Rowley v. Rowley*.⁶ *Lane v. Page*² and *Aleyn v. Belchier*⁴ are really in favour of the respondents, and *Tyrconnell (Lord) v. Ancoaster (Duke)*³ is not in point at all. It is a well-settled rule that if there is an agreement for the exercise of a power which is a fraud upon the power, and is the *causa sine qua non* of the appointment, the appointment is altogether bad—*Turner's Settled Estates, In re* [1884].⁹ That applies to powers of jointuring as well as to other powers. The distinction between *Lane v. Page*² and *Baldwin v. Roche*¹ is that in the former case part of the actual jointure went to the husband or his creditors, while in the latter it did not; but that is a distinction of form merely, not of substance. *Baldwin v. Roche*¹ has found its way into the text-books, and has become known to the profession; but the exact point there has never been decided in the same way in this country, and, having regard to the thinness of the distinction between it and the other cases, it ought not to be followed.

VAUGHAN WILLIAMS, L.J., referred to the short facts of the case, and the effect of the decision of Kekewich, J., and (9) 54 L. J. Ch. 690, 693; 28 Ch. D. 205, 217.

continued: I think that it must be taken that Mr. Justice Kekewich arrived at the conclusion that he did upon the basis that there was a corrupt bargain between the husband and wife here—a bargain which he thought was a bargain intended to benefit the husband solely. The evidence upon which he came to this conclusion was this: There was correspondence between the husband and wife, by which it appeared that the husband expressed his intention only to execute this power of jointure in favour of his wife if she would pay him the sum of 50*l*. Then there was the evidence of an actuary that 50*l*. was the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and the wife. Mr. Justice Kekewich came to the conclusion that that made it an arrangement solely for the benefit of the husband, and for that reason it was a corrupt bargain and a fraud upon the power. I cannot agree with that decision. Mr. Justice Kekewich in his judgment fully recognised the distinction between the execution of a power of jointuring and the execution of a power in favour of children; but, while fully recognising that distinction, he nevertheless has come to the conclusion that this execution of the power to jointure by the husband was a fraud upon the power, being solely for the benefit of the husband. If the bargain made between the husband and the wife here had been a bargain dealing with the actual jointure itself, and a bargain under which the wife only received part of the sum secured by the jointure, and the residue of it was paid to some nominee of the husband or some creditor of the husband, I should have entirely agreed with his decision; but he seems to have thought that, inasmuch as the money paid by the wife was, according to the evidence of the actuary, the full value of that which she was to get, it placed the case upon the same level as if that which had been the subject of the bargain had been a disposition of a part of the jointure itself. However much one is to look at substance and not at form, I cannot agree with that conclusion. I think that Mr. Justice Kekewich, in arriving at the conclusion

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that he did, was to a large extent following his own decision in *Whelan v. Palmer*⁷; but in my opinion that decision cannot be supported any more than the decision in the present case, because, to my mind, that decision neglects, as the decision in this case seems to me to do, the distinction between dealing with the jointure itself and the giving of a consideration by the wife, which leaves her entitled on the death of her husband to receive the whole of the jointure. I think, therefore, that our decision must be taken as affecting not only the present case, but also the case of *Whelan v. Palmer*⁷ as an authority.

We have had our attention called to an authority which practically disposes of this case in so far as the authority is one which we ought to follow—namely, *Baldwin v. Roche*.¹ In one sense the decision of that case in the Irish Courts does not bind us, although it is a decision to which, having regard to the eminence of the Judges who were parties to the judgment, we should pay the very greatest attention. But there is a sense in which the decision is binding on us in a very great degree, because the case is referred to in the eighth edition (in 1861) of *Sugden on Powers*, at p. 609, as an authority which was in accordance with the law; and it is also referred to in the second edition of Mr. Justice Farwell's book on *Powers*, p. 434, as a binding authority. It is plain that an authority of this sort is an authority which may have been, and probably has been in fact, acted upon by conveyancers and others as a binding authority, and it would be a very serious thing now, more than forty years after the date of Lord St. Leonards' book, in which the decision is so distinctly approved, to say that we are questioning it. Excepting *Whelan v. Palmer*,⁷ there has been no decision whatsoever in which *Baldwin v. Roche*¹ has ever been questioned, and perhaps it is not right to say that it was questioned even in *Whelan v. Palmer*.⁷

I propose now to call attention to *Lane v. Page*,² which is the case first referred to by Sugden in dealing with this subject—at page 609 of the eighth edition of his book on *Powers*. It is a case in which the bargain

made was a bargain affecting the jointure itself, and part of the jointure was to go to the payment of a creditor of the husband—of course after the husband's death—and the residue of the jointure was to go to the wife. Lord Hardwicke held in that case that the jointure was good as far as the wife's portion was concerned, but bad so far as the portion going to the creditor of the husband was concerned. But, although we have not in the present case to deal with any severance of the jointure, such as that which had to be dealt with in *Lane v. Page*,² yet that case is an authority in this way—that it is quite plain that there was a bargain there between the husband and the wife, and Lord Hardwicke held that, notwithstanding the bargain, the jointure stood so far as that portion of it was concerned which the wife was to take. It may be convenient at this moment to say a word about some comments that Sir William Grant made in *Daubeny v. Cockburn*.³ upon that case. Sir William Grant took the view that if the execution of the power of jointuring was fraudulent in one respect it was bad altogether, and he did not approve of the decision of Lord Hardwicke that the jointure stood as to part and was bad as to the residue. But we need not trouble with that case at all. Every one reading the judgment of Sir William Grant must be struck with the force of his reasoning, but it does not touch the case that we now have to deal with. Having made those observations upon *Lane v. Page*² and *Daubeny v. Cockburn*,³ I think I may pass to the judgment in *Baldwin v. Roche*,¹ only observing that, in his observations in *Rowley v. Rowley*,⁶ Vice-Chancellor Wood recognises the authority of *Lane v. Page*,² although the case which he had to deal with there was not the case of a jointure, but the case of a power of appointment amongst children.

*Baldwin v. Roche*¹ is a remarkable case. I do not think I can do better or put it more shortly than it is put in the marginal note to the report: "Tenant for life, with a power of jointure, marries; but does not exercise the power. His wife was seized of real estate for the term of her life, which, on the marriage,

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was settled to the use of the husband for the joint lives of himself and his wife, remainder to the wife for her life. The husband afterwards became indebted; and agreed with his wife and creditor that he would exercise the power of jointuring in her favour; and that she should grant to the creditor an annuity for the term of her life, equal in amount to the jointure, to be charged upon her estate, and to become payable upon the death of the husband:—which agreement was carried into execution. The husband died; Held, that the execution of the power of jointuring was not a fraud upon the remainderman." Before I read some observations of the Judges in that case I would point out what a strong case it is, and how completely it covers the present case, because in that case, as in this, the execution of the power of jointuring was an execution which took place after the marriage, and not in pursuance of any ante-nuptial agreement. Moreover, the consideration which the wife gave was equal in amount to the jointure, and under those circumstances the Judges did not hold that the fact that the wife gave a consideration to the husband—that is to say, to the husband's creditor at the instance of the husband—for executing the power of jointuring in her favour rendered the bargain corrupt and a fraud upon the remaindermen. They came to exactly the contrary conclusion. Baron Lefroy in the course of the argument says: "In both those cases"—that is, *Lane v. Page*² and *Aleyn v. Belchier*⁴—"the whole contract related to the jointure, and nothing else."—In the present case there is no contract relating to the jointure whatsoever. The wife gets the jointure.—"How do you answer the common case of a settlement where the husband gets a fortune with his wife, applies it in payment of his own debts, and in consideration of it, executes the power of jointuring?" The answer which was made to that was simply this: "The evidence shows that, though not in form, yet in substance the contract of the parties was, that the husband's debt should be paid out of the jointure." That answer was not thought sufficient, and, it seems to me, for the obvious reason that

the answer still left it an absolutely true proposition that the wife was to receive the jointure in full, and no part of it was under this bargain to be taken from her. Chief Baron Brady in his judgment says this (p. 114): "The case has been put by the counsel for the defendant on the only ground upon which the claim can be resisted, namely, that the Court ought to look on this transaction, not as a grant of a jointure to the wife, but as the grant of an annuity to the creditor of the husband; and if that were the whole of this case, it seems to me that it would fall within the authorities. But these authorities only go to this extent: that in the execution of a power of jointuring, which is given for the benefit of the wife, it shall not be so executed, as to be the means, colourably of conveying an interest in the jointure itself, to the creditor of the husband. If the intention of the parties really is, that the jointure shall go to some third person, such intention cannot be effected by an execution of the power; for such execution of the power is not a grant of a jointure at all." Then he says, "But is that the case here?" Baron Richards in his judgment states what he conceives to be the bargain in that case between the husband and the wife. He says (p. 115): "I will suppose that the whole of this transaction was spread out upon the face of the jointure deed, and then it would run thus:—that whereas the husband was indebted to Gash, and whereas his wife was entitled to a certain property, and was desirous to secure thereout the debt due to her husband's creditor, and that the husband was desirous of doing the same, but that if the wife did so, she would be left without an adequate provision; and, therefore, the husband agreed to secure to her a jointure charged on his lands; and, therefore, in consideration of the wife making her own property liable to the payment of this debt, the husband exercises his power to jointure, and charges the jointure upon the estate of which he was merely tenant for life. What is there fraudulent or against conscience in such a transaction? What equity has the remainderman, who takes the estate subject to the capricious exercise of that power, to complain?

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How is he prejudiced? I do not see." Baron Leffroy in his judgment (p. 116) says: "Mr. Deasy properly admits, that there is a difference between a jointuring power and a power to appoint amongst children. A jointuring power is one by which the husband may take a benefit; not a benefit by perverting that which is the subject-matter of the power, to a purpose which the donor of the power did not intend, but by applying it to its proper use, in consideration of his getting something, which he is at liberty to get, for his own benefit. It is very different from a power to appoint to children."

I think that, having regard to the passages which I have just read from the judgments of the Judges in that case, it is clear that the decision in that case, if we follow it, absolutely disposes of the present appeal. In my judgment, we ought to follow that case—first, because I think the reasoning of the learned Judges there is sound; and secondly, for the reason that I have already given, that the case has not been questioned during the forty and more years since it was referred to as an authority by Sugden, and it has probably been acted upon again and again by conveyancers and others. Under these circumstances, I think that upon the authority of that case we ought to allow this appeal, with the usual consequences with regard to costs here and below.

ROMER, L.J.—I am of the same opinion. A power of jointuring is a somewhat peculiar power, and differs in many obvious respects from the power given to a tenant for life to appoint amongst children or amongst a special limited class. It has accordingly been held that while an appointment by way of jointure as the result of a bargain between husband and wife, or between intended husband and wife, that part of the jointure shall go or be for the benefit of the husband's creditors, or a stranger, is bad to the extent of that part, yet the appointment may stand so far as the jointure is to be enjoyed by the wife herself. Probably one of the reasons for this view of the Courts was that to hold otherwise would have been to invalidate the bargains so frequently made by

which the husband and wife have contracted on a settlement that the wife should get a jointure in consideration of the husband obtaining an interest in her property. The Courts apparently, and very naturally, have shrunk from such a conclusion, and accordingly the rule that the wife might hold a jointure intended to be enjoyed by herself, though she has obtained it by a bargain with her husband, giving him or his creditors as a consideration some interest in her property, has long been recognised. It has been recognised from very early times—from *Lane v. Page*² down to the present time, with the exception of and until the decisions of Mr. Justice Kekewich in *Whelan v. Palmer*⁷ and in the present case.

After what my Lord has said about the cases, it does not appear to me necessary to go through the authorities. All I can say is that I think that the rule to which I have referred has been so long recognised and acted upon that it ought not to be departed from; and, in my opinion, the two decisions of Mr. Justice Kekewich to which I have referred were wrong. The present case clearly comes within the rule, for the whole of the jointure is to be enjoyed by the wife. The circumstances that the husband and wife were separated for so long a time, and that she had commenced divorce proceedings against him, are not circumstances which deprived the wife of her position as such or prevented her from being a proper object of the power of jointure. Nor do I think that they are circumstances which, from a legal point of view, prevent the present appointment from being good, or prevent the wife from enjoying the benefit of the jointure under the rule to which I have referred.

It follows that the appeal must succeed; and there ought to be a declaration that the plaintiff is entitled to the jointure, and an account of what is due for arrears, and an order for payment. Probably it will be sufficient if liberty to apply for a receiver is given, if that be necessary; and of course the defendants must pay the costs here and below.

COZENS-HARDY, L.J.—I am of the same opinion, and I have very little to add.

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I agree with what has been said by my Lord and by Lord Justice Romer, that a power of jointuring is peculiar. It is so peculiar that I am not aware of any power which stands on precisely the same footing. The result of the authorities seems to me to be that the remaindermen cannot complain so far as the appointment of a jointure is really for the benefit of the wife in this sense—that she will take the jointure itself free from any obligation to hand over any part of it to anybody else. It is no objection to the validity of the appointment that the husband receives a consideration for exercising the power. That that is so in the case of an ante-nuptial bargain cannot be doubted. *Tyrconnell (Lord) v. Ancoaster (Duke)*³ is one amongst many authorities which shew that. In that case, in consideration of the husband receiving 10,000*l.*, part of his intended wife's property, he agreed to execute a jointure power, and that was held valid. What difference can there be if the bargain is not ante-nuptial but post-nuptial, made, not between the intended husband and the intended wife, but between the husband and the wife, who is now in a position to make the contract? I cannot see what difference in principle there can be, nor do I think that Mr. Justice Kekewich himself thought there was any real difference. His view seems to be that the quantum of consideration given by the wife was a matter so material as to enable the Court to say that there was no real bargain. With great respect to the learned Judge, I cannot follow that. If the wife may make a bargain with her husband in this matter, the Court has really nothing to say to the question whether she has paid more or less than the actuarial value for that which she acquires by the exercise of the power.

I will only say with regard to *Baldwin v. Roche*¹ that I think it was well decided; but, whether it was well decided or not, sixty years have elapsed since it was decided, and it has been quoted without disapproval, and I think I may say with approval, both by Lord St. Leonards and by Mr. Justice Farwell in their books on *Powers*.

I therefore agree that the appeal ought to be allowed.

Appeal allowed.

Solicitors—King, Adams & Co., for appellant;
James Johnstone, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J.)	SOOTHILL UPPER
1904.)	URBAN COUNCIL v.
Aug. 3, 4, 5, 6, 8, 9.)	WAKEFIELD RURAL
Nov. 23.)	COUNCIL.

Local Government — Water-supply to Adjoining District — Sanction of Local Government Board — Contract — Penalty — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 61 and 174, sub-s. 2.

Section 61 of the Public Health Act, 1875, merely requires the sanction of the Local Government Board to the supply of water by one authority to another, and not to the terms of the agreement under which it is supplied.

Section 174, sub-section 2 of the same statute, which requires a penalty to be specified for non-performance of the terms of a contract made by an urban authority, only applies to contracts in which a price in money is to be paid by the urban council, and does not include cases in which the contract is to be carried out by the urban authority, and the consideration paid to it.

On December 24, 1881, the Soothill Upper Local Board (the predecessors of the plaintiffs) and the guardians of the Wakefield Union acting as a rural sanitary authority (the predecessors of the Wakefield Council) jointly applied in writing to the Local Government Board to sanction the supply by Soothill to Wakefield for the parishes of East and West Ardsley of water which Soothill obtained in bulk from the corporation of Halifax. A question also arose between the parties upon a clause of the draft agreement then being negotiated, and, as they were unable to agree upon this clause, an

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application was made to the Local Government Board to determine the matter. In reply, the Local Government Board, on May 15 and 17, 1882, stated in writing to the two authorities respectively, that, as regards the supply of water by Soothill to Wakefield, the Board were not aware of any reason why, at the proper time, the consent should not be given; but they pointed out that under the statute no sanction on their part was required to the proposed terms of agreement, and that they had no power to deal with the question in dispute between the parties as to the details of the proposed agreement. Shortly afterwards an agreement in writing dated July 17, 1882, was come to between the two authorities, and water was duly supplied on the terms of it by Soothill to Wakefield; but it did not appear that any further formal sanction was then given by the Local Government Board. In 1885 it was proposed that Soothill should give to Wakefield an increased supply; and on June 26, 1885, the clerk to the Soothill Upper Local Board wrote to the Local Government Board stating that it was proposed to increase the supply, and sent a copy of the proposed agreement for that purpose, and expressly asked for the sanction of the Local Government Board under section 61. In reply, the Local Government Board, on July 15, 1885, stated in writing that under section 61 of the Public Health Act, 1875, the Board thereby sanctioned the supply of water by the Soothill Upper Local Board to the rural sanitary authority of the Wakefield Union "for the benefit of the parishes of East and West Ardsley."

On November 16, 1889, the Local Government Board, understanding that an agreement had been come to between the Wakefield and Hunslet Unions for the supply of water to the township of Middleton, gave their sanction under section 61 to the supply by Wakefield to Hunslet for the purposes of that district, and at the same time forwarded to the Wakefield authority a copy of the letter addressed by the Local Government Board to the Soothill authority sanctioning the supply given by that authority to Wakefield. By an order of January 14, 1895,

the Board sanctioned the supply of water by Wakefield to Rothwell Urban District Council, and the agreement of March 27, 1895, shewed that this water was intended to be Soothill water supplied to Wakefield, and by Wakefield to Rothwell for Loft-house and Thorpe.

In 1895 the successors of these authorities negotiated a new water agreement dated January 31, 1895, which was the one sued upon. On January 28, 1895, the Soothill authority (the plaintiffs) wrote to the Local Government Board inclosing a copy of the proposed agreement, and asking for the sanction of the Local Government Board to the agreement. In reply, the Board stated that, under section 61 of the Public Health Act, the Board's sanction was only required to the supply of water by one authority to another, and that it was not their practice to approve of the agreements entered into by the authorities. They added that, if the area for which the supply under the new agreement was to be given was the same as, or wholly comprised in, the area for which the Board previously sanctioned the supply, no further sanction on the part of the Board was required. The area of supply contemplated was in fact a wider area, and on May 22, 1895, the Local Government Board said that it was not their practice to give a general sanction in respect of all the contributory places in a rural district, but they would consider applications in respect of particular contributory places when the supply was actually furnished.

By the Ardsley East and West (Constitution of Urban District) Order, 1895, as confirmed by the County of the West Riding of Yorkshire (Ardsley East and West) Confirmation Order, 1895, the townships of Ardsley East and Ardsley West were together constituted an urban district within the meaning of the Public Health Act, 1875, and the Local Government Act, 1894, with the usual consequential provisions. By an agreement dated March 24, 1897, between the Wakefield Council and the Ardsley Council, it was agreed that the water agreement should become the sole property of the Ardsley Council, who should be entitled exclusively to all the benefits and be exclusively liable and responsible

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for all liabilities thereunder, and should indemnify the Wakefield Council therefrom, and that the parties thereto should use their utmost endeavours to obtain the sanction of the plaintiffs to such of the clauses as affected (*inter alia*) the said water agreement of 1895, and until such sanction was obtained the clauses of the agreement should be binding upon the defendants *inter se*, who should indemnify the other of them in respect of the liabilities and stipulations for which such parties had respectively made themselves exclusively liable.

On January 16, 1900, the plaintiffs wrote to the Local Government Board with reference to the correspondence of 1895, and asked whether they were right in regarding, as they had done, the sanction given by the Local Government Board in 1882 for the supply of water by Soothill to Wakefield for East and West Ardsley as extending to sanction a supply of water to East and West Ardsley under the agreement of 1895, so far as such supply was confined to the district of East and West Ardsley. At this date the townships of Ardsley East and Ardsley West had been constituted an urban district. The Local Government Board, in reply, by letter dated February 28, 1900, expressed their opinion that the terms of the order constituting the urban district of Ardsley East and West were sufficiently wide to cover the transfer of powers vested in the Wakefield authority by virtue of any sanction given by the Board under section 61 of the Public Health Act; but with reference to the question of the agreement stated that it was not their practice under section 61 of the Act to go beyond the actual duty imposed on them by that section—namely, sanctioning the supply of water by one authority to the other. On March 8, 1900, the plaintiffs wrote to the Board that from their letter the plaintiffs gathered that they had still the sanction of the Local Government Board to the supply of water by them to the urban district council of East and West Ardsley, and asked if that understanding was correct, and in reply the Board stated that they had nothing to add to their letter of February 28, 1900.

The plaintiffs sought to enforce their rights under the agreement of January 31, 1895, claiming in the alternative against the Wakefield Rural Council and the Ardsley East and West Urban Council, but in the result the question was narrowed down to one of liability, the defendants having agreed between themselves that if the plaintiffs succeeded in point of law judgment should be given against the Ardsley East and West Urban Council. The defences upon which the case is reported were two—First, that the agreement of January 31, 1895, was invalid on the ground that the sanction of the Local Government Board was not obtained pursuant to section 61 of the Public Health Act, 1875; secondly, that it was also invalid under section 174, sub-section 2 of the same Act in not prescribing a pecuniary penalty.

Eve, K.C., and *E. Clayton*, for the plaintiffs.—The proper sanction required by section 61 of the Public Health Act, 1875,¹ has been obtained. It was not necessary to have a penalty clause—*Att.-Gen. v. Gaskill* [1882].²

Micklem, K.C., *R. J. Parker*, and *Tomlin*, for the defendants. — The provisions of section 61¹ have not been complied with, as the agreement of January 31, 1895, has never received the sanction of the Local Government Board. There were also sub-contracts between

(1) Public Health Act, 1875, s. 61: "Any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities, or as, in case of dispute, may be settled by arbitration in manner provided by this Act." Section 174, so far as material to be stated, enacts: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed; (namely,) (1) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority: (2) Every such contract shall specify the work materials matters or things to be furnished had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

(2) 52 L. J. Ch. 163; 22 Ch. D. 537.

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the defendants and others which were never sanctioned. The contract is also void for want of the introduction of a penalty clause—*Young v. Leamington Corporation* [1883],³ *Mellis v. Shirley and Freemanile Local Board* [1885],⁴ and *British Insulated Wire Co. v. Prescott Urban Council* [1895].⁵

Eve, K.C., in reply.—The sub-contracts cannot affect the rights of the plaintiffs and defendants under the contract sued upon—*Halifax Corporation v. Soothill Upper Local Board* [1874].⁶

Cur. adv. vult.

Nov. 23.—SWINFEN EADY, J., read a written judgment. After stating the facts as they existed at the date of the authority of July 15, 1885, his Lordship said: This sanction has never been withdrawn. Although the words “for the benefit of the parishes of East and West Ardsley” are added to the formal consent, there does not appear to be any statutory power to prescribe the use which the Wakefield authority is to make of the water when obtained. Section 61 merely requires the sanction of the Local Government Board to the supply of water by one authority to another, and the Board gave its consent to the Soothill authority supplying the Wakefield authority. [His Lordship then referred to the facts with respect to the supply to Hunslet Union and Rothwell Urban District Council, and continued:] Thus far everything was done with the sanction of the Local Government Board, so far as such sanction was requisite. [His Lordship then stated the facts leading up to the agreement of January 31, 1895, and the subsequent events, and continued:] Under these circumstances it seems to me to be clear that the supply of water by the plaintiffs has been sanctioned by the Local Government Board, whether it is to be treated as a supply to the Wakefield authority or as a supply direct to the urban district of Ardsley East and West, and that is the

only supply which I have to consider in this action. The Local Government Board were certainly acting within their rights in refusing to consider any particular agreement, and in confining themselves to the actual duty imposed upon them by section 61; and in my opinion the correspondence shews that the sanction of the Board was obtained to the supply of water by the plaintiffs to the local authority of the adjoining district, whether Wakefield or Ardsley.

The second objection taken by the defendants to the validity of the agreement of 1895 is the absence of any pecuniary penalty, under section 174, sub-section 2 of the Public Health Act. Assuming that this sub-section is obligatory, and not merely directory (see *Young v. Leamington Corporation*³ and *British Insulated Wire Co. v. Prescott Urban Council*⁵), it applies only to contracts made by an urban authority, and therefore it has to be considered how the plaintiffs, who are an urban authority, are affected by it. The defendants, the Wakefield Council, are a rural authority, and therefore not bound by any such provision. The provisions of section 174 are for the protection of an urban authority and of the ratepayers of their district. The penalty in sub-section 2 is a penalty to be made payable to, and in no case by, the urban authority, in case the terms of the contract are not duly performed—that means, not duly performed by the other party. The “price to be paid” is a price to be paid by the urban authority for the work, materials, matters, or things to be furnished, had, or done, to or for the urban authority. Accordingly this sub-section can, from the nature and terms of it, only apply to cases where work, materials, matters, or things are to be furnished, had, or done to or for an urban authority, for a price in money to be paid by the urban authority. In such cases the contract is to specify the time within which the contract is to be performed, and shall specify some pecuniary penalty. The provisions of sub-sections 3 and 4 of section 174 also shew that the section refers only to contracts where the money is to be paid by the urban authority, and do not include cases where the

(3) 52 L. J. Q.B. 713; 8 App. Cas. 517.

(4) 55 L. J. Q.B. 143; 16 Q.B. D. 446.

(5) 64 L. J. Q.B. 811; [1895] 2 Q.B. 463. On appeal, 65 L. J. Q.B. 190; [1895] 2 Q.B. 538.

(6) 31 L. T. 6.

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contract is to be carried out by the urban authority, and the consideration paid to it. In the present case it is the urban authority—the plaintiffs—who are to supply water to another person for a price in money to be paid to the urban authority. Is the urban authority to stipulate that, if they do not carry out the terms of the contract—that is, if they do not supply the water—they shall themselves pay a penalty? This is absurd. Are they, then, to stipulate that if the purchasers do not pay the price in money they shall pay some pecuniary penalty? Obviously not, for the penalty is to be paid in case the contract is not duly performed within the stipulated time, and not if the price is not paid. Here the urban authority has, in fact, stipulated that, if the price is not punctually paid, interest thereon at 5 per cent. shall be paid, and it might be contended that this is sufficient penalty within the meaning of the statute; but the real answer to the argument is that the present contract for the supply of water by an urban to a rural authority is not within the section at all.

[His Lordship then dealt with the remaining question, which turned upon the true construction of the agreement of January 31, 1895, and on this point also found in favour of the plaintiffs, for whom he gave judgment with costs, but with a stay of execution for six months to enable the Ardsley District Council to make and levy a rate to discharge their liability under the judgment.]

Solicitors—Jaques & Co., agents for Scholesfield, Taylor & Maggs, Batley, for plaintiffs; Barton & Pearman, agents for Scatterd, Hopkins & Middlebrooks, Leeds, for defendants.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 15, 17, 18, 21, 22.

Dec. 5.

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Money-lending—Harsh and Unconscionable Bargain—Excessive Rate of Interest—Absence of Risk—Closed Transaction—Re-opening—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1, sub-ss. 1 and 2—“Liable.”

Money-lenders advanced to a borrower 2,000l., repayable by twelve consecutive monthly instalments, with interest, amounting in all to 3,300l., and in the event of default being made in any one payment the whole amount remaining unpaid was to become immediately payable. There was evidence that the money-lenders were aware when making the loan that, owing to the borrower's financial position, they were running no risk:—Held, that, having regard to the lenders' knowledge of the absence of risk, the rate of interest was excessive, and the transaction was harsh and unconscionable within the meaning of sub-section 1 of section 1 of the Money-lenders Act, 1900, and it ought to be re-opened and an order made for repayment of the amount actually advanced, with interest at 10 per cent.

Sub-section 1 of section 1 gives the borrower relief only in respect of the transaction the subject of an action brought by the money-lender, and the power of the Court to re-open under that sub-section is limited to that transaction, and the account can only be taken in that transaction, or some transaction which is relevant to it, and not in a previous transaction altogether closed.

Under sub-section 2 a borrower can obtain relief in proceedings taken by him, and he may take proceedings either when he is sued by the money-lender, or before he is sued. The sub-section applies even after the loan has been repaid, and under it the Court could re-open a closed transaction. “Liable” in that sub-section is not to be read as “liable in fact.”

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Appeal from a decision of Kekewich, J.

The action was brought by a registered firm of money-lenders trading as "P. Saunders," at 11 Savile Row, against the executor of H. T. Alton, deceased, for 3,025*l.*, being the balance remaining due on a promissory note for 3,300*l.*, dated October 3, 1903, made by Alton in favour of the plaintiffs.

The note provided that the money was to be paid by twelve consecutive monthly payments of 275*l.* each, the first to be paid on November 3, 1903, and in the event of default being made in any one payment the whole amount remaining unpaid was to become immediately payable.

Alton paid the first instalment due under the note. He died on November 18, 1903. His executor refused to pay the balance due under the note, but he offered to pay the amount actually advanced on the loan with interest at 10 per cent., after deducting the instalment already paid by Alton. The plaintiffs refused this offer.

The action was brought in the King's Bench Division, under Order XIV. of the Rules of Court, 1883, but an action had been commenced in the Chancery Division for the administration of Alton's estate, and by an order made in that action the action in the King's Bench Division was transferred to the Chancery Division, and it was assigned to Kekewich, J. Prior to the order transferring the action an order had been made by the Judge in chambers in the King's Bench Division directing that the action should be set down for trial without pleadings, the defendant to be entitled to raise any defence at the trial.

The defendant, in his affidavit in opposition to the application for leave to enter judgment under Order XIV., alleged that the sole consideration for the promissory note was a sum of 2,000*l.*, and 1,300*l.*, the balance of the 3,300*l.*, was charged in respect of interest, which amounted to more than 100 per cent. per annum. He further stated that at the date when the promissory note was signed Alton was suffering from loss of will power, and not in a fit condition, owing to intemperate habits of long standing, to transact business; and he

further stated that he believed that Alton did not thoroughly understand and appreciate the effect of the transaction in question, and that his condition was known to the plaintiffs, and that they took undue advantage of him having regard thereto.

Alton had been introduced to the plaintiffs by a Mr. Sagar, who had had previous dealings with Alton, and Sagar and others contributed part of the 2,000*l.* advanced to Alton, and shared in the profits of the transaction in proportion, and Sagar received a commission for the introduction of the business. The plaintiffs had also before making the advance made enquiries as to Alton's financial position, and had received a report from a Mr. Stubbs, which ran thus: "He is regarded as a man of the highest respectability, and is understood to be a large shareholder and director in the firm of Alton & Co. (Limited), brewers of this town, Derby. He is reputed to be well-to-do, but at times is inclined to be slow in his payments. He is, however, the owner of property, and is considered a desirable man to deal with in the ordinary way of business. It is not thought that any unreasonable risk would be incurred in granting credit to the extent named."

The defendant stated in his affidavit that the net value of Alton's estate was sworn by him at 42,154*l.* 6*s.* 1*d.*, and that a large part of his estate consisted of shares readily saleable in the market.

In addition to the promissory note for 3,300*l.* of October 3, 1903, given by Alton in respect of the loan transaction mentioned in the affidavit, there was another loan transaction of July 6, 1903, in respect of a loan of that date to be repaid by instalments amounting to 1,400*l.*, secured by a promissory note for that amount. Of the 1,400*l.*, 400*l.* was interest. The instalments were to be five monthly payments of 250*l.*, the first to be paid on August 6, 1903, and the balance of 150*l.* on January 6, 1904, the entire sum to become payable forthwith in case of default. That sum was repaid in September, 1903, and the transaction thus closed.

Kekewich, J., gave judgment for the defendant, declaring that all the transactions

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and acts of the plaintiffs Braham Samuel and Philip Samuel (carrying on business as money-lenders and suing under the registered name of P. Saunders) and Alton ought to be re-opened and set aside, and that the executor of Alton ought to be relieved from payment of any sum in excess of the sums actually advanced to Alton and interest thereon at the rate of 10 per cent. per annum, and that, if any such excess had been paid by Alton or by the defendant, the plaintiffs ought to repay the same to the defendant. The judgment also ordered the following account—namely, of all sums actually advanced by the plaintiffs to Alton, and of all sums received by the plaintiffs from Alton in respect of any such advance, and that in taking the account the defendant be charged with interest at the rate of 10 per cent. per annum on the sums from time to time owing to the plaintiffs, and that the balance due from either party to the other be certified. The judgment ordered the plaintiffs to pay the defendant's costs.

His Lordship said that as he read the Money-lenders Act, 1900, and the decision of the Court of Appeal in *A Debtor, In re* [1903],¹ the object of the Act was to get rid of the fetters which by tradition had been imposed on the Court of Chancery in re-opening transactions which were more or less harsh and unjust between persons who complained against money-lenders and those money-lenders. He came to the conclusion that the absence of risk made the rate of interest excessive, especially when coupled with the default clause, and that therefore the transaction was "harsh and unconscionable" within the meaning of the Act.

The plaintiffs appealed.

The material sections of the Money-lenders Act, 1900, are set out below.²

(1) 72 L. J. K.B. 382; [1903] 1 K.B. 705.

(2) Money-lenders Act, 1900, s. 1, sub-s. 1: "Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act . . . and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case,

Lawson Walton, K.C., and Hohler, for the appellants.—The transaction of July, 1903, has been settled and closed, and there is no jurisdiction under the Money-lenders Act, 1900, to re-open it at the instance of the borrower. The words of sub-section 2 of section 1 apply to a present liability. There is nothing which points to a closed transaction, and there is no reason for enlarging the words in that respect. There may be jurisdiction in equity to re-open it, but not under the Act. The Act does not cut down the equitable jurisdiction—*A Debtor, In re*.¹

The transaction was not harsh and unconscionable within the meaning of the Act. This man was of full age, and if he chooses to raise money on certain terms he must pay for it, and cannot afterwards complain. He would have got no relief in a Court of Chancery before the Act. If a particular rate of interest is agreed upon by people who are their own masters there

the transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued."

Sub-section 2: "Any Court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived."

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is nothing harsh in it. There is nothing more harsh in that than in their having to pay large prices for particular works of art.

The loan in this case was not secured in any sense which relieved the money-lenders from risk, and for the purposes of the Money-lenders Act, 1900, must be regarded as practically unsecured. In such a case it is not for the Court, but for the parties, to measure the risk and the rate of interest. The material word in the section is "unconscionable." The word "harsh" is merely rhetorical. If there is no evidence to create the moral characteristics by which an unconscientious bargain is determined, the Act does not alter the principles of relief.

The cases go upon the fact that there was some advantage taken by the money-lender of the misfortunes or position of the borrower.

A *Debtor, In re*,¹ does not go the length of shewing that a particular Judge's disapproval makes a transaction "harsh and unconscionable." The Court must find a standard involving moral wrong—*Nevill v. Snelling* [1880],² *Levene v. Greenwood* [1904],³ and *Poncione v. Higgins* [1904].⁴

A contract, in the event of default in one instalment, to repay the whole advance at once *plus* the future interest is not in itself unconscionable—*Wallingford v. Mutual Society (Directors)* [1880].⁵

P. O. Laurence, K.C., and *M. Macnaghten*, for the respondent.—*Poncione v. Higgins*⁶ shews that a closed transaction can be opened under the Act, though the point does not appear to have been taken in that case.

Our claim for relief is based on fraud, according to the decision in *Chesterfield (Earl) v. Janssen* [1750].⁷ If this bargain is stripped of everything, it was simply a gift by the borrower to the money-lenders. He could have at any time drawn a cheque on his banker for the money required. The plaintiffs knew perfectly

well what kind of man Alton was, and that he could be swayed to borrow money from a money-lender.

The Court has power under the Money-lenders Act, 1900, s. 1, sub-s. 1, and under its general jurisdiction, to open any previous account between the money-lender and the borrower. The power is not limited to the actual transaction in respect of which the proceedings are being taken. The plaintiffs cannot say they made no enquiry as to Alton's position. They knew what it was from Sagar. They must have known that Alton did not really want money, and would not spend it when he got it. At any rate, at the time of the second transaction they were not acting in good faith.

Lawson Walton, K.C., replied.

Dec. 5.—VAUGHAN WILLIAMS, L.J., read the judgment of the Court as follows: This is an action brought by "P. Saunders" (a firm) against James William Newbold (the executor of H. T. Alton, deceased), defendant. The action, as appears from the affidavit of Philip Samuel, a partner in the plaintiff firm, sworn in support of a summons under Order XIV., is for the sum of 3,025*l.*, the balance of 3,300*l.* the amount of a promissory note made by Alton, dated October 3, 1903, in favour of the plaintiffs or order, repayable by twelve consecutive monthly instalments of 275*l.* each, the first to be paid on November 3, 1903, with a default clause, whereon default was made. An order was made on the summons directing that the action be set down for trial without pleadings, the defendant to be entitled to raise any defence at the trial. The defendant by his affidavit alleged (as is the fact) that the sole consideration for the promissory note was a sum of 2,000*l.*, and not 3,300*l.*, the balance of 1,300*l.* being charged in respect of interest, which interest amounts to more than 100 per cent. per annum. The defendant's affidavit further stated that at the date when the promissory note was signed Alton was suffering from loss of will power, and not in a fit condition, owing to intemperate habits of long standing, to transact business, and further stated that the deponent verily

(3) 49 L. J. Ch. 777; 15 Ch. D. 679.

(4) 20 Times L. R. 389.

(5) 21 Times L. R. 11.

(6) 50 L. J. C.P. 49; 5 App. Cas. 885.

(7) 2 Ves. sen. 125; 1 Wh. & Tu. L.C. (7th ed.), 289.

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believed that Alton did not thoroughly understand and appreciate the effect of the transaction in question, and that his condition was known to the plaintiffs, and that they took undue advantage of him, having regard thereto.

In addition to the promissory note for 3,300*l.* of October 3, 1903, made and given by Alton in respect of the loan transaction mentioned in the affidavit, there was another loan transaction of July 6, 1903, in respect of a loan of that date to be repaid by instalments amounting to 1,400*l.*, secured by promissory note for that amount. Of the 1,400*l.*, 400*l.* was interest. The instalments were to be five monthly payments of 250*l.*, the first to be paid on August 6, 1903, and the balance of 150*l.* on January 6, 1904, the entire sum to become payable forthwith in case of default.

[His Lordship read the order made by Kekewich, J., as set out above, and continued:] Mr. Justice Kekewich, by his judgment, says in effect that, although Alton, from an active, shrewd man of business, had fallen into a state of considerable neglect of business and inability to grapple with matters of business, and this condition was induced by excessive drinking, resulting in liver disease, yet this was not noticeable to the ordinary observer, and therefore that knowledge of this state of things could not be attributed to Philip Samuel, and that Samuel was justified in dealing with Alton as a man of ordinary capacity quite competent to negotiate a loan, and to deal with him as a money-lender. Mr. Justice Kekewich then goes on to point out that the rate of interest was very high and the terms severe, since they included a default clause which made the whole sum charged for principal and interest payable on default in payment of any instalment. But he does not hold that this rate and these terms alone made the transaction "harsh and unconscionable" within the meaning of the Act, although he suggests that he might have been justified in so doing. That upon which the learned Judge really does base his judgment is the absence of risk which ought to have been present to the mind of the money-lenders. He comes to the conclusion that this absence of risk

made the rate of interest excessive, especially when coupled with the default clause, and that therefore the transaction was "harsh and unconscionable" within the meaning of the Act. The learned Judge, in coming to the conclusion that there was no risk, although the loan was secured by nothing but the note of hand, relies upon the report of Stubbs obtained by the plaintiffs. [His Lordship read it, and continued:] The learned Judge also points out that if the plaintiffs had chosen to make enquiries at Alton's bankers they would have discovered that Alton's position was such that lenders for much larger sums than 3,000*l.* would run no risks whatever. The learned Judge concludes thus: "It seems to me impossible with that before me to consider that Samuel dealt reasonably with this gentleman. He exacted the very extreme terms from a man who was perfectly competent to pay, and against whom the only thing that any one suggested as regards business was that he was inclined to be slow in his payments; but there was substance behind, and a little slowness was not any very great disadvantage. It seems to me that here I have a case of a money-lender charging a rate of interest which was extremely high; which, if it is not 'harsh and unconscionable' in itself, is 'harsh and unconscionable' when exacted from a man who could obtain money at the ordinary current rates from a banker, or a man who had money at command. On these grounds I think that upon my construction of the Act I ought to have no hesitation in holding that the transaction is 'harsh and unconscionable,' and ought to be set aside."

Several points have been argued before us. Some relate to the transaction of October 3, some to the transaction of July 6. We propose, in the first instance, to deal with the 2,000*l.* loan of October 3. The learned Judge has, as we have pointed out, found in favour of the plaintiffs that they were justified in dealing with Alton as a man of ordinary capacity, competent to negotiate a loan, and has preferred to base his judgment not merely on the fact of the interest being excessive, but on the fact that the

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absence of risk, having regard to facts as to the financial position of Alton which Philip Samuel knew, or by proper enquiries might have known, rendered the terms of the loan harsh and unconscionable. It seems to us that we have in the Court of Appeal had our attention called to facts, to which the learned Judge does not expressly refer, which confirm his view as to the absence of risk and the amount of knowledge of Alton's financial position which ought to be imputed to the plaintiffs. In the first place, the cash ledger produced before us and at the trial shews that Sagar and others, who (whatever may have been the position of Philip Samuel) had had previous financial dealings with Alton, shared in the bonus or profit of 1,300% in proportion to their contributions towards the 2,000% actually advanced to Alton. We think that the proper inference from this is that all these men were co-adventurers in this loan transaction, and that the knowledge of any of the co-adventurers ought to be imputed to the rest of the party. We know it is said that the plaintiffs made their advance by giving their cheque for 2,000% before getting these contributions, since the crossed cheque was given on October 3, and the contributions were not given and the division of the bonus was not made until October 5, and that the credit balance of the plaintiffs at their bank was sufficient to meet the cheque when given. We do not think that the credit balance was sufficient; but, even assuming it was, it is impossible to suppose that the arrangement for contribution to the loan fund and the sharing of the bonus was not made before October 5, and probably it was made before the 3rd. None of the contributors were called as witnesses, although some of them were in Court, and must have heard Philip Samuel's evidence and appreciated the importance of the sequence of events as stated by him. Moreover, Philip Samuel knew that Sagar was the agent of Alton to come and ask for the loan, and carry back to Alton the terms upon which it would be made. He knew, moreover, that Sagar was receiving commission from Alton for obtaining the loan, although he

might not know the exact amount; and, knowing this, Philip Samuel agreed to allow, and with the concurrence of his co-adventurers did allow, Sagar 57% 10s. commission for introducing the Alton 2,000% loan to the co-adventurers, of whom Sagar was one. Now, having regard to Sagar's position and to his many financial transactions with Alton, as evidenced by Alton's pass-book and the correspondence between Sagar and Alton between January and October, 1903, and Sagar's knowledge of Alton's means to be inferred from all these facts, we cannot doubt but that the money-lenders were fully aware of the absence of risk and that the rate of interest was excessive, having regard to the risk or absence of risk, and that the terms, having regard to what the money-lenders knew of Alton, were "harsh and unconscionable," and we think that the 10 per cent. allowed by the order of Mr. Justice Kekewich is amply sufficient.

The case of the loan of July 6 is more difficult. Mr. Justice Kekewich has re-opened this transaction, and has ordered it to be included in the account. We cannot accept the argument of counsel for the respondent that the provision of sub-section 1 of section 1, that the Court may, in cases where proceedings are taken by the money-lender for the recovery of money lent, and there is evidence to shew that the interest charged in respect of that sum is excessive, and the transaction—that is, the transaction in respect of which the money-lender brings the action—is harsh and unconscionable, re-open not only that transaction, but also re-open any account taken between the same parties, includes an account taken in any matter, however foreign to the transaction sued on. We think that the account re-opened must be relevant to the transaction in respect of which the action is brought. The section seems to us intended to give the defendant relief by way of defence in the action which the money-lender has brought. This seems to be rather confirmed than otherwise by that part of the section which says that the defendant may re-open that transaction, notwithstanding any statement or

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settlement of account or any agreement purporting to close previous dealings and to create a new obligation. Sub-section 1 of section 1 of the Act seems to us to give relief only in respect of the transaction the subject of the money-lender's action, and we think that, as the power to re-open is limited to that transaction, so the account can only be taken in that transaction or in some transaction part and parcel of the same, or which, even though it may include new obligations, yet comprised what purported to be a close of the dealings in respect of which the money-lender is taking proceedings. We should point out that Mr. Justice Kekewich, in his judgment, does not go into the question whether the 1,400% transaction was harsh and unconscionable.

It is true that sub-section 2 provides that any Court in which proceedings might be taken by a money-lender may, at the instance of the borrower, or surety, or other person liable, exercise the like powers as may be exercised in an action by a money-lender for the recovery of money lent, and that in our judgment this sub-section applies even to a case where the loan has been repaid. This limitation is not a limitation to cases in which the money-lender has an unsatisfied cause of action, or there is some one liable to be sued; the limitation is only to a Court in which proceedings might be taken by a money-lender for recovery of money lent. Given such a Court—that is, given a Court having jurisdiction—that Court may exercise at the instance of the borrower the powers given by sub-section 1. Such powers clearly cover a power to order repayment by the money-lender, and we cannot see that this power is in any way excluded by the words at the end of the section, “notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.” Counsel for the appellants, in arguing the contrary, relied very much on the word “liable” in sub-section 2 of section 1. The words of this section are: “Any Court . . . may, at the instance of the borrower or surety or other person liable, exercise the like powers as

may be exercised under this section, where proceedings are taken for the recovery of money lent.” And he relied also upon the words at the end of this section as to the Court entertaining an application notwithstanding that the time for repayment of a loan may not have arrived. As to the force of the word “liable,” it seems to us that “liable” cannot be read as meaning liable in fact. So to read it would be to exclude from the power of the Court given under sub-section 2 the power which the Court clearly has under sub-section 1 to order repayment by a money-lender. Moreover, one must not forget that the Money-lenders Act, 1900, is an amending Act, amplifying the powers heretofore exercised by the Court of Chancery, and it is clear that the Court of Chancery did not allow the fact of repayment to prevent the re-opening of a transaction entered into by a borrower whom the Court deemed from the circumstances of the case unable to protect himself. As to the words at the end of the section, we think they only mean that the borrower may obtain relief, not only when he is sued, but before he is sued. But, assuming as we do that the defendant by taking proper steps could, notwithstanding payment, have obtained an order re-opening the transaction, provided he had counterclaimed or upon due notice made an application in the action to that effect, he did not do so. Neither did he make any application at the trial to amend. The fact is that the case of the loan of July 6 being “harsh and unconscionable” was not made at the trial, and the judgment of Mr. Justice Kekewich does not deal with the question; and in these circumstances it is impossible for us to allow an amendment now. The order made under Order XIV. is limited to the defences of the defendant.

We think, therefore, that the judgment ought to be amended by striking out so much of it as refers to the loan of 1,400% which was repaid; but this should be without prejudice to the right of the defendant Newbold, as executor of Alton, to bring an action to re-open that transaction if he be so advised. With regard to costs, we think that justice will be done by not

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disturbing the order of the Court below as to costs, and giving no costs of the appeal.

Order varied.

Solicitors—B. Barnett, for plaintiffs; Fowler & Co., agents for Eddowes & Sons, Derby, for defendant.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Oct. 30, 31. Nov. 1.

HARRIS v.
FLOWER.

Easement—Right of Way—User for Premises Extending beyond Dominant Land—Abandonment—Excessive User—Injunction.

The grantee of a right of way is only entitled to use it bona fide for purposes of the dominant tenement, and the owner of the servient tenement is entitled to relief if the acts of the grantee of the right of way necessarily involve its use for the purposes of buildings upon other land to which the right of way is not appurtenant, thereby increasing the area of the dominant tenement, and consequently the burden of the servient tenement.

The defendant having a right of way over the plaintiff's land to certain land coloured pink on a plan, and being also the owner of certain adjoining land coloured white, had by his own acts completely landlocked the white land so that the only access thereto was now over the pink land, and had built a factory partly on the pink and partly on the white land. The factory was all one building and a substantial part of it was on the pink land. The only access to it from the highway was by means of the right of way:—Held (affirming SWINFEN EADY, J.), that the acts of the defendant did not amount to an abandonment or extinction of the right of way; but (reversing SWINFEN EADY, J.) that the proposed user for the purposes

of the part of the building erected on the white land was in excess of the grant.

Finch v. Great Western Railway (5 Ex. D. 254) distinguished.

Appeal against a decision of Swinfen Eady, J.

Both the plaintiff and the defendant derived title from the London, Chatham, and Dover Railway on the occasion of that company selling certain superfluous lands in 1891. The conveyance to the defendant's predecessor in title, William Murrin, was dated July 1, 1891. It conveyed to him in fee-simple certain freehold lands then known as No. 80 Royal Hill, Greenwich (called "the pink land" by the Court of Appeal), together with full and free right and liberty "of ingress, egress and regress," passage and way into and upon the said hereditaments thereby conveyed, from a certain street called Prior Street, over and upon certain land therein described (being the land subsequently conveyed to the plaintiff's predecessor in title). The conveyance to the plaintiff's predecessor in title, John Jennings, was dated July 13, 1891. It conveyed to him the servient land, and contained a covenant by John Jennings, for himself, his heirs and assigns, that he would at all times allow the owner and occupier of No. 80 Royal Hill (the pink land) full and free right and liberty of ingress, egress, regress, passage, and way over and upon the servient land.

Wm. Murrin when he purchased the pink land was already the owner of adjoining property (called "the white land" by the Court of Appeal) consisting of No. 72 Royal Hill, known as the Prince Albert public-house, which had its own approach to Royal Hill, and also of certain land at the rear thereof. The white land in the rear of the public-house adjoined the rear portion of the pink land, but the public-house itself and the pink land were separated by intervening houses on the frontage to Royal Hill.

Wm. Murrin determined to build certain assembly-rooms and a billiard-room partly on the white land and partly on the pink land, to be used as an adjunct to the public-house, according to plans which shewed a proposed gateway giving

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the premises a back entry by means of the right of way into Prior Street. The magistrates objected to the proposed gateway, and said they would not allow any opening in the wall leading from the licensed premises into another street than Royal Hill. The plan was then altered so as to omit the proposed gateway and cut off any connection between the licensed premises and Prior Street, and in this form was passed by the magistrates on August 25, 1891. Wm. Murrin subsequently conveyed the public-house and the rest of the white land and the land coloured pink to Messrs. Parker & Thomas, by whom the works were completed in November, 1894; but an opening for a gateway was still left in the cross-wall cutting off the licensed premises from the rest of the premises, as the owners were desirous of retaining this back entrance if it could be managed.

By various mesne assurances, and ultimately by an indenture of February 16, 1898, the same premises were conveyed to the defendant George Robert Murrell, together with an express grant of ingress, egress, and regress into and upon the pink land from and to Prior Street. In the summer of 1898 the defendant George Robert Murrell again altered the premises, all openings between the front portion and the rear portion of the Prince Albert being closed with brickwork both on the ground floor and the first floor, and all communication between the front portion and the rear portion being entirely severed and the licence confined to the front portion. The result of this was that the licensed premises were completely severed from the new building in the rear, the only access to which was now by the right of way. The defendant George Robert Murrell was now proposing to use the new building as a factory and warehouse. A substantial part of the building was erected on the pink land. It was all one building, with no physical division between the parts built on the pink and the white land respectively.

The plaintiff brought this action against George Robert Murrell and his mortgagees claiming that the defendants had lost their right of way by abandonment, and also claiming an injunction to restrain

the defendants from using the right of way as a means of access to the factory and premises which at one time formed part of the licensed premises known as the Prince Albert.

Swinfen Eady, J., held that Wm. Murrin or his successors in title never had any intention of abandoning the right of way, and that the easement had not been abandoned. As to the excessive user, he said that it was established by *Finch v. Great Western Railway* [1879]¹ that where there was an express grant of a private right of way to a particular place the grant was not to be restricted to access to the land for purposes for which access would be required at the time of the grant. In accordance with that and similar decisions, he determined that the right of way in the present case had not been extinguished by the alterations made in the dominant tenement. The defendant was using the right of way *bona fide* for the purpose of access to the dominant land, and to the building thereon, and none the less so because a portion of that building extended beyond the boundary of the land then so conveyed. This fact distinguished the present case from *Skull v. Glenister* [1864],² which was observed upon in *Finch v. Great Western Railway*.¹ The result was that the action failed, and must be dismissed with costs. The mortgagees were not in any case necessary or proper parties to the action.

The plaintiff appealed.

Micklem, K.C., and *Johnston Edwards*, for the appellant.—The right of way has been lost by abandonment. Non-user coupled with an indication of an intention to abandon will cause the extinguishment of an easement—*Reg. v. Chorley* [1848]³ and *Moore v. Rawson* [1824].⁴

[VAUGHAN WILLIAMS, L.J.—I doubt if a right of way granted by deed can ever be lost by non-user.]

It can if there is also an intention to abandon. Such intention was shewn in this case. The right of user claimed here is excessive. The grant of a right of way

(1) 5 Ex. D. 254.

(2) 33 L. J. C.P. 185; 16 C. B. (N.S.) 81.

(3) 12 Q.B. 515.

(4) 3 L. J. (O.S.) K.B. 32; 3 B. & C. 332.

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to a close will not justify its user to a place beyond—*Lawton v. Wood* [1698],⁵ *Henning v. Burnet* [1852],⁶ *Ackroyd v. Smith* [1850],⁷ *Wimbledon and Putney Commons Conservators v. Dixon* [1875],⁸ *Williams v. James* [1867],⁹ and *Skull v. Glenister*.² The case of *Finch v. Great Western Railway*,¹ on which Swinfen Eady, J., relied, is distinguishable, as the Court there held that the railway company were in fact using the way for the *bona fide* purposes of the dominant tenement alone. If the defendant has now no access to the white land except over the pink, the difficulty is of his own creation. If the way is not to be treated as abandoned, in any case the plaintiff is entitled to an injunction to restrain this excessive user for the purposes of the white land and so much of the building as is erected thereon.

Eve, K.C., and *Martelli*, for the respondent George Robert Murrell.—A right of way created by express grant and not by mere prescription is not to be measured by the user at the time of the grant. It all depends on the construction of the grant, to every word of which a meaning is to be attached—*Somerset v. Great Western Railway* [1882],¹⁰ *per Fry, J.* The word “egress” in this grant is not synonymous with “regress,” and means that the grantee can pass from the dominant tenement to adjoining land of his own. The law stated by Powell, J., in *Lawton v. Wood*⁵ is qualified by Lord Raymond’s note. The question is one of fact: *quo animo* did the grantee use the way?—*Skull v. Glenister*.² A substantial part of the building is on the pink land, the dominant tenement; and having regard to the nature of this building nothing could be done on the white land which cannot be regarded as incidental to the due occupation and enjoyment of the pink land. The premises are now so altered that the white land can only be used as an adjunct to the pink. The case of *Finch v. Great Western Railway*¹ is a stronger one than

the present, and shews that the judgment of Swinfen Eady, J., was right on his finding of fact—namely, that the defendants are not using the way colourably for the purposes of the white land, but *bona fide* for the purposes of the pink. There is no ground for the suggestion that the way has been abandoned.

Micklem, K.C., replied.

VAUGHAN WILLIAMS, L.J.—I will state the facts as shortly as possible. It appears that there being a sale by a railway company of certain superfluous lands, the plaintiff claims under a conveyance of a piece of the lands sold subject to an easement which was imposed in favour of another piece of the lands (which I will call the pink land), and the defendant is the person who claims under the conveyance of the pink land, in favour of which a right of way was granted at the time of these two conveyances over the piece of land purchased by the predecessors in title of the plaintiff. The defendant is also the owner of an adjoining piece of land (which I will call the white land), and that may be divided into two parts. One part is used for the purposes of a public-house, and that has an exit into a public highway, Royal Hill, and the other part of the white land has had buildings built upon it, and at the present moment is completely severed from the public-house by reason of obstructions erected by the defendant himself. The question that is raised in this case is whether the defendant is entitled to use the right of way, which admittedly is a right of way appurtenant to the pink land, for the purpose of approaching the buildings erected partly upon the part of the white land which is not used for the purposes of the public-house and partly upon the pink land to which the right of way is appurtenant. Mr. Justice Swinfen Eady in his judgment deals with the matter in this way: He does not at all lay it down that if there is a right of way appurtenant to one close, the owner of the dominant tenement is entitled to use that right of way for the purposes of access to another close which is not part and parcel of the close to which the right of way is appurtenant. He does not take up

(5) 1 Ld. Raym. 75.

(6) 22 L. J. Ex. 79; 8 Ex. 187.

(7) 19 L. J. C.P. 315; 10 C. B. 164.

(8) 45 L. J. Ch. 353; 1 Ch. D. 362.

(9) 36 L. J. C.P. 256; L. R. 2 C.P. 577.

(10) 46 L. T. 883.

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that position; and, having regard to the authorities, it is quite impossible for any one to maintain that position. But what Mr. Justice Swinfen Eady does is to ask himself the question whether upon the facts of this case the defendants are using the right of way *bona fide* for the purposes of access to the pink land, and his conclusion in effect is that the defendant is so using the right of way for the purposes of access to the pink land.

Although in form the question may be somewhat different from the question which was put in the various cases which have been cited to us, in substance it seems to me that the question is identical with the question put in *Skull v. Glenister*² and in *Williams v. James*.³ I will first deal with the question put in *Skull v. Glenister*.² The report states the following as the question put to the jury: "Did the defendants really use the way with carts and wagons as a way to Wheeler's land, or did they really use it as a way to the houses they were building? And was the going first to Wheeler's a mere colourable use?" *Answer*. It was a mere colourable use." And Chief Justice Erle, in delivering judgment, says, "The question which the learned Judge left, was, whether the defendants used the way as a way to Wheeler's land, or was it a mere colourable use of it for the purpose of getting at their own land"; and Mr. Justice Williams, after referring to the authorities, continues: "These authorities appear to establish the principle, that, if the defendants here had directly used the road in question as a way over the grantor's land through Wheeler's close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so. The jury must be taken to have found that they had. Upon this part of the case, therefore, I think the direction was substantially right, and the verdict justified by the evidence."

Now if *Williams v. James*³ is looked at, it is a decision to the same effect. Chief Justice Bovill says: "It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the

latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bona fide* or a mere colourable use of the right of way." Mr. Justice Willes, who delivered the second judgment, says: "To be a legitimate user of the right of way, it must be used for the enjoyment of the Nine-acre field, and not colourably for other closes. I quite agree also with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place." In that case also the question put to the jury was a question as to the nature of the user, and the jury found that the storing of the hay grown not on the field to which the right of way was appurtenant, but on another field in the occupation of the dominant owner, was done honestly and not to get the way further on, and therefore there was no excess in the user of the way. Mr. Justice Montague Smith said: "The jury have found that there is an immemorial right of way over the plaintiff's land for carts, carriages, and horses, for the more convenient use and occupation of the Nine acre field. Before the jury could decide whether there had been any excess in the user of the right by the defendant they must have decided the extent of the right of way. The way here is claimed for the more convenient use of the Nine acre field. The circumstances under which the hay was stacked, and the purpose and object of the defendant in carrying it away, are questions for the jury. As I read the finding of the jury, the stacking and the subsequent dealing with the hay were in the honest and reasonable use of the Nine acre field."

That being so, we have to consider here what was in substance and intention the user claimed by the defendant in the present case. There has been very little actual user, and we have to deal rather with what the user threatened is. The question of the user is a question of fact; but if we come to a conclusion different from that at which Mr. Justice

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Swinfen Eady arrived, it will not be on a question of fact such as those questions of fact on which the Court of Appeal very unwillingly and reluctantly comes to a different conclusion from that taken in the Court below; because here the question of fact does not depend on any conflict of evidence, but is a question of the proper inference to be drawn from the facts, which are not in dispute. Under these circumstances we are bound to deal with the matter according to our own view of the proper inference to be drawn from the facts. Now what are the facts here? The defendant or his predecessor, being the owner of the white land divided into two parts, wished to use the part of the white land lying in the rear of the public-house, so as to improve the public-house, and built certain large buildings, an assembly hall and offices, and billiard-room, and he proposed to use these buildings in connection with the public-house. That was the way in which those buildings came into existence. Now the new building so built, although built to a considerable extent on the white land, was also built partly on the pink land. I also think that the new building must properly be regarded not as several buildings, but as one building consisting of separate parts, and as built for the purpose of being dealt with for the use of the public-house, and the original intention of the defendant or his predecessor was to use the right of way for the purpose of giving access to the assembly-hall and billiard-room as part and parcel of the public-house. That was the original intention. The buildings were intended as adjuncts to the public-house, and the intention was to use the right of way as an access to these buildings. The magistrates did not like the public-house to have a back way situated as this one was, but in 1891 they granted or renewed the licence subject to the condition that the defendant or his predecessor closed the back entrance, and he did so.

Now I asked counsel for the respondent whether they contended that, so long as these buildings partly on the white land and partly on the pink were used as part of the public-house, they could have claimed to use this right of way as an

access thereto without being guilty of excess, and they admitted that they could not. Well, lately the defendant determined to sever these buildings from the public-house, and he proposes to use them as a factory and warehouse, and he says he has a right of access to this factory and warehouse by the right of way. The question which we have to ask ourselves is this: Would such a user under these circumstances be for the purpose of obtaining access to the building on the pink land, or would it be a user for the purpose of obtaining access to the white land? In my judgment, in a case of this sort we must look to all the circumstances of the case and see what the intention of the defendant is with regard to the threatened user. Now it seems to me that the way in which the matter must have presented itself to the defendant is this: He makes up his mind that he will cut off from the public-house by physical obstruction these buildings standing partly on the white land and partly on the pink. The moment he did that, the access to the white land from Royal Hill was cut off, and no access existed to the white land except that by the right of way. The defendant intended under these circumstances to get his means of approach to the white land, and so much of these buildings as is erected on the white land, by the user of this right of way for the purpose. *Prima facie* that cannot be denied. It is what he was driven to do; for when he shut off so much of access as existed from the public-house, he was necessarily driven to find some other approach. But he says, although that is so, it is justified under the user of the right of way as appurtenant to the pink land, because what he is really doing is getting access to the pink land, and it is a reasonable user of the pink land to build on it this part of the building: and that being so, he is not the less using the right of way for the purpose of access to the pink land because he is in a position to walk into the rest of the building which is built on the white land; in other words, the proposed user is really access to the pink land, and the access to the white land is a mere subsidiary user, and the principal user is for access to the pink

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land. I cannot agree. I think if we look at the whole history of this case, including the cutting off of all access to the white land except by this right of way, it is impossible to say that the defendant is not using this right of way for the purpose of access to land to which the right of way is not appurtenant. That is the view which I take of it. Of course, it was open to the defendant, if he chose, to cut off the white land on which the buildings were from the public-house, and close the access from Royal Hill, but it seems to me that when he did so he was deliberately contemplating that he would be able to do so by reason of the access to the white land through the pink. I cannot help thinking that there not only may be, but that there must be, many things to be done in respect of the buildings on the white land which cannot be said to be mere adjuncts to the honest user of the right of way for the purposes of the pink land. To begin with, the first thing he was doing before the completion of the building was to use the right of way for the purpose of carrying materials on to the white land so as to erect that part of the building, and I cannot doubt that as time goes on he will probably use this right of way for the purpose of doing repairs on the white land; and under these circumstances it seems to me that, notwithstanding the fact that the buildings on the white and on the pink lands are intended to be used jointly for one purpose, yet that consideration does not exclude the inference that the user of the way is for the purpose of giving access to land to which the right of way is not appurtenant.

The reason of it is that a right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right; and the Court will not allow that which is in its nature a burthen on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant. I do not know that it makes any difference whether the right of way arises by prescription or grant. The burthen imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the

way in excess of the grant. There can be no doubt in the present case that, if this building is used as a factory, a heavy and frequent traffic will arise which has not arisen before. This particular burthen could not have arisen without the user of the white land as well as of the pink. It is not a mere case of user of the pink land, with some usual offices on the white land connected with the buildings on the pink land. The whole object of this scheme is to include the profitable user of the white land as well as of the pink, and I think the access is to be used for the very purpose of enabling the white land to be used profitably as well as the pink, and I think we ought under these circumstances to restrain this user.

At present all we shall do is to make a declaration that the defendant is not entitled to use the land of the plaintiff as a passage or way to or from the piece of land in the rear of the public-house, with liberty to apply. The appellant is entitled to his costs of the appeal and his costs in the Court below, except so far as they were increased by his claim for abandonment, which excepted costs must be paid by the appellant.

ROMER, L.J.—I agree in thinking that Mr. Justice Swinfen Eady came to a right conclusion on the question of abandonment, but I come to the conclusion that what the defendant has done and claims the right to do is not justifiable. The law really is not in dispute. If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B. This proposition of law is admitted. The question is whether what the defendant does or claims the right to do comes within the proposition I have stated. In my opinion it does. I think that it is impossible to say that this large building is to be regarded as if wholly erected on the land coloured pink, nor can it be said that every user of the way for the purposes of the land coloured white is one for the proper enjoyment of the land coloured pink. I will take one instance. The defendant has used, and claims a right to use, this right of way for the

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purpose of carrying building materials for the part of his buildings on the land coloured white. That, to my mind, is a user of the right of way for passage over the land coloured pink for the enjoyment of this land coloured white. It is impossible to say that by reason of one building being on both lands the defendant has made the right of way which was granted for the enjoyment of the one a right of way for the enjoyment of both, and that is what the defendant is really doing. That would substantially enlarge the grant of the right of way. The servient tenement is not obliged to submit to the carrying of building materials for the purpose I have indicated; and other instances might easily be given which would result in using the right of way for purposes of the land coloured white, and not for the true and proper enjoyment of the land to which the way was appurtenant.

As to *Finch v. Great Western Railway*,¹ that no doubt is a case of considerable difficulty—one which is upon the border-line. I gather that the Judges in that case came to the conclusion that what the railway company was doing was in substance for the due enjoyment of the dominant land. They were using the dominant land for the purpose of penning cattle, and no doubt the cattle were intended ultimately to be sent all over the railway system; but the ground of the decision was that the railway company was entitled to use the dominant land for the purpose of a cattle-pen, just as they might have erected a slaughter-house upon it. To my mind, that case only turned on the question of fact—whether what the railway company did was for the enjoyment of the dominant tenement in accordance with the right of way granted. Similarly, in the present case the defendant might have erected a building on the land coloured pink and used it for a contractor's business, and made use of the right of way for that purpose; but what he is really doing here is, under guise of the enjoyment of the dominant tenement, to try and make the right of way become a right of way for the enjoyment of both lands, the pink and the white, and using the land coloured pink as a mere continuation of the right of

passage from the pink to the white. That is not what is justified by the grant, and the plaintiff is entitled to say it is in excess of the grant, and a declaration in his favour ought to be made accordingly.

COZENS-HARDY, L.J.—I am of the same opinion. It is clear to my mind that there has been no abandonment or extinction of the right of way. What is the right of way? It is a right of way for all purposes—that is, for all purposes with reference to the dominant tenement. The question is whether the defendant has not attempted, and is not attempting, to enlarge the area of the dominant tenement. The land coloured white is entirely landlocked by the acts of the defendant. The only access is by the passage over the land coloured pink; and it is, in my judgment, impossible to use the right of way so as to enlarge the dominant tenement in that manner.

Appeal allowed.

Solicitors—Edwin Shalless, for appellant;
Pothecary & Co., for respondent.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. { THOMPSON'S SETTLEMENT TRUSTS, *In re*;
1904. { THOMPSON v.
Nov. 19, 30. { ALEXANDER.

Trustees—Settlement—Power to Appoint New Trustees—Appointment of Limited Company as Joint Trustees—Validity—Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20).

A limited company may be a trustee, and may hold trust property in joint tenancy with a natural person as co-trustee.

Where a settlement contains a power for the appointment of a new trustee, the donee of the power is entitled to appoint a limited company as such trustee jointly with a continuing trustee, in the absence of indications in the settlement of a contrary intention.

THOMPSON'S SETTLEMENT TRUSTS, IN RE.

Originating summons.

By an indenture of settlement dated December 5, 1866, and executed on the marriage of Arthur Kelly Thompson and Mary Elizabeth Alexander, it was provided (*inter alia*) that if Samuel Thompson and George Caledon Alexander, the trustees thereby constituted, or either of them, or any trustee or trustees appointed as thereafter provided, should (*inter alia*) die, in any such case it should be lawful for the said Arthur Kelly Thompson and the said Mary Elizabeth Alexander, or the survivor of them, to appoint a "new trustee," or new trustees, in the place of the trustee or trustees so dying; and upon every or any such appointment the number of trustees might be augmented, or reduced (but so that in no case should the number be less than two); and upon every such appointment the trust property should (if and so far as the nature of the property and other circumstances should require or admit) be transferred, so that the same might be vested in the trustees or trustee for the time being.

Samuel Thompson, one of the two trustees, died on April 12, 1904.

Mr. and Mrs. A. K. Thompson were now anxious to appoint the Ocean Accident and Guarantee Corporation (a company limited by shares) as co-trustee, jointly with George Caledon Alexander, of the settlement of December 5, 1866, in place of the deceased trustee.

The present summons was accordingly issued by them on October 26, 1904, asking whether it was lawful for Mr. and Mrs. Thompson, on the true construction of the above proviso, to appoint the Ocean Accident and Guarantee Corporation, or any other corporation, to act as such co-trustee.

George Lawrence, for the summons.—The corporation can be validly appointed under the proviso contained in the settlement. Formerly this was impossible, inasmuch as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common—*Law Guarantee and Trust Society v. Bank of England* [1890].¹ This difficulty, how-

(1) 24 Q.B.D. 406.

ever, has since been removed—first, by section 6 of the National Debt (Stockholders' Relief) Act, 1892 (55 & 56 Vict. c. 39), and secondly, by the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20). It is true that in *Brogden, In re; Billing v. Brogden* [1888],² North, J., expressed an opinion that he had no power to appoint a limited company as trustee. That *dictum*, however, ought not to be heeded now that the law has been altered in the manner indicated.

In case, however, it be held that the husband and wife are not entitled to appoint this corporation under the power of appointment in the settlement, it is still open for the surviving trustee to appoint the corporation under the statutory power conferred by section 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), since there is clearly no "contrary intention" expressed in the settlement in accordance with the provisions of sub-section 5—*Wheeler and De Rochow's Settlement Trusts, In re* [1895].³ Section 10, it is true, provides in its terms only for the appointment of a "person" or "persons"; but "person" there includes a limited company by virtue of section 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63).

W. E. Hollams, for the defendants, the surviving trustee and a child of the marriage, adopted the same arguments.

Cur. adv. vult.

Nov. 30.—SWINFEN EADY, J.—The question raised by this summons is whether, in the events which have happened, the plaintiffs may lawfully appoint the Ocean Accident and Guarantee Corporation, Lim., to be a trustee of the settlement. Undoubtedly corporations may be trustees. In *Att.-Gen. v. Landerfield* [1743],⁴ where a testator had devised real estate to St. Bartholomew's Hospital, the Attorney-General argued that, as corporations could not be seised to a use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust; but the report states that the Lord

(2) 23 L. J. N.C. 147; W. N. (1888), 238. ¶

(3) 65 L. J. Ch. 219; [1896] 1 Ch. 315.

(4) 9 Mod. 286.

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Chancellor (Lord Hardwicke) would not let him go on, nothing being clearer than that corporations might be trustees. And that the Court of Chancery (now the Chancery Division) will enforce and execute the trusts on which corporations hold property, whether lay or ecclesiastical, was established by *Att.-Gen. v. St. John's Hospital, Bedford* [1865].⁵ Until recently there was a difficulty in a natural person being a trustee jointly with a corporation, as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common — *Coke upon Littleton*, 190a; *Williams's Saunders* (1871), vol. 2, p. 716, Note 1; and *Law Guarantee and Trust Society v. Bank of England*.¹ The law in this respect has, however, been altered by the Bodies Corporate (Joint Tenancy) Act, 1899, which provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances, or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants. This provision is much more comprehensive than that contained in section 6 of the National Debt (Stockholders' Relief) Act, 1892, which provides that stock may be transferred to, and held in the names of, an individual and a body corporate, or of two or more bodies corporate, and that any such holding shall, in its relation to the bank, be deemed a joint tenancy. Under the Act of 1899 a joint tenancy is actually created, and the incidents of a joint tenancy will follow as far as may be. A limited liability company may be wound up and dissolved, but the Act of 1899 provides that where a body corporate is joint tenant of any property, then, on its dissolution, the property shall devolve on the other joint tenant. The plaintiffs' settlement contemplates that the trustees of it shall be able to

take and hold lands, and this a limited company can do, without licence in mortmain, under section 18 of the Companies Act, 1862. For these reasons I am of opinion that there is not any legal objection to the plaintiffs appointing the Ocean Accident and Guarantee Corporation, Lim., to be a trustee of their marriage settlement jointly with the continuing trustee.

Solicitors—Hollams, Sons, Coward & Hawksley, for all parties.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

WARRINGTON, J. } TRENCHARD, *In re*;
1904. } TRENCHARD v.
Nov. 18. } TRENCHARD.

Will—Construction—Annuity—Charge on Certain Freehold Land—No Specific Devise of the Land—Mixed Residue—Rentcharge or Legacy—Estate Duty—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 9 and 14.

Whether a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and renders the personalty not liable, depends upon whether, according to the true construction of the instrument in question, that is the result. Where there is a simple gift of a legacy or annuity with a mere charge upon real estate, the personal estate is not only not exonerated, but remains primarily liable.

A testator by his will gave his wife, so long as she should remain his widow, an annuity of 500l., and declared that the same should be a first charge on certain freehold land at Greenwich not specifically devised by the testator, and after giving certain legacies devised and bequeathed all his real and personal estate not otherwise disposed of to trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to stand possessed of the residue upon certain trusts:—Held, on the construction of the will,

(5) 34 L. J. Ch. 441, 450; 2 De G. J. & S. 621, 635.

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that the annuity was not a rentcharge, but a mere personal legacy payable like the other legacies out of the mixed residue of real and personal estate, but with a special charge if necessary on the land at Greenwich, and that consequently the estate duty was payable out of such residue as a testamentary expense.

Lomax v. Lomax (19 L. J. Ch. 137; 12 Beav. 285), *Shipperdson v. Tower* (1 Y. & C. C. C. 441), *Patching v. Barnett* (51 L. J. Ch. 74), *Buckley v. Buckley* (19 L. R. Ir. 544), and *Waring, In re*; *Greer v. Waring* ([1896] 1 Ir. R. 427), *considered.*

Statement of law in Theobald on Wills (5th ed.), p. 442, *modified.*

By his will dated November 20, 1897, Edward Penny Trenchard appointed certain persons executors and trustees, and gave certain legacies to his wife. The will then proceeded (clause 5): "I give unto my said wife so long as she shall remain my widow an annuity of 500*l.* payable by equal quarterly instalments the first at the expiration of three calendar months after my decease and I declare that the said annuity shall be a first charge on all my freehold properties situate at Greenwich in the county of Kent." Certain other legacies were then given.

The only other material clause (clause 7) was as follows: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees Upon trust subject nevertheless to the powers and directions hereinafter contained to sell call in and convert into money the same or such part thereof as shall not consist of money and with and out of the moneys produced by such sale calling in and conversion and with and out of my ready money to pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and to stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called 'my residuary estate') upon and subject to the trusts powers directions and conditions hereinafter contained." There was no specific devise by the testator of the freehold properties at Greenwich.

The testator died on April 3, 1899.

This originating summons was taken out by his widow for the determination by the Court of the question whether the estate duty payable on the testator's death ought to have been provided for out of the proceeds of the sale and conversion of the residuary real and personal estate, or whether any and what proportion thereof or the interest thereon ought to be borne by the plaintiff or charged upon the annuity of 500*l.* bequeathed to her by the will.

Rowden, K.C., and *J. Bradford*, for the plaintiff.—By the will in the present case a mixed fund of real and personal property has been created, out of which the testamentary expenses are to be paid. The estate duty payable on the annuity given to the widow is included in those expenses, unless it should be held that the annuity is a specific devise of part of the realty at Greenwich—*Jolley, In re*; *Neal v. Jolley* [1901].¹ It is, however, merely an ordinary personal annuity, and consequently it bears no part of the estate duty, which is a testamentary expense—*Clemow, In re*; *Yeo v. Clemow* [1900],² *Treasure, In re*; *Wild v. Stanham* [1900],³ and *Fearnside, In re*; *Baines v. Chadwick* [1902].⁴ Even since the passing of the Land Transfer Act, 1897, estate duty on realty does not come within "testamentary expenses"—*Sharman, In re*; *Wright v. Sharman* [1901].⁵ The personalty is not exonerated. Generally speaking, legacies include annuities. A gift of an annuity with a mere charge on land is not specific—*Theobald on Wills* (5th ed.), p. 129. The fact of the charge does not alter the character of the annuity—*Paget v. Huish* [1863].⁶ The annuity in question is not a specific legacy—*Davies v. Ashford* [1845].⁷

The testator could hardly have intended that this annuity should be a rentcharge, for if it was, and he had disposed of the

(1) 17 Times L. R. 244.

(2) 69 L. J. Ch. 522; [1900] 2 Ch. 182.

(3) 69 L. J. Ch. 751; [1900] 2 Ch. 648.

(4) 72 L. J. Ch. 200; [1903] 1 Ch. 250.

(5) 70 L. J. Ch. 671; [1901] 2 Ch. 280.

(6) 32 L. J. Ch. 468, 469; 1 H. & M. 663, 667.

(7) 14 L. J. Ch. 478; 15 Sim. 42.

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property at Greenwich in his lifetime, the gift would have failed altogether.

H. Terrell, K.C., and *E. Clayton*, for the trustees of the will and also for the residuary legatees.—The question here is whether the annuity is primarily payable out of the real estate, and not whether it amounts to a specific devise. If it did not pass to the executors "as such" the estate duty is payable out of the property itself—Finance Act, 1894, s. 9. The annuity being primarily payable out of the real estate at Greenwich, the personal estate is only liable if the real estate should prove to be insufficient, and in that event only is the annuity payable out of property which passes to the executors as such. Being a first charge on a particular estate, it is a legal rentcharge payable out of that estate—*Ramsay v. Thorngate* [1849]⁸—and the estate could only be sold subject to such rentcharge—*Dart on Vendors and Purchasers* (6th ed.), p. 691, and 2 *White and Tudor's Leading Cases in Equity* (7th ed.), p. 896.

A gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable—*Theobald on Wills* (5th ed.), p. 442. The cases there cited—*Shipperdson v. Tower* [1842],⁹ *Patching v. Barnett* [1881],¹⁰ *Buckley v. Buckley* [1887],¹¹ and *Waring, In re; Greer v. Waring* [1896]¹²—shew that the statement of the law is correct. *Lomax v. Lomax* [1849],¹³ also there cited, admittedly does not touch the point. It is true that in all the other cases express powers of distress and entry were given to the annuitants. Although no such powers are expressly given in the present case, that makes no difference, for those remedies are now conferred on owners of any annual sums charged on land by the Conveyancing and Law of Property Act, 1881, s. 44. The annuity is a rentcharge, and did not pass to the executors "as such" within section 9, sub-section 1 of the Finance Act, 1894,

and consequently the estate duty is not a testamentary expense, but must be borne proportionately by the annuitant—*Orford, In re; Cartwright v. Duc Del Balzo* [1895],¹⁴ *Sharman, In re; Wright v. Sharman*,⁵ *St. Albans (Duke), In re; Loder v. St. Albans (Duke)* [1900],¹⁵ and *Berry v. Gaukroger* [1903].¹⁶

Although the executors may pay the estate duty on the annuity—Finance Act, 1894, s. 6, sub-s. 2—the annuitant is liable for such duty—section 7, sub-section 4. A rateable part of the estate duty is a first charge on the annuity—section 9, sub-section 1—and may be recovered from the annuitant—section 14, sub-section 1.

The annuitant has only to pay interest on the estate duty apportioned in respect of his interest—*Parker-Jervis, In re; Salt v. Locker* [1898].¹⁷

If executors pay estate duty on realty, they do so as trustees and not as executors. Although here the residue is a mixed fund, the executors have a charge on the annuity for the estate duty payable in respect of the same, the duty not being under the circumstances a testamentary expense. *Jolley, In re*,¹ is not a decision to the contrary. In this case there is an exoneration of the residuary estate—*Forrest v. Prescott* [1870].¹⁸

Rowden, K.C., in reply.—The statement of law in *Theobald on Wills*, p. 442, is inconsistent with the statement at p. 129, and requires modification. It is not borne out by the cases cited in support of it by the learned author, each of which turned upon the construction of the particular will under consideration. The question as to charging a proportionate part of the estate duty on the realty does not arise, because the mixed fund of realty and personalty goes to the same persons—*Gray, In re; Gray v. Gray* [1896],¹⁹ and *King, In re; Travers v. Kelly* [1904].²⁰

WARRINGTON, J.—In this case a question is raised as to the incidence of estate duty;

(8) 18 L. J. Ch. 238; 16 Sim. 575.

(9) 1 Y. & C. C. C. 441.

(10) 51 L. J. Ch. 74, 78.

(11) 19 L. R. Ir. 544.

(12) [1896] 1 Ir. R. 427.

(13) 19 L. J. Ch. 137; 12 Beav. 285.

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(14) 65 L. J. Ch. 253; [1896] 1 Ch. 257.

(15) 69 L. J. Ch. 863; [1900] 2 Ch. 873.

(16) 72 L. J. Ch. 485; [1903] 2 Ch. 116.

(17) 67 L. J. Ch. 682; [1898] 2 Ch. 643.

(18) L. R. 10 Eq. 545.

(19) 65 L. J. Ch. 462; [1896] 1 Ch. 620.

(20) 73 L. J. Ch. 210; [1904] 1 Ch. 863.

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and the principal question is whether any part of the estate duty payable in respect of the testator's estate ought to fall upon an annuity given to his widow. That is the substance of what I have to decide.

In support of the case for the residuary legatees, who seek to throw a portion of the estate duty on the annuity, it is contended that the annuity is a part of the real estate—that is to say, that it is to be treated as a legal rentcharge payable exclusively or primarily (and in this case it comes to the same thing according to the argument) out of the real estate; and that, it being substantially a part of the real estate, it stands on the same footing as if there had been a specific devise of part of the real estate. It is further contended that the case comes within the case of *Jolley, In re*,¹ in which Mr. Justice Joyce decided that the estate duty payable in respect of specifically devised real estate must fall upon that estate. In truth the question I have to decide is whether, upon the true construction of the testator's will, the annuity is part of the real estate and ought so to be treated.

The material parts of the will for the determination of this question are contained in paragraphs 5 and 7. [His Lordship read the clauses, and continued:] That is the whole of the will which it is necessary to read for the purposes of my judgment. At first sight I think one may say that there seems little to be said on the words of the will for the contention that the annuity is really part of the real estate. It is an annuity given in the usual and ordinary form for describing a personal annuity. It is true that it is declared to be a charge on specific real estate; but that, again, looks at first sight like nothing more than a security for payment of the annuity. According to the general rule, an annuity is included amongst legacies, and I should have thought that that rule would have extended to this annuity, especially as the estate at Greenwich is not specifically devised, but is included amongst the items devised by clause 7. On the words of the will, standing alone, I should have had little difficulty in arriving at the conclusion that the annuity was a mere personal legacy secured by a charge on

land. But I was referred to certain authorities and to a statement of the law contained in a well-known text-book—*Theobald on Wills* (5th ed.). That statement is to be found at p. 442. It is this: "A gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable." If that is a correct statement of the law, it is obviously applicable to the will with which I have to deal, and I should be bound to hold that the annuity was a legal rentcharge and nothing less, and the argument of counsel for the residuary legatees might prevail as to that part of it. What the result would have been is another matter. But is that a correct statement of the law, or does it require some modification? I was referred to all the cases which the learned author cites in support of it, except *Lomax v. Lomax*,¹³ which both parties agree does not support the proposition. I have been referred to, and have considered, all the other cases which are cited, and I may say that the result of that consideration is that they are all cases depending upon the construction of the particular will in each case.

The first case is *Shipperdon v. Tower*.⁹ There the testator, after directing his debts, funeral and testamentary expenses to be paid, bequeathed several annuities and pecuniary legacies, and declared that the several annuities thereinbefore bequeathed should be charged upon his real estate. I may say in passing that it is not in that case a charge on specific real estate, but upon all his real estate. By a subsequent clause he charged all his real estate with the payment of all his debts, funeral and testamentary expenses and legacies, or of such part thereof as his personal estate not specifically bequeathed should be insufficient to pay and satisfy. It is not mentioned in the headnote, but I may add that the annuities were charged on the real estate, and the will expressly gave powers of distress and entry to the annuitants. It was held that the annuities were primarily, if not solely, charged upon the testator's real estate, and that under the term "legacies" the testator did not mean to include annuities. If one looks

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at it, that must have been the result, for he charged the annuities on real estate, and he gave the annuitants powers of distress and entry, but he charged the legacies on the real estate only in relief of the personalty. It is plain that he meant to make a distinction between annuities and legacies. It is difficult to see how the Court could come to any other conclusion. *Shippardson v. Tower*,⁹ therefore, stands entirely alone, and turns on a question of construction. The next case is *Patching v. Barnett*.¹⁰ That is a case which requires rather more consideration. It is a long case, and there are a good many points in it; but the only point which I need refer to is this: The testator devised real estate to trustees upon certain trusts, and by a codicil he gave an annuity to E. S. during her life, and charged the same on two specific real estates, with usual powers of distress and entry in case the annuity should be in arrear. In the first place it is to be noticed that that is a gift which comes entirely by itself in a codicil, and deals with nothing else than the annuity. It charges it on specific real estate, and gives express powers of distress and entry. The case came before Vice-Chancellor Malins and then before the Court of Appeal. The Master of the Rolls dealt with it very much as I have already indicated. He said, "Here is a gift by a codicil to a lady of an annuity or yearly sum, which the testator directs to be charged upon two certain farms, and he directs that if it is in arrear or unpaid, it shall be lawful for her to distrain 'to the end and intent that she may be fully paid and satisfied the annuity.' That is how she is to be paid, and then if it is in arrear for a longer time it is to be lawful for her 'to enter into and upon and to hold all and singular the hereditaments hereby charged with the payment of the said annuity or yearly sum of 100*l.* and every part thereof, and to receive and take the rents and profits thereof to her and their own use until she and they shall be therewith and thereby or otherwise fully paid and satisfied the said annuity and the arrears thereof due at the time of such entry, and which shall afterwards accrue and become due during her and their

being in possession of the hereditaments, together with all costs, charges and expenses,' and so on. It appears to me to be too plain for argument that that is the legal limitation of a rent-charge. The words 'annuity or yearly sum' no doubt may describe both a personal annuity and a rentcharge. When you look to the subsequent limitation and on what it is charged, there is a rent-charge"—I suppose that by "subsequent limitation" the Master of the Rolls must have meant that in the codicil. He cannot be referring to the limitation in the will—"There is no operation or exoneration of personal estate. The personal estate is not charged at all. As I said before, those cases which say that where there is a bequest payable out of personal estate the mere addition of a charge on real estate does not exonerate the personalty, have no application to a case where, from the construction of the instrument, the Court is led to the conclusion that the personal estate is not liable." The Master of the Rolls thought the case ought to be decided according to the construction of the particular instrument, and that the true intention of the testator expressed in the codicil was that E. S. should have a rentcharge charged on the estate, and not an annuity. It was a case which depended on the construction of the codicil. Herecognised the authority of cases which say that "where there is a bequest payable out of personal estate the mere addition of a charge on real estate does not exonerate the personalty." That case is undoubtedly the one which comes nearest to supporting Mr. Theobald's proposition, but, for the reason I have given, I do not think that it really does support it. It depends on the construction of the particular instrument. The next case is *Buckley v. Buckley*,¹¹ where the headnote is not quite accurate. It is necessary to look at the full statement of the will in the body of the report. The testator gave a great number of annuities or rent-charges. I will take one of them as an example. He says, "I give, devise, and bequeath unto my wife, for and during the term of her natural life, one annuity or yearly rentcharge of 150*l.*, the same to be a first charge on my property in

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High Street, Belfast, and to be payable on the days hereinafter mentioned." He gave another annuity or yearly rentcharge of 150*l.* to his daughter, to be a second charge on his property in High Street, Belfast. This annuity he limits not only to his daughter, but to her children or other issue; and then he gives to his son Michael 100*l.* a year during his life (not calling it an annuity), to be a third charge on his said property in High Street. Then follows another annuity or yearly rentcharge of 65*l.* a year to another son, to be a fourth charge; and a similar annuity to a third son, to be a fifth charge on the property. Again, in the construction of this will it seems obvious that what the testator was dealing with was this property, and that he was giving his wife and children charges on it. The decision of the Master of the Rolls was that they were rentcharges, and not payable out of the personal estate. In doing so he professes to be following *Lomax v. Lomax*,¹³ *Shipperdson v. Tower*,⁹ and *Patching v. Barnett*.¹⁰ Therefore *Buckley v. Buckley*¹¹ also depended upon the construction of the particular will. The next case cited is *Waring, In re; Greer v. Waring*.¹² That was even a more special case. The testator devised and bequeathed all his real and leasehold estate to his son L., and, after giving legacies to his daughters and others, directed that his daughters should reside with L. while they remained unmarried; and in case of any of them not agreeing to do so he directed as follows: "I direct that my son L. shall pay to them the annual sum of 200*l.*, said sum to be paid to them or any of them so long as they or any of them shall remain unmarried; and I charge all my real and freehold property with said annual sum of 200*l.*; and in case all my said daughters shall marry the said annual sum of 200*l.* shall cease." He gave the residue of his property, real and personal, to L., subject to the payments of his debts, funeral and testamentary expenses, and appointed L. his executor. He died possessed of freehold and leasehold property and ordinary personalty, and it was held that the annuity was charged only on the freeholds, and not on the leaseholds or other personalty. What was the meaning of

that? The daughters were to live with the devisee of the real estate. If they did not live with him he was to make them an allowance until they married. What was more natural than to find that the testator had charged that annuity on the real estate which he had given to his son? I may mention this also, that, having given to him real and leasehold property, he charged the 200*l.* on the freeholds only, thus shewing an intention to charge it on that property only, and not on leaseholds. It is not an annuity at all: it is a charge on the freehold property. That seems to me to be a case which does not support the general proposition, but to depend upon the construction of the will. I come to the conclusion, therefore, that the statement in *Theobald on Wills* is not, as it stands, an accurate statement of the law. It is only accurate if it is read to be "A gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and the personalty is not liable if according to the true construction of the instrument in question that is the result."

Putting that aside, what is the position when, in the absence of anything else to lead to an opposite conclusion, a testator gives an annuity and charges it on real estate? For that purpose I will refer to *Paget v. Huish*.⁶ I will not refer to the headnote, but to part of the judgment of Vice-Chancellor Page-Wood, in which he lays down general principles of law. He says: "The question on this special case is one which very frequently arises, whether certain annuities are given only out of particular property, or whether, though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question, whether the annuities are payable out of corpus or only out of income. As to the first point, the authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will. The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the

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personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts. Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it. The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable." Under which class does this annuity come? I think it comes within the first class. It is a simple gift of an annuity with a charge on real estate. There is nothing beyond that. It is contended that there is something in this will which enables me to hold that this is a mere rentcharge or at least payable primarily out of the real estate. It is said that since the Conveyancing Act, 1881, every annuitant has the right of distress and entry as a security for his annuity; that I must presume that the testator knew that, and therefore omitted to insert express powers of distress and entry in the gift; and that therefore this case is on all-fours with *Patching v. Barnett*.¹⁰ But I have to determine this case as a question of construction. To shew that the testator knew that the annuitant would have powers of distress and entry carries the case no further, because, even if this was a personal annuity, since the Conveyancing Act, if it was charged on land, the annuitant would have powers of distress and entry. So that it throws no light upon the point, for the Conveyancing Act applies as much to a personal legacy with a charge on real estate as to a rentcharge.

The conclusion I have come to is that this is a mere personal annuity, not payable primarily out of the Greenwich estate, but payable (I will not say primarily) out of the personalty. This is a mixed fund, and the annuity is payable, in the same manner as the other legacies, out of the mixed fund, but with a special charge, if necessary, on the Greenwich

property. In these circumstances I need not deal with the question how far the estate duty on a rentcharge, where the land is included with the personalty as a joint gift, is covered by a direction to pay testamentary expenses. But I may say that I can see a great deal of difference between a direction to pay testamentary expenses out of personalty and a direction to pay them out of a mixed fund. I think an argument may well be founded on that distinction, but I need not decide anything of the kind now. I hold that this is simply a legacy, payable like the other legacies, and the incidence of the estate duty will follow from that.

Solicitors—Harston & Bennett; Ward, Perks & McKay.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

KEKEWICH, J. { W. TASKER & SONS,
1904. LIM., *In re*;
Dec. 14, 16, 20. { HOARE v. W. TASKER
& SONS, LIM.

Company—Debenture—Return to Company on Repayment of Debt—Transfer—New Issue—Rights of Purchasers—Priorities.

A company issued a series of debentures to rank *pari passu* as a first charge, the company not to be at liberty to create any mortgage or charge on the security in priority to or *pari passu* with those debentures. Certain of the debentures having been issued as security for loans were, on repayment of the debts, returned to the company with blank transfers. These debentures were subsequently assigned to fresh holders for value by completing the transfers:—Held, that this transaction was an issue of new debentures, and that the debentures so dealt with could not rank *pari passu* with the remaining debentures of the original series.

Further consideration and summons.

The question arising on the Master's certificate in a debenture-holders' action

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was whether a transaction by which the company issued to applicants debentures of a particular series, which had been returned by their original holders on payment-off of the loans in respect of which they had held them, was a transfer of them as original debentures, with the rights attached thereto, or an issue of new debentures.

W. Tasker & Sons, Lim., was a company incorporated in April, 1896, and by the articles of association the directors had extensive powers to borrow money not exceeding the nominal amount of the capital, and to secure the repayment of the same by the issue of debentures charged upon the property of the company, and any debentures might be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise.

The material articles were as follows:

Article 49: "Every debenture or other security created by the company may be so framed that the same shall be assignable free from any equities between the company and the original or any intermediate holders."

Article 112 (k): "The directors shall have power to borrow or raise any sum or sums of money on such security and upon such terms as to interest or otherwise as they may deem fit and for the purpose of securing the same and interest, or for any other purpose, create, issue, make and give respectively any perpetual or redeemable debentures or debenture stock, or any mortgage or charge on the undertaking or the whole or any part of the property (present or future) or uncalled capital of the company, and any debentures or debenture stock may be issued to or deposited with any person lending money to the company by way of security collateral or otherwise."

Having power to issue the first mortgage debentures up to 35,000*l.*, the company in July, 1896, issued debentures to the plaintiff and others subject to the following conditions (*inter alia*) indorsed thereon:

"(1) This debenture is one of a series of debentures of 20*l.*, 50*l.* and 100*l.* each issued or about to be issued by the Company for an aggregate amount of

35,000*l.* and the said debentures are all intended to be in the same form.

"(2) The debentures of this series shall rank *pari passu* as a first charge upon the premises within charged without any preference or priority one over another and shall until the moneys hereby secured shall become payable be a floating charge upon such premises but so that the Company is not to be at liberty to create any mortgage or charge thereon in priority to or *pari passu* with the said debentures."

"(4) A register of the debentures will be kept at the Company's registered office wherein there will be entered the names addresses and descriptions of the registered holders and particulars of the debentures held by them respectively.

"(5) The registered holder of this debenture will be regarded as exclusively entitled to the benefit thereof and the Company shall not be bound to enter in the register notice of any trust affecting this debenture or to recognize any right therein.

"(6) Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his legal personal representative."

"(9) The principal moneys and interest hereby secured will be paid without regard to any equities between the Company and the original and any intermediate holder hereof and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the Company."

In May, 1899, the company required further capital and obtained loans amounting to 1,700*l.* from two gentlemen named Ashby and Herbert, to whom they issued debentures of the above series to twice the amount of their respective loans.

The total amount of debentures issued by the company did not exceed the limit of 35,000*l.*

From time to time the company paid off parts of these loans, and upon each occasion received back from the lender debentures of twice the value of the money so repaid, and also, by request of the company, a transfer of such debentures executed by the lender in blank, except as to his own name and address.

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As the company received applications for new debentures, on payment of the amount secured by them, it issued to such applicants for full face value some of the identical debentures which had been returned by the first lenders, together with the transfers in respect thereof, with the blanks filled in by the company and duly registered. Others of the debentures were deposited by the company (but without the corresponding transfers) as security to persons who made advances.

In July, 1903, a receiver and manager of the company's business was appointed at the instance of the plaintiff, and in August, 1903, the company passed a resolution for voluntary winding-up.

In the Master's certificate the plaintiff and other original holders of the debentures were entered in the first schedule, and the various holders of the returned debentures which had been dealt with as above were entered in parts 1, 2, 3, and 4 of the second schedule. The claim of the latter to rank as debenture-holders *pari passu* with the holders entered in the first schedule, and to participate in the benefits of the trust deed, was adjourned into Court.

Ashton Cross, for the plaintiff.

Sheldon, for other debenture-holders in the first schedule.—The debt was repaid by the company and not by the new holders of the debentures, which are therefore not entitled to rank with the first mortgage debentures. The company is in the position of a mortgagor entitled to a reconveyance, but it cannot keep the security alive for its own benefit to the prejudice of other mortgagees. An end was put to the security when the debt was repaid, and it was *ultra vires* to re-issue the debentures under the guise of transferring them. The new holders can have no better right to share with the other holders of the debentures of the same series than the company purchasing its own debentures in *George Routledge & Sons, Lim., In re* [1904].¹ By its articles the company can borrow further money as between itself and the shareholders, but not as against the debenture-holders.

An intention of merger is shewn in the execution of transfers at the time of repayment. Condition 2 prevents the re-issue of a debenture paid off, and condition 9 is not applicable to debenture-holders *inter se*. This transaction was a fresh issue, not a further issue of the original debentures by way of collateral security, as in *Regent's Canal Ironworks Co., In re* [1876].²

A. F. Peterson, for certain debenture-holders in the second schedule.—In respect of one debenture the holder was a transferee, as she applied to the company for it prior to its return on repayment. All the debentures are good in the hands of the present holders who had no notice of any irregularity; they are equivalent to "bearer debentures" under the bargain contained in the conditions indorsed on them. *George Routledge & Sons, Lim., In re*,¹ does not apply, as here the company has never itself become registered holder or transferee. The restriction in the articles of association on the borrowing powers of the company binds only the shareholders, and even if the company acted *ultra vires*, the holders of these debentures, when registered, are entitled to rank *pari passu* as having a first charge.

Muir Mackenzie, for other debenture-holders in the second schedule, adopted *A. F. Peterson's* argument.—In *George Routledge & Sons, Lim., In re*,¹ the debentures were transferred to the company, and there was therefore merger, so that a subsequent issue of them could not be good. Here the company intended to keep the debentures alive, and consequently there was no merger—*Thorne v. Cann* [1894].³ In the case of the debentures deposited without transfers, this was a deposit by way of collateral security within article 112 (k).

E. Manson, for further debenture-holders in the second schedule, adopted *A. F. Peterson's* and *Muir Mackenzie's* arguments.—The company never took a transfer, and there could be no merger, as the legal title remained outstanding. There was no condition as to equities in *George Routledge & Sons, Lim., In re*.¹ Conditions 5 and 9 come into operation, and must be regarded as binding on all the other holders of

(2) 45 L. J. Ch. 360, 620; 3 Ch. D. 48, 411.

(3) 64 L. J. Ch. 1; [1895] A.C. 11.

(1) 73 L. J. Ch. 848; [1904] 2 Ch. 474.

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debentures of the series of which these still form part.

Gatey, for the trustee of the debenture trust deed.

KEKEWICH, J.—The question in this case is of some importance to those interested in the issue of debentures, and I think that it is completely new. I am not considering any claim against the company. All these debentures specified in the second schedule to the certificate, parts 1, 2, 3, and 4, may be perfectly good debentures against the company, and yet the point which I have to decide may be decided against the holders of those debentures. The question I have to decide is whether they are to rank *pari passu* with the debentures specified in the first schedule.

The articles of association conferred very large borrowing powers on the company, and expressly authorised the issue of debentures by depositing them as security for moneys advanced.

I must take the Master's certificate as it stands. The claims are for convenience divided into four different parts, but they all fall under one head, and there is no distinction in substance between the four different classes. The company issued debentures for 35,000*l.*, and from time to time paid off some of those debentures. The certificate is distinct as to that. On such payment-off the company requested the debenture-holders whom they had paid off to execute a blank transfer—that is, a transfer containing the name of the transferor, but leaving a blank for the name of the transferee. At a later date, as part of an independent transaction, the company borrowed money from third persons, and on such borrowing filled in the name of those borrowers as transferees, and registered each as the transferee. Does that constitute a transfer of the original debenture, or does it constitute an issue of a new debenture belonging to a series different from the original debentures? I presuppose that there is such a series, and as a matter of fact there is no doubt about it. Looking at one of these impugned debentures, it appears that each holder of these debentures is told as part of his contract not only with

the company, but with the other holders, that he is to have a debenture which will rank *pari passu* with all the other debentures of that issue; but that no other debentures are to be issued other than this series, which shall rank *pari passu*. I have to consider whether what has been done constitutes an attempt to evade the condition and make other debentures rank *pari passu* with those held under the first issue. There is no distinction between the different classes in the second schedule. In every case the transaction was the same in substance. The debt was paid off by the company, and there was a re-issue for advances, so that the same piece of paper was re-issued and a transfer executed in the manner I have mentioned.

Mr. Justice Buckley had recently before him a case of *George Routledge & Sons, Lim., In re*,¹ which was quite different from this, but which no doubt throws some light upon it. There the company had gone a step further. On the payment-off the company took an assignment to themselves and then re-issued the debentures, and the learned Judge held that that was undoubtedly bad. He expressed himself in plain language: "The result to my mind is that the debt and the security were both gone." No doubt those who contested the validity of the debentures in question in that case put it on the ground of merger; but the learned Judge did not state any principles or cite any cases on that difficult branch of the law. What he did say was that both the debt and the security were absolutely gone; and although the merger doctrine may have been present to his mind, he did not go upon any technical ground of that kind, but went on the substance of the thing—that the debt was paid off. That is shewn more clearly by the assignment of the debentures to the company itself.

To my mind, the same result follows here. I think that everything depends on the payment-off. No doubt it was an acceleration. The debt was not due by the terms of the debenture; but the company could at any time buy up its debentures and secure them, if the creditors were willing, so as to prevent any charge against the company. Of course

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the debt is gone, and I think that the security must be also gone. It was perfectly competent for the company to arrange for the transfer of the debentures to any creditor. In that case the company became merely an intermediary between the person who desired to transfer and the person who wished to advance the money. If that were the substance of the transaction, there would be no difficulty about it, but I find there was nothing paid at the time. At a later period some one was found to advance the money. I cannot see that there was any power in the company to do anything of the kind. I am not considering what the rights of these debenture-holders are against the company; it may be that as against the company the registered holders are undoubtedly right. It seems to me that upon repayment the debt was gone, and that when the company borrowed further money, whether by depositing the debentures as collateral security or by issuing them in the ordinary way, they issued new debentures. I do not think the case of the debenture applied for prior to the date of the repayment by the company is distinct from the others. Therefore I hold that the certificate is right, and that the only persons entitled to rank as holders of this series of debentures for 35,000*l.* are those mentioned in the first schedule.

Solicitors — Wood & Wootton, for plaintiff;
E. Bevir, for other holders of original debentures; Taylor, Hoare & Pilcher, Mackrell, Maton, Godlee & Quincey, and Turner & Co., for different holders of new debentures;
Percy J. Nicholls, agent for A. J. Ellaby, Southampton, for trustee.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.

FARWELL, J. } ATT.-GEN. v.
1904. } METROPOLITAN ELECTRIC
Oct. 28. } SUPPLY CO.

*Electric Lighting—County of London—
“Areas of supply”—Undertakers—Prohibition against Supplying Beyond “area of supply”—Limited Liability Company—
Restriction on General Trading Powers.*

A limited liability company incorporated under the Companies Act, 1862, and having for its objects the production and supply generally of electric, magnetic, or other force for lighting and other purposes, undertook to supply certain statutory “areas of supply,” within the administrative county of London, with electric energy, under special powers conferred on it by Act of Parliament, and by Provisional Orders confirmed by Act of Parliament, all of which contained a prohibition against the undertakers supplying energy, or erecting or laying down any electric lines or work beyond their statutory areas of supply, without the authority of Parliament or the licence of the Board of Trade:—Held, that the prohibition did not operate merely in connection with and relation to the particular area in question, but was of universal application, so that the company could be restrained from carrying on its business and supplying energy in any other place whatsoever, however far removed from its areas of supply, and although such business was carried on and supply furnished quite independently of any of the company's special statutory powers.

Action by the Attorney-General on the relation of the Willesden Urban District Council, and by the council, for an injunction to restrain the defendants, the Metropolitan Electric Supply Co., Lim., from contravening the provisions prohibiting them from supplying energy beyond their area of supply as defined in the Act of Parliament, and the Orders confirmed by Act of Parliament, under which their statutory undertakings were held.

The relators were the District Council for the Urban District of Willesden, in the County of Middlesex, and by virtue of the Willesden Electric Lighting Order, 1898, confirmed by the Electric Lighting

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Orders Confirmation (No. 7) Act, 1898, were authorised to supply electrical energy within the said urban district, and, by virtue of the Willesden Urban District Council Act, 1903, were also empowered to supply electrical energy to (amongst others) any company owning any railway within the said urban district for use therein.

The defendants were a limited liability company, incorporated in 1887 under the Companies Act, 1862 to 1886, and the objects of the company, as stated in their memorandum of association, were (*inter alia*) the producing, transmitting, storing, and using electric, magnetic, or other force for lighting and other purposes.

By the Metropolitan Electric Lighting Act, 1889 (52 & 53 Vict. c. cxcvi.),¹ the

defendant company were, subject to the provisions of that Act and the Electric Lighting Acts, 1882 and 1888 (therein called "the principal Act"), authorised to erect and maintain electric lines and works and to supply electric energy within the parish of St. Martin-in-the-Fields, in the county of Middlesex, and certain other parts of the Metropolis (in the Act defined as "the area of supply").

By the Metropolitan Electric Supply Company (Mid-London) Lighting Order, 1889, similar powers were given to the defendant company over an area of supply comprising St. Giles district, Holborn district, and the Strand district, and by the same company's West London Lighting Order, 1889, similar powers were given to the defendant company over an area of supply comprising the parish of St. Marylebone. Both these Provisional Orders were confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1889. By the defendant company's Paddington Lighting Order, 1890, confirmed by the Electric Lighting Orders Confirmation (No. 12) Act, 1890, similar powers were conferred on the company over an area of supply comprising the parish of Paddington. The prohibitions and conditions contained in these Provisional Orders respectively were similar to the provisions in the same behalf contained in the Metropolitan Electric Lighting Act, 1889.

Owing to the great increase in the September one thousand eight hundred and ninety

"If the undertakers supply energy or erect or lay down electric lines or works in contravention of this section the Board of Trade on such terms as they may think just may make an order declaring that the powers of the undertakers under this Act shall cease. . . ."

Section 6: "The undertakers within a period of six months after the passing of this Act and before exercising any of the powers by this Act conferred on them in relation to the execution of works shall show to the satisfaction of the Board of Trade that they are in a position fully and efficiently to discharge the duties and obligations imposed upon them by this Act throughout the area of supply."

Section 9: "Subject to the provisions of this Act and the principal Act the undertakers may supply energy within the area of supply for all public and private purposes as defined by the said Act"

(1) The material sections of the Metropolitan Electric Lighting Act, 1889, were as follows:

Section 3: "The undertakers for the purpose of this Act are the Metropolitan Electric Supply Company Limited being a company registered under the Companies Acts 1862 to 1886 with limited liability and having its initial capital of five hundred thousand pounds divided into fifty thousand shares of ten pounds each with power to increase such capital.

"Provided that if the undertaking or any part thereof is at any time purchased by or transferred to any other body or persons in accordance with the provisions of this Act or of the principal Act such body or persons shall from the date of such purchase or transfer be the undertakers in relation to such undertaking or part thereof for the purposes of this Act in lieu of the company above mentioned.

"The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other company or person supplying energy under any license Provisional Order or special Act within the administrative County of London unless the undertakers are authorised by Parliament to do so."

Section 5: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament or under a license granted by the Board of Trade under the principal Act:

"Provided that where the undertakers were on the twentieth day of May one thousand eight hundred and eighty-nine supplying or under any binding agreement to supply energy to any premises beyond the area of supply they may continue to supply or supply energy to such premises until the twenty-ninth day of

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demand for the supply of electric current, and in order to meet this demand, the company found it practically impossible to provide adequate station accommodation within their areas of supply. They accordingly acquired land at Acton and Willesden, and constructed a large electrical generating station and works thereon. In order to obtain statutory powers to supply from the Willesden electrical generating station and works electric current to their distributing stations within the several areas of supply above mentioned, the defendant company obtained an Act—the Metropolitan Electric Supply Company Act, 1898² (61 & 62

(2) The material provisions of the Metropolitan Electric Supply Company Act, 1898, are as follows:

Section 2: "It shall be lawful for the Company to hold and use as a station for generating electric current or electrical energy certain lands recently acquired by them in the parishes of Willesden and Acton and County of Middlesex or some part thereof viz.:—

Lands bounded on the south or south-west by the Grand Junction Canal on the north-west by Acton Lane on the north by the London and North-Western Railway and on the east by the Midland and South-Western Junction Railway;

and to establish and work on those lands plant for generating electrical energy and for other purposes incidental to or connected with their undertaking or business."

Section 12: "Nothing in this Act contained shall be deemed to release the Company from any of the duties liabilities or conditions imposed upon them by the Metropolitan Electric Supply Company (Paddington) Lighting Order 1890 or impose upon the local or other public authority any further obligation or liability with respect to the sale or purchase of the undertaking of the Company than would have existed if this Act had not been passed."

Section 13: "Nothing in this Act contained shall be deemed to release the Company or the Vestry of the parish of St. Marylebone from any of the duties liabilities obligations or conditions imposed upon them by the Metropolitan Electric Supply Company (West London) Lighting Order 1889." . . .

Section 16: "It shall be lawful for the Company to use any of their cables or wires and any mains or cables connected therewith for the transmission of electric current or electrical energy from their works on the said lands at Willesden and Acton to the several distributing stations of the Company in their Paddington Marylebone and Mid-London areas defined by the several Provisional Orders hereinbefore mentioned and the area in Saint Martin-in-the-

Vict. c. ccxxxv.)—to empower them to use the said lands "for the purpose of their undertaking and to lay certain cables or wires in streets and along the Grand Junction Canal and for other purposes."

By the Metropolitan Electric Supply Company Act, 1901 (1 Edw. 7. c. ccxxviii.), the company were authorised to lay down a second and additional set of mains connecting their station at Willesden with their areas of supply.

In December, 1903, the defendant company commenced and since then continued to supply electric energy to the London and North-Western Railway Co. on their premises adjoining the Willesden works of the defendant company and within the urban district of Willesden, but such supply did not involve the crossing of any public or private roads or any interference with the rights of any person or corporation. The Willesden Urban District Council objected that this supply was a violation of the statutory prohibitions contained in the defendant company's Acts and Orders above referred to, and was illegal, and that the defendant company had no statutory or other powers authorising them to supply electrical energy in the said urban district, and were not entitled to supply electrical energy outside their statutory areas of supply. This action was consequently instituted by the Attorney-General on the relation of the district council.

Uppjohn, K.C., and J. W. Greig, for the plaintiffs.—This is a limited company, and, although its memorandum gives it the fullest general powers, it has gone to Parliament for special powers to open roads and lay down mains, &c., and the bargain is that in consideration of getting those powers within the statutory area it will subject itself to the restrictions contained in the Act. Section 3 of the company's Act of

Fields and the neighbourhood defined by the Metropolitan Electric Lighting Act 1889 and to use the generating station on the said lands for the purpose of supplying electric current or electrical energy within the several areas or districts over which the Company have now powers of supply or over which they may hereafter have such powers under any special Act or Provisional Order.

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1889, stating the capital of the company, read in connection with section 6, shews that the Legislature took into consideration the financial condition of this company when conferring upon it these special powers. Section 5 contains an absolute prohibition against supplying energy outside the area of supply except under the authority of Parliament or a licence by the Board of Trade. This Act, and the Provisional Orders having the force of statutes, all contain this prohibition, which is part of a general system imposed by the Board of Trade on every company which becomes an undertaker, and now by statute imposed not only on every company, but on everybody, whether local authority, company, or person. There is nothing in the company's subsequent Acts of 1898 and 1901 which would lead the Court to the conclusion that it was intended to sweep that restriction aside and enable the defendant company to engage in any business or any operation connected with the supply of electrical energy which it can do under its original powers conferred by registration of its memorandum of association. The preambles of those two Acts shew that the Legislature meant to facilitate the defendant company in performing their statutory obligations in respect of their statutory areas of supply, and it was never contemplated that it should set them free from any prohibition or restriction to which they were subject. In section 16 of the Act of 1898, "undertaking" means the "statutory undertaking" referred to in the preamble to the Act, and not the undertaking of the company generally.

Cripps, K.C., Jenkins, K.C., and Sargant, for the defendant company.—This was first a limited liability company, which by its articles could have set up a generating station anywhere. The company then sought special powers in the Metropolitan area, but there was no intention to interfere with the general powers of a limited liability company. As regards each area of supply, and limited to each area of supply, it was given special powers and put under special disabilities. These prohibitions are put in for the protection of the companies concerned, and to prevent them from competing with companies in

an adjoining area, as was done in the case of water and gas undertakings. The object of the prohibition was to prevent raiding in adjoining areas, not to impose a general disability. Even if there was such a disability before the Act of 1898, it was taken away by that Act, which enabled the Willesden station to be erected and used in a general way and for all purposes, without any limitation. The relator council has no monopoly to supply electric light within its own district, and, but for the intervention of the Attorney-General, it could not be heard in this action at all. It has not suffered or pleaded damage. The Act of 1898 gives the defendant company power to use lands at Willesden for the purpose of its undertaking, which means its undertaking as a whole. It has not ceased to be a limited company. It has a perfect right to set up works in Durham, for instance, to-morrow. In this Act the company is dealt with *quoad* a limited company in an unlimited position. It was found to be impossible to make all the statutory areas self-contained districts. The company then, as a limited company, commenced erecting these works, as it was entitled to do, without any statutory powers, for ordinary generating purposes. In order to connect these works with the statutory areas and to supply those areas, the company needed statutory powers, which it sought and obtained by this Act. Had the company erected these works without statutory powers, merely as a limited company, it might have been liable to a general injunction against nuisance and to a great many other costly proceedings which would have driven it out of London. This Act, however, gives the company a statutory right, without any limitation of any sort. The prohibition clause in the earlier Act and Orders is not absolute, but only a prohibition, unless otherwise empowered by Parliament or the Board of Trade. Parliament did otherwise empower by the general terms of the Act of 1898.

The Act of 1889 merely empowers the company. It does not impose a limitation. The Act is confined to the county of London. Willesden is outside the county. The prohibition against purchasing or acquiring the undertaking of

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another company relates only to the administrative county of London. The whole of this Act, properly understood, has to do with the question of "districting." It was meant to protect the statutory areas against each other. Section 5 refers to "undertakers" for the purpose of this Act. That means undertakers *qua* undertakers. It does not affect a limited company as regards its general position at all, and if it can supply outside its area, without in so doing using any of its statutory powers, it is left at liberty to do so. If the plaintiffs are right, the company would, under the Act, have had only to abuse its statutory powers sufficiently to lose those powers, and to have become absolutely free at Willesden, and that would be a *reductio ad absurdum*. With regard to the question of finance, there is nothing in the company's having to give security inconsistent with the company retaining its general powers. The company merely has to satisfy the Board of Trade that it has sufficient financial ability to carry out the specific powers. In section 5, moreover, the prohibition is against supplying energy "beyond" the area of supply. That imports that the company must not use the area of supply as a basis from or through which to supply districts adjoining or lying beyond the boundaries of its statutory area of supply. It must be construed in connection with and in relation to the area of supply. Speaking strictly, it would be absurd to describe Edinburgh, or Durham, as being beyond London. If the Legislature had intended to prohibit the company from carrying on its business at those places, or elsewhere, it would have imposed a prohibition in general terms, and not merely prohibited it from supplying energy "beyond" the area of supply, in an Act paying special attention to the districting into areas of supply of the administrative county of London.

Uppohn, K.C., replied.

FARWELL, J.—This is an action by the Attorney-General in which he complains that the defendants, the Metropolitan Electric Supply Co., Lim., are contravening the prohibition in the Act of

Parliament and the Orders confirmed by Act of Parliament, under which their undertakings are held, and seeks for an injunction to restrain them. Of course, the Attorney-General can maintain such an action irrespective of the fact that the Willesden Urban District Council, who join as relators for the purpose of costs, would have no right of action themselves.

Now the question really turns on the construction of two Acts of Parliament. I should say that the defendants have three statutory areas, all within the administrative county of London. The wording of the negative clauses is practically identical in all three, and I propose only to refer to the Act of Parliament. The plaintiffs have recently found that they were unable conveniently to generate sufficient electricity in their several areas for the supply of their customers within those areas. They have accordingly obtained statutory authority to set up a generating station at Willesden, which is without those three areas and also without the administrative county of London, and they have also acquired statutory authority to supply their areas from that generating station. Before turning to the Acts of Parliament under which the statutory undertakings in question are held, I should mention that the defendant company is not formed under any private Act of Parliament, but is a limited company under the Act of 1862 and the following Acts, and it is not suggested that there is anything *ultra vires* the powers of its memorandum of association; but for the purpose of the argument in this case it is in very much the same position as an individual would be if he chose to do this as a private speculation.

The first of the defendant company's Acts is dated August 26, 1889, and it defines "the undertakers" as "the Metropolitan Electric Supply Company Limited being a company registered under the Companies Acts 1862 to 1886 with limited liability . . . and having its initial capital of five hundred thousand pounds divided into fifty thousand shares of ten pounds each." Before I go through the two or three sections to which it is necessary

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to refer, I should perhaps say that, having regard to the arguments that I have heard, I think it is germane to the subject to consider what the Legislature had in view in making the provisions which I find in the Act of Parliament itself. As Lord Halsbury said in *Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs, and Trade Marks* [1898],³ referring to *Heydon's Case* [1584],⁴ "We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy." That is a very general way of stating it, but no doubt one is entitled to put one's self in the position in which the Legislature was at the time the Act was passed in order to see what was the state of knowledge as far as all the circumstances brought before the Legislature are concerned, for the purpose of seeing what it was the Legislature was aiming at. I have been told by counsel on both sides that the object of Parliament was first of all to allot certain districts which should be dealt with by certain companies, and, as appears from Major Marindin's report to the Board of Trade, to which both parties have agreed to refer, the idea in the London district, at any rate, was that there should be two companies, because there are two alternative systems of supply, and one might use one and the other the other, but there could not be more than two in any one area. Competition, no doubt, was intended to be limited so that each company should have its own area, or so that each two companies should have their own area to themselves. But further than that—and I do not think counsel for the defendants denied it—I think also that the Legislature took into consideration the financial condition of the company to which it was giving statutory authority; I think it is only right to infer that they would do so, for it is obvious with regard to a company asking for statutory powers to break up streets, to interfere in the way that one sees only too often with the

traffic of the highway, and to carry on the various works which necessarily interfere a good deal with the general user by the public of what is public property, that the Legislature would naturally take pains to see that the company, which they do so authorise to interfere has money enough not only to carry out its work, but also to continue to carry on the undertaking when it has once established it. For those purposes it seems to me that the Act of Parliament has inserted in it various clauses with reference to the solvency of the company, and its accounts, and so on, shewing that that is the true view. Bearing in mind that those two objects are two of the objects which Parliament had in view, I find a provision at the end of section 3 of the Act to which I will refer. It is "The undertakers shall not purchase or acquire the undertaking of or associate themselves with any other Company or person supplying energy under any license Provisional Order or special Act within the administrative County of London unless the undertakers are authorised by Parliament to do so." Having regard to what I have just said as to the practice of allowing two companies to compete within each area in the administrative county of London, and not outside, I think that it is exceedingly probable that that section was put in having that in view, and that it is probable that it never was contemplated that this company or any other company would be in the least likely to want to go outside the administrative county. However that may be, I can only deal with the words as I find them, and that, no doubt, does extend only to companies and so on within the administrative county; but it also is limited to the purchase or acquisition of an existing undertaking, and it is sufficient for me to say that that section has no application to the case before me.

Then comes section 5, which is the material section in the present case, and it is in terms both general and explicit. The defendants are driven to ask me to put a limitation upon the clear negative words: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric

(3) 67 L. J. Ch. 628, 630; [1898] A.C. 571, 573.

(4) 3 Co. Rep. 7a.

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lines or works beyond the area of supply otherwise than under the authority of Parliament or under a license granted by the Board of Trade." The undertakers are in this case supplying energy to the London and North-Western Railway Co. at Willesden, which is outside their area. I am asked to say, first of all, that "the undertakers" cannot mean simply the Metropolitan Electric Supply Co. for all time. To that extent, although it is not necessary for me to determine it now, I should be disposed to agree. I do not suppose it was intended to say that the Metropolitan Electric Supply Co. shall never do this, whatever happens, but the qualification, if any, which is necessary, is—"The undertakers so long as they remain undertakers in the sense that they are running this undertaking." That qualification I am willing to accept, but it does not help the defendants. The qualification they ask me to put in is "shall not use any of the powers given to them by the Act for the purpose of this undertaking." I find it absolutely impossible to insert any such words at all. Counsel put it tersely as "shall not *qua* undertakers." I do not know that the use of the Latin word *qua* assists him much. It is in effect, when translated at length into English, "shall not use any of the powers given to them as undertakers." I may say that I see no ground whatever for so limiting the words, nor do I feel justified in doing anything of the sort. Even if there were any possibility of limiting them so as to make it not inconsistent with section 3—as to which I express no opinion—it would not help the defendants in the present case, because the circumstances have not arisen: they have not "acquired or purchased the undertaking of," and so on. They are simply themselves using their new generating station for the purpose of supplying customers outside their statutory area. I think that counsel for the defendants had not the courage to ask me to insert the words "within the administrative County of London," nor do I see how it would be possible.

There is a further point to which I adverted during the argument, and that

is that the proviso immediately following these negative words excludes any idea of any limitations on the use of any of the powers *qua* undertakers as suggested, for the proviso is "where the undertakers were on the 20th day of May 1889"—which is months before the Act was passed—"supplying or under any binding agreement to supply energy to any premises beyond the area of supply," they might continue to do so for six months—or at any rate for a limited period. If this was confined to a prohibition against using the statutory powers, that proviso is absolutely unnecessary. It is quite plain that the undertakers before the passing of the Act were not using any of the powers of the Act, for there were none to use; and if they were supplying energy beyond the limits of supply, they were doing it by virtue of some rights or powers of their own as a limited company, and not as "undertakers" under this Act. The proviso is absolutely inconsistent with any such limitation as I am asked to insert, and I find myself wholly unable to insert it.

Then, that being the negative clause, one finds, as one would expect, a corresponding affirmative clause—namely, section 9—which provides, "Subject to the provisions of this Act and the principal Act the undertakers may supply energy within the area of supply," and so on. I do not think there is any other section in this particular Act to which it is necessary to refer, and I turn to the Act of 1898. It is to be remembered that the argument which I have heard deals with each area as intended to be a self-sufficing area in which there should be a statutory company generating its own electricity and supplying it to its customers within its own area, all being done within its own area, so that there should be a distinct kingdom to itself. The preamble to the Act of 1898 recites, "And whereas the demand for the supply of electric current within the areas supplied and authorised to be supplied by the Company has increased and is increasing very rapidly and in order to enable the Company to meet this demand the Company have found it

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practically impossible to provide adequate station accommodation within their said areas." See now what Parliament is told. The Legislature has thought it proper to have a number of small electric domains complete within themselves, and Parliament is told that that particular system in the present case will not work because the supply and demand have increased so rapidly that their generating stations are insufficient to supply the needs, and for obvious reasons in densely populated districts it is not possible to put up a very large generating station, or multiply generating stations, without the risk of continual injunctions against nuisance. They accordingly appealed to Parliament to relax its policy with regard to this, because they cannot undertake to supply their own customers within their statutory areas from generating stations within those areas, to allow them to put their generating stations from those areas outside. That is the whole purview of the statute. To my mind it is as plain as possible. "And whereas the Company in order to provide for the demands upon them"—that is, the demands referred to in the previous sentence from their own customers within their own areas—"have acquired a piece of land in the parishes of Willesden and Acton and are engaged in constructing a large electrical generating station and works thereon on which they have expended and are in course of expending large sums of money. And whereas it will conduce to the convenience of those who use the electric current in the said several areas of supply of the Company that the Company should be empowered to supply from the said electrical generating station and works electric current to their distributing stations within the several areas of supply herein-before mentioned and for that purpose to lay down," &c. The whole scope of the preamble is limited to the convenience and the benefit of the customers within the statutory areas, and the whole Act is a mere enabling of the company to substitute a generating station outside for the generating station within the area. Section 2 is in general terms. I express no opinion about what may happen if the

Metropolitan Electric Supply Co. should eventually deprive themselves of or give up their three statutory areas. What this section will mean then somebody else may construe when the event happens. I pass it by with the observation that it is simply an authority to hold and to use as a station for generating purposes a certain piece of land, and to establish and work on that land plant for generating electrical energy and for other purposes incidental to their undertaking or business. That does not in terms or by implication authorise the supply of anything from that station; it simply authorises the manufacture and the generation of power on that spot. I will take section 16 next, which enable them to supply. It is plain to my mind, and it is consistent with the preamble, that the supply is only to the several areas or districts over which the company have now powers of supply, or over which they may hereafter have such powers under any special Act or Provisional Order. The argument is that the words "and elsewhere wherever they may think fit to use it as a limited company," or words to that effect, should be added. But it appears to me to be absolutely impossible that I should do anything of that sort, or that I should hold that there is anything in this Act which impliedly authorised their doing anything of the sort in contravention of the express provision of section 5 of the Act of 1889. But it does not stop there, because, if I go back to sections 12 and 13, I find there is an express saving: "Nothing in this Act contained shall be deemed to release the Company from any of the duties liabilities or conditions"—counsel for the defendants admitted that the negative section was a condition—"imposed upon them" by the Paddington Lighting Order, 1890, and the West London Lighting Order, 1889, both of which contain negative provisions to the same effect. On all these grounds it appears to me that the company are acting in direct contravention of the Act of Parliament in doing that which they are now proposing to do. I therefore propose to grant an injunction as asked. I propose to suspend it for a little time

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so as not to inconvenience the London and North-Western Railway Co. by suddenly depriving them of an electric supply.

Solicitors—W. G. Greig, for plaintiff; Barlow & Barlow, for defendants.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

JOYCE, J. }
1904. } ATT.-GEN. v. STAFFORD-
Dec. 14, 15, 16. } SHIRE COUNTY COUNCIL.

*Local Government—County Council—
Highway or Main Road—Retaining Walls
—Liability to Repair—Local Government
Act, 1888 (51 & 52 Vict. c. 41), s. 11—
Declaration—Mandatory Order.*

*A county council is not, by virtue of
the Local Government Act, 1888, under
any direct liability to repair retaining
walls by the side of a main road.*

*The liability of a road authority to
repair a highway, whether at common law
or by statute, is general; and the Court
will not, either by declaration or man-
datory order or otherwise, prescribe what
particular works or repairs are necessary,
or whether any particular work or repairs
be necessary for the maintenance of the
road.*

*Quære, whether there be any legal liabi-
lity to repair a highway upon any one
other than the inhabitants of the parish.*

Action by the Attorney-General at the relation of the trustees of Lord Macclesfield's settled estates. Through certain lands forming part of the settled estates ran a highway or main road known as the Leek and Macclesfield main road, which, by virtue of section 11 of the Local Government Act, 1888, is now vested in the defendant county council. The road in question had, in various places where it passed through the Macclesfield estate, been cut through the side of a hill or sloping ground. In such places the road on the lower side was

supported by an embankment or supporting walls, and on the upper side the road was protected by retaining or breast walls, constructed for the purpose of preventing the soil of the adjoining land from slipping on to the highway. These walls had, as the plaintiffs alleged, always been repaired and maintained by the highway authority for the time being until the Local Government Act, 1888, came into operation, since which time they had been repaired and maintained by the defendant county council until the year 1902, when they disputed their liability to continue such repair and maintenance. The plaintiffs also alleged that certain of the retaining walls were out of repair, and insufficient to protect the highway, and were therefore a public nuisance. They claimed, first, a declaration that the defendants were liable to repair and maintain the retaining walls; and secondly, that the defendants be ordered forthwith to repair such walls as were in need of repair. The defence was a denial that the walls were out of repair, a denial of liability and that there was any right or cause of action in the plaintiffs.

Hughes, K.C., and R. C. Glen, for the plaintiffs.—The walls are repairable by the defendants under the Highways Act, 1888, s. 11. The county council must do everything that is necessary for repairing and maintaining the road and protecting it from damage—*Sandgate Urban Council v. Kent County Council* [1898].¹ Therefore they must keep in repair these retaining walls. The walls are out of repair, and are likely to fall down, and, being dangerous to the public, are consequently a nuisance—*Reg. v. Watson* [1703].² If the walls are vested in the county council, and they are liable to repair them, there is a right of action in the adjoining landowner without adding the Attorney-General—*Baron v. Portlady-by-Sea Urban Council* [1900]³—even though no evidence of actual damage is given—*Att.-Gen. v. Shrewsbury and Kingsland Bridge Co.* [1882].⁴

(1) 79 L. T. 425.

(2) 2 Ld. Raym. 856.

(3) 69 L. J. Q.B. 899; [1900] 2 Q.B. 588.

(4) 51 L. J. Ch. 746; 21 Ch. D. 752.

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[They also referred to the Highways and Locomotives Amendment Act, 1878, s. 13; *Att.-Gen. v. Ashbourne Recreation Co.* [1902],⁵ and *Att.-Gen. v. Wimbledon House Estate Co.* [1904].⁶]

Danckwerts, K.C., and *John Leslie*, for the defendants.—This action is misconceived. The case of *Sandgate Urban Council v. Kent County Council*¹ has nothing to do with the present case. There the only question was as to the contribution to be made by two authorities to the cost of repairs. The only duty of a county council with respect to repairs is that imposed by section 11 of the Act of 1888, and that duty is the same as the duties formerly imposed upon highway boards and surveyors of highways. County councils are only liable as successors of surveyors of highways. The original liability to repair was on the inhabitants of the parish unless otherwise expressly provided by statute—*Rex v. St. George's, Hanover Square (Inhabitants)* [1812],⁷ and *Reg. v. Brightside Bierlow (Inhabitants)* [1849].⁸ On the dedication of a highway the inhabitants of the parish became *ipso facto* liable to repair—*Rex v. Leake (Inhabitants)* [1833].⁹ The only liability of the surveyors of highways was as agents of the inhabitants—*Young v. Davis* [1862]¹⁰ and *Cowley v. Newmarket Local Board* [1892].¹¹ The extent of the liability was merely to repair the road so as to make it reasonably fit for traffic—*Reg. v. Cluworth (Inhabitants)* [1705],¹² *Reg. v. Stretford (Inhabitants)* [1705],¹³ *Rex v. Landulph (Inhabitants)* [1834],¹⁴ *Reg. v. Henley (Inhabitants)* [1847],¹⁵ *Reg. v. High Halden (Inhabitants)* [1859],¹⁶ *Leek Improvement Commissioners v. Stafford Justices* [1888],¹⁷ and *Rex v. Devon*

(Inhabitants) [1825].¹⁸ It is entirely in the discretion of the highway authority as to how the repairs should be done—*Reg. v. Claxby (Inhabitants)* [1855]¹⁹ and *Sandgate Urban Council v. Kent County Council*.¹ A turnpike trust does not relieve the inhabitants from liability—*Reg. v. Netherthong (Inhabitants)* [1818]²⁰ and *Reg. v. Preston (Inhabitants)* [1838].²¹ Turnpike trustees are not liable to repair except under a special Act—*Rex v. Llandilo Commissioners* [1788]²²; nor were surveyors of highways so liable—*Young v. Davis*¹⁰ and *Reg. v. Poole Corporation* [1887].²³ There is no indictment against a highway board for repairs—*Loughborough Highway Board v. Curzon* [1886]²⁴; and no *mandamus* will lie to repair a road—*Reg. v. Oxford and Witney Road Trustees* [1840].²⁵ A highway authority is not liable for non-feasance, but only for misfeasance—*Cowley v. Newmarket Local Board*.¹¹ The Court will not make a declaration before the occasion for it arises—*Honour v. Equitable Life Assurance Society* [1900]²⁶—and a declaration will only be made where it is ancillary to legal rights—*Williams v. North's Navigation Collieries* [1904].²⁷ If the road is out of repair, the county council or their surveyor may be summoned before the Justices—*Cowley v. Newmarket Local Board*.¹¹ It rests with the defendants to say what is best to be done, and they may let the walls come down and clear away the soil—*Reg. v. Greenhow (Inhabitants)* [1876].²⁸ They are not liable to continue to repair the walls simply because they have repaired them in the past—*Rex v. Llandilo Commissioners*.²²

Hughes, K.C., in reply.—The Court will make a declaration where it refuses

(5) 72 L. J. Ch. 67; [1903] 1 Ch. 101.

(6) 73 L. J. Ch. 593; [1904] 2 Ch. 34.

(7) 3 Campb. 222.

(8) 19 L. J. M.C. 50; 13 Q.B. 933.

(9) 5 B. & Ad. 469.

(10) 2 H. & C. 197; reported below, 31 L. J. Ex. 250.

(11) [1892] A.C. 345.

(12) 1 Salk. 358.

(13) 2 Ld. Raym. 1169.

(14) 1 Moo. & R. 393.

(15) 2 Cox C.C. 384.

(16) 1 F. & F. 678.

(17) 57 L. J. M.C. 102; 20 Q.B. D. 794.

(18) 4 L. J. (o.s.) K.B. 34; 4 B. & C. 670.

(19) 24 L. J. Q.B. 223.

(20) 2 B. & Ald. 179.

(21) 2 Lewin C.C. 193.

(22) 2 Term Rep. 232.

(23) 56 L. J. M.C. 131; 19 Q.B. D. 602.

(24) 65 L. J. M.C. 122, 126; 16 Q.B. D. 565, 571; 17 Q.B. D. 344.

(25) 12 Ad. & E. 427.

(26) 69 L. J. Ch. 420; [1900] 1 Ch. 852.

(27) 73 L. J. K.B. 575, 579; [1904] 2 K.B. 44, 49.

(28) 45 L. J. M.C. 141; 1 Q.B. D. 703.

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other relief. Declarations were made in the following cases: *Ellis v. Bedford (Duke)* [1899],²⁹ *Llandudno Urban Council v. Woods* [1899],³⁰ *Att.-Gen. v. Merthyr Tydfil Union* [1900],³¹ *Islington Vestry v. Hornsey Urban Council* [1900],³² *Young v. Ashley Gardens Properties* [1903],³³ and *Att.-Gen. v. West Riding County Council* [1903],³⁴ the last case being most like the present one.

JOYCE, J.—This is ostensibly an action to compel the county council to perform the statutory duty imposed upon them by section 11 of the Local Government Act, 1888, of repairing and maintaining a main road. It is alleged that the county council has committed default by failing to keep in repair certain retaining walls. In my opinion, the real object of the action is to compel the county council to keep up the retaining walls adjoining the estate of Lord Macclesfield, where the land is at a higher level than the road. The plaintiffs seek to get at what they want in this way. They say that section 11 of the Act of 1888 imposes upon the county council a statutory liability to maintain and repair the road. Next they say that the county council is bound to keep in repair every work which is necessary for the maintenance and protection of the road. They contend that these walls are necessary for that purpose, and therefore that the county council is bound to maintain and repair them and, I suppose, to keep them in perfect condition. It seems to me that I cannot impose such an obligation on the county council without extending the statute or adding something to it which is not to be found there.

The plaintiffs claim a declaration that the defendants are liable to repair the walls, and that they be ordered forthwith to repair them. In my opinion, no such mandatory order as that asked for can be properly granted. It is a necessary requisite of every mandatory injunction that it should be certain and definite in

its terms, so as to shew clearly and specifically what the enjoined person is required to do. It is not the practice of the Court to grant a mandatory order to do repairs, since the Court cannot superintend the work to be done. No doubt that difficulty had occurred to the plaintiffs, and the claim to a mandatory order has been dropped. The Court was then asked to make a declaration that the county council is liable to maintain and repair certain walls, without anything being said as to the height or length of the walls to be repaired, as to the materials to be used, the time within which the work was to be done, or any other particulars. How can the Court say that the repair of these walls, even if particulars were given, was necessary to the repair and maintenance of the road? At all events, in my opinion, it is impossible to say so on the evidence in this case. In the case of *Sandgate Urban Council v. Kent County Council*,¹ where the only question was in what proportion the cost of the works was to be contributed by the two authorities, Lord Davey said: "there is no liability upon the road authorities, which could be enforced either by indictment or otherwise, to do any particular work. Their liability, either at common law or by statute, is general, to repair and maintain the highway, leaving it to them to find out the best, or at any rate adequate, means of discharging that liability." No case has been cited where the Court has taken upon itself to say what particular works ought to be done by the highway authority, and I am unable and I decline in the present case to prescribe what particular works are required for the purpose of maintaining the highway or what particular repairs are necessary. It is clear on the authorities that no *mandamus* will lie against a highway authority to do any particular repairs. If the road is allowed to get out of repair, no doubt there is an appropriate remedy.

On the evidence I hold that the road is not at present out of repair. It is said, however, that the retaining walls being out of repair constitute a nuisance; but that is not proved, and I hold, as a fact, that the retaining walls in their present condition are neither dangerous nor a

(29) 68 L. J. Ch. 289; [1899] 1 Ch. 494.

(30) 68 L. J. Ch. 623; [1899] 2 Ch. 705.

(31) 69 L. J. Ch. 299; [1900] 1 Ch. 516.

(32) 69 L. J. Ch. 324; [1900] 1 Ch. 695.

(33) 72 L. J. Ch. 520; [1903] 2 Ch. 112.

(34) 1 L. G. R. 223.

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public nuisance, nor anything of the kind.

An elaborate argument was addressed to the Court on behalf of the defendants to shew that the original liability to repair was on the inhabitants of the parish, that the only liability of the county council was as successors of the highway board, and that no action would lie against the county council. I was much impressed with that argument, but it is not necessary to decide the point. I hold that the action is misconceived, that it fails on the merits, and must be dismissed with the usual consequences.

Solicitors—Lawrence, Graham & Co., for plaintiffs; Herbert M. Davis, for defendants.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.

FARWELL, J. }
1904. } RAINFORD v. KEITH.
Dec. 16, 17, 20. }

Company—Certificate of Shares—Note that "without the production of this certificate, no transfer of the shares mentioned therein can be registered"—Contract—Parties—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 22 and 30.

A note that "without the production of this certificate, no transfer of the shares mentioned therein can be registered," appended to a certificate of shares in a company incorporated under the Companies Act, 1862, issued to a registered holder in respect of his holding, is not an invitation to the whole world to deal with the certificate on the footing of a contract by the company with the holder for the time being thereof not to allow a transfer to be registered without its production.

The company bona fide registering a transfer without production of the certificate will not be liable in damages to a person holding the certificate by way of mortgage whose rights have been defeated by the transfer.

The Blackman Co., Lim., who were defendants to this action, were incorporated in the year 1890. The articles of association of the company, so far as material, were as follows: Article 13: "The company shall not be bound to regard or see to the execution of any trusts, whether express, implied, or constructive, to which any share may be subject." Article 23 required the instrument of transfer to be signed by both parties. Article 24: "Before registration of any transfer, the instrument of transfer shall be left at the office of the company, together with any evidence the company may require to prove the title of the transferor, and the transfer shall thenceforward be kept by the company." Article 26: "The directors may also refuse to register any transfer of shares, whether fully paid up or not, or of stock by any holder, or joint holders, who is, or are, or any one of whom is, indebted to the company on any account whatsoever."

The company issued to one Casmey, who was the holder of 120 ordinary shares in the company, a certificate of his holding. At the foot of the certificate was a note in the following terms: "Note. Without the production of this certificate, no transfer of the shares mentioned therein can be registered."

In May, 1903, the plaintiff lent to Casmey 100*l.*, and took from him as security a transfer with the date left in blank of his 120 ordinary shares in the defendant company, and he handed over the certificate with the transfer to the plaintiff. On June 25, 1903, Casmey executed a transfer of the same 120 shares to one Younie in consideration of 90*l.* This transfer was presented to the company for registration, and was registered on June 25, 1903. The absence of the certificate was accounted for to the satisfaction of the board of directors by a declaration of Casmey, in which he stated that the certificate was in the possession of a friend of his, but was not held by such friend as a charge against any loan or other consideration. The chairman of the board was called, and explained that Casmey had been a trusted servant of the company for sixteen years, and that they believed his statement, and on the faith

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of it registered the transfer and issued a fresh certificate to Younie. On September 2, 1903, the plaintiff filled in the date of his transfer and presented it for registration, which was refused, and he thereupon brought this action. There were two alternative claims, but the only one calling for a report was a claim for damages for registering the transfer to Younie and refusing to register the transfer to the plaintiff.

T. Clarkson, for the plaintiff.—The note amounts to an undertaking that a transfer will not be registered unless the certificate of shares is contemporaneously produced. Any person advancing money on the faith of this undertaking is entitled to be compensated for any damage he may suffer by reason of the company having registered another person without requiring production of the certificate.

Upjohn, K.C., and *Clauson*, for the defendants.—In order to ascertain the liability of the company, regard must first be had to the Companies Act, 1862.¹ The statute provides that the articles must be looked at to see what the company has provided as regards the transfer of shares. These require an instrument of transfer signed by both parties. The cases nearest in point are the advertisement cases—*Williams v. Carwardine* [1833]² and *Carlill v. Carbolic Smoke Ball Co.* [1892].³ But they depend upon the form of the advertisement, which does not in every case amount to an absolute offer capable of acceptance. But, even if that were so, there was in this case no communication of acceptance of the offer, which, as Lord Blackburn pointed out in *Brogden v. Metropolitan Railway* [1877],⁴ is essential to complete the contract. *Goy & Co., In re*; *Farmer v. Goy & Co.* [1900],⁵ is only

(1) The following provisions of the Companies Act, 1862, were referred to: Section 22: "The shares or other interest of any member in a company under this Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company. . . ."

Section 30: "No notice of any trust, express, implied, or constructive, shall be entered on the register, or be receivable by the registrar. . . ."

(2) 2 L. J. K.B. 101; 4 B. & Ad. 621.

(3) 62 L. J. Q.B. 257; [1893] 1 Q.B. 256.

(4) 2 App. Cas. 666, 692.

(5) 69 L. J. Ch. 481; [1900] 2 Ch. 149.

a question of construction of contract, and does not touch the question of law now raised.

[They also referred to *Low v. Bouverie* [1891].⁶]

The question is purely academical, for there is no obligation, statutory or otherwise, on the company to print this or any other footnote on a certificate of shares, and an adverse decision would merely lead to the issue of certificates without these footnotes.

T. Clarkson replied.

[In addition to the authorities above-mentioned, *dicta* in the following cases were referred to: *Colonial Bank v. Whinney* [1886],⁷ *Shropshire Union Railways and Canal Co. v. Reg.* [1875],⁸ *Société Générale de Paris v. Walker* [1885].⁹]

Cur. adv. vult.

Dec. 20.—*FARWELL, J.*, read a written judgment, in which, after stating the facts to the effect above stated, he continued:

Now I have no hesitation in finding that the board of directors acted with complete *bona fides* and believed Casmeys' explanation of the absence of the certificate; but if they did in fact owe a duty to the plaintiff to take reasonable and proper care, I hold that they did not in fact discharge it. I cannot think that they would be justified in accepting such a statement as that the certificate was in the hands of a friend, with no reason given for its non-production by such friend, and no explanation of his or its whereabouts. But the plaintiff has to establish the existence of such a duty; and, relying as he does on the note set out above, he must contend that it amounts either to a representation which the company is estopped from denying, or that it is a contract with all persons to whose hands the certificate may come. In my opinion, it is not a case of estoppel. If the note is a representation at all, it is not one of fact, but either of intention or of law. If it is either of these, no action will, of course, lie—see *Citizens' Bank of Louisiana v. First National Bank of New*

(6) 60 L. J. Ch. 594; [1891] 3 Ch. 82.

(7) 56 L. J. Ch. 43; 11 App. Cas. 426.

(8) 45 L. J. Q.B. 31; L. R. 7 H.L. 496.

(9) 55 L. J. Q.B. 169; 11 App. Cas. 20.

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Orleans [1873]¹⁰ and *Beattie v. Ebury (Lord)* [1872].¹¹ But I am relieved from considering this point, for the plaintiff neither pleaded nor alleged in his evidence that he saw the certificate before he made the loan, that he ever read the note, or that he believed or acted on it.

But it is said that it is a contract by the company—first with the registered owner of the shares mentioned in the certificate, and secondly with all persons to whose hands it may come. I pass by the first branch, as the registered owner was the rogue through whose dishonesty the present difficulty has arisen. But the second raises a question of considerable importance. There is no doubt that documents may be so framed as, apart from representation and estoppel, to invite persons not parties to them to act upon the faith of some statements therein, and if such persons do in fact accept such invitation a complete contract will be established. A good illustration of this will be found in *Agra v. Masterman's Bank, In re; Asiatic Banking Corporation, ex parte* [1867].¹² The bank in that case gave a letter of credit to Dickson & Co., containing the words, "parties negotiating bills under it are requested to endorse particulars on the back hereof," and this (as Lord Justice Turner said) rendered it plain that the letter was given by the bank with a view to its being shewn to persons who were to negotiate the bills, and to make advances on the faith of the letter—that that part of the letter was in truth addressed to the persons by whom the bills were to be negotiated; and he accordingly held that there was a good equity to sustain a bill filed by any one of the persons by whom bills drawn under the letter of credit had been negotiated to compel the board to accept and pay such bills. Lord Cairns went further, and held that, on the offer in the letter being accepted and acted on, there was a valid and binding legal contract. This is, however, in each case a question of construction of the document. Not every declaration of intention, even although it assumes that persons will act on it,

creates a contract. Thus, in *Harris v. Nickerson* [1873]¹³ an auctioneer's advertisement that he would sell certain furniture on certain days was held to be a mere declaration of intention, and not to amount to a contract with any one who would act on it, although the object of the advertisement was, of course, to induce people to attend at the auction.

In the case before me I fail to find anything in the shape of an invitation or offer on which any one is entitled to act. In my opinion, it is addressed as a warning to the owner of the registered shares, bidding him take care of his certificate because he cannot compel the company to register a transfer without its production. Such a meaning as this makes it reasonable and in accordance with the usual practice of companies; but if it is a contract by the company not to register without production of the certificate, it is inconsistent with section 22 of the Companies Act, 1862, and article 24 of the company's articles, inasmuch as it would fetter the discretion given by that article by compelling the production of the certificate in every case. So far as the registered owner is concerned, such a contract would be of no service to him, but would be a limitation of the generality of his power of transfer. He is not affected by anything short of a transfer executed by himself. The company for its own sake provides that it shall not be compellable to register without the certificate, for it thus gets the security that a rogue must not only forge a signature, but also steal a certificate. But still less is there any ground for supposing that it is in the company's interest to make any offer to third persons who may get the certificate. It is no doubt to the advantage of a company to make its securities assignable free from equities; and clauses with this view, often followed by words to the effect that all persons obtaining a debenture may act accordingly, have been held to amount to contracts with persons not parties to the debenture. But this reasoning has no application to the company's shares. Section 30 of the Companies Act, 1862, and article 13 of the company's articles are aimed at relieving the company

(10) 43 L. J. Ch. 269; L. R. 6 H.L. 352.

(11) 41 L. J. Ch. 804; L. R. 7 Ch. 777.

(12) 36 L. J. Ch. 222; L. R. 2 Ch. 391.

(13) 42 L. J. Q.B. 171; L. R. 8 Q.B. 286.

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from the burden of considering trusts. It is of no advantage to the company, but may be the reverse, to have to regard interests outside its own register, as in *Bradford Banking Co. v. Briggs* [1886],¹⁴ where the company's lien was defeated by the doctrine of *Hopkinson v. Rolt* [1861].¹⁵ It would be strange to find a company deliberately and intentionally giving up its claim to disregard trusts, and inviting the world to deal with the certificates of its shares independently of legal transfer; and all the more because such a course of conduct could bring no profit to the company, but might lead to very serious consequences, if such a note as I have in the present case was held to be an invitation to all the world to deal with the certificate on the footing of a contract by the company with the holder for the time being thereof not to allow a transfer to be registered without its production. In my opinion, the note has no such meaning; but if it had, I should certainly require much clearer evidence than I have in the present case before I found that the plaintiff had read, and acted upon, such offer.

I have so far dealt with the case on general principles, and will now refer to the three cases cited as having some bearing on the subject. In *Shropshire Union Railways and Canal Co. v. Reg.*⁸ Lord Cairns says: "It is said that there was some complete protection in the possession of the certificates, so that if the holder passed them over to another person that other person would think he obtained a good title because no transfer could be permitted without the production of the certificates. But, my Lords, whether a transfer should be permitted or not under those circumstances would be entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates, but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." If this was the decision of the House, there would be nothing for

me to decide; but I do not think that it was, and it is clear that Lord Blackburn, in *Colonial Bank v. Whinney*,⁷ did not so regard it, for he says, "but I continue to think that it is not wrong in the directors to act in the way which by this note they hold forth that they will act, and I think it at least doubtful whether, if they hastily and without inquiry registered the transfer, they might not incur responsibility to a pledgee who had the certificates with that note upon them if he suffered loss from their so acting." The decision in that case has no bearing on the present. It was there held that a registered shareholder who had deposited his certificate (with a note upon it similar to, but rather more resembling words of contract than, the one in the present case) had the shares comprised in such certificates in his order and disposition on bankruptcy. The House held that a deposit of certificates would create a good equitable security, that the depositor might still continue to be the reputed owner, but that whether he did so or not was a question of fact—namely, whether the goods were in such a situation as to convey to the minds of those who knew their situation the reputation of ownership, and that persons who gave credit to the registered holder of shares mentioned in a certificate with such a note had no legitimate ground for believing that they were such owners unless the certificates were produced. The case of *Société Générale de Paris v. Walker*⁹ has no direct bearing on the present case, but Lord Selborne cites Lord Cairns's *dictum* in *Shropshire Union Railways and Canal Co. v. Reg.*⁸ apparently with approval, and Lord Blackburn certainly does not express any opinion in favour of the plaintiff. The case is, therefore, not covered by authority, but the *dictum* of Lord Cairns is in favour of my view. I hold, therefore, that the plaintiff's case fails, and must be dismissed with costs.

Solicitors—C. G. Cudby, agent for Samuel Brown, Manchester, for plaintiff; Gadsden & Treherne, for defendants.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.

(14) 56 L. J. Ch. 364; 12 App. Cas. 29.

(15) 34 L. J. Ch. 468; 9 H.L. C. 514.

WARRINGTON, J. }
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 Nov. 23, 24. }

Mortgage—Special Provision as to Interest—Mortgages in Possession—Interest in Arrear—Sale of Portion of Mortgaged Property—Action for Redemption—Taking Accounts—Rests—Practice.

A mortgage contained a special provision that if interest should be twenty-one days in arrear it should be capitalised and bear interest. The mortgagees entered into possession when interest was in arrear, but payment of the arrears was subsequently tendered and accepted, and the rents and profits were afterwards (at least prima facie) sufficient to keep down the interest:—Held, on taking the accounts, that the mortgagees had not established a case to be entitled to compound interest under the special provision.

Union Bank of London v. Ingram (50 L. J. Ch. 74; 16 Ch. D. 53), Bright v. Campbell (41 Ch. D. 388), and Cockburn v. Edwards (51 L. J. Ch. 46; 18 Ch. D. 449) considered.

It is not the practice, in taking the account against a mortgagee in possession who has sold a portion of the mortgaged property, that a rest as at the date of sale should be taken of the rents and profits as well as of the principal and interest.

Thompson v. Hudson (40 L. J. Ch. 28; L. R. 10 Eq. 497) distinguished.

On October 22, 1887, the plaintiff, being a member of the Oldham Ebenezer Building Society, executed a mortgage, of leasehold property to the building society as security for 1,800*l*.

The mortgage deed, which was an ordinary building-society mortgage, contained a covenant for payment by the mortgagor of all subscriptions and other moneys, according to the rules of the society, including interest at 5 per cent.

On October 8, 1890, and July 4, 1892, further advances of 120*l*. and 60*l*. respectively were made by the society to the plaintiff on the security of the same property.

On March 13, 1893, the plaintiff created a second mortgage, in the ordinary form, by mortgaging his equity of redemption to

Mrs. Ann Gill to secure 200*l*. and interest. The mortgage deed contained the ordinary covenant for payment of the principal money, with interest at 6 per cent., payable half-yearly. It further contained a special proviso as follows: "It is hereby agreed that if and so often as any interest due under the covenant hereinbefore contained or this present provision shall be in arrear for 21 days after the day hereby appointed for the payment thereof such interest shall be treated as an accession to the capital moneys hereby secured as on the day on which the same ought to have been paid and thenceforth bear interest payable at the rate and on the days aforesaid and this security shall extend to such capitalised interest in all respects."

The plaintiff afterwards became embarrassed, and failed to pay the half-year's interest due on March 13, 1894; and on May 29, 1894, the second mortgagee (Mrs. Gill) entered into possession of the mortgaged property.

On June 16, 1894, the plaintiff paid and Mrs. Gill accepted the interest then due, but Mrs. Gill continued in possession.

On September 11, 1894, Mrs. Gill took a transfer of the building society's mortgage of October 22, 1887, and the further charges of October 8, 1890, and July 4, 1892.

On November 24, 1899, the mortgagee sold a portion of the mortgaged property for 250*l*. under her power of sale.

On September 20, 1900, the plaintiff commenced the present action for redemption, and for all proper accounts to be taken, including an account as against a mortgagee in possession.

The mortgagee had set up the claim that the whole property had been sold, but she abandoned it before the defence was put in.

By an order made in the action on July 30, 1901, it was ordered that—first, an account should be taken of what was due to the mortgagee under the several indentures of mortgage, further charge, and transfer; secondly, an account of sums properly laid out in repairs and improvements; thirdly, an account of rents and profits, and

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"without prejudice to any question upon further consideration as to rests" it was ordered that what should appear due under account (3) should be deducted from what should appear due under accounts (1) and (2), and the balance certified; fourthly, an enquiry what part of the hereditaments had been sold; and fifthly, an account of the proceeds of any such sale.

By his certificate dated July 29, 1904, the Master certified that there was due to the mortgagee from the plaintiff under the second mortgage dated March 13, 1893, the sum of 200*l.* for principal and 158*l.* 13*s.* 1*d.* for compound interest at 6 per cent. from March 13, 1894, to date of certificate, and under the mortgage and further charges dated respectively October 22, 1887, October 8, 1890, and July 4, 1892, and the transfer of September 11, 1894, the sum of 1,299*l.* 8*s.* 1*d.* for principal and 642*l.* 1*s.* for simple interest at 5 per cent. from September 11, 1894, to date of certificate, such four sums making altogether the sum of 2,300*l.* 2*s.* 2*d.*, against which was set off the sum of 250*l.* after referred to, leaving the sum of 2,050*l.* 2*s.* 2*d.*; (2) that 390*l.* 9*s.* was the sum, with interest, laid out by the mortgagee in repairs and improvements; (3) that the mortgagee had received rents and profits to the amount (after proper deductions) of 970*l.* 11*s.* 2*d.*; that 2,050*l.* 2*s.* 2*d.* and 390*l.* 9*s.* made the sum of 2,440*l.* 11*s.* 2*d.*, and deducting 970*l.* 11*s.* 2*d.* left the sum of 1,470*l.* due to the mortgagee; and (4) and (5) that a part of the hereditaments had been sold on November 24, 1899, by the mortgagee for the sum of 250*l.*, and that sum had been applied (as above mentioned) in reduction of the principal and interest.

On August 18, 1904, the plaintiff took out a summons asking that the Master's certificate might be varied (*inter alia*)—

1. By declaring that, no interest having been due under the mortgages at the date when possession was taken by the mortgagee, only simple interest at the rate of 6 per cent. per annum was payable under the mortgage of March 13, 1893;

2. By directing that a rest be taken on November 24, 1899, upon the sale by the mortgagee of a portion of the mortgaged

premises, and that upon taking such rest the mortgagee should bring into the account all sums received in respect of rents and profits up to date;

6. That the account be directed to be taken with annual rests upon the ground that the mortgagee before action brought set up an unfounded claim to the property and denied the plaintiff's character as mortgagor, and the rents had materially exceeded the expenditure.

A. F. Peterson, for the plaintiff.—The Master has allowed compound interest on the mortgage of March 13, 1893, from March, 1894. But the only case in which compound interest can be charged as between mortgagor and mortgagee is where there is a bargain to that effect, and in the present case the mortgagee does not make out his case to the benefit of the special provision in the mortgage. The half-year's interest, which had become due in March, 1894, and was owing when the mortgagee entered in May, was afterwards tendered by the mortgagor and accepted by the mortgagee, so that in effect no interest was in arrear when possession was taken, and subsequently the rents and profits were sufficient to keep down the interest. The special provision therefore does not apply, and the certificate ought to be varied accordingly, so to allow only simple interest.

The question of rests was specially left open by the reservation in the order of July 30, 1901, that the account of rents and profits was to be "without prejudice to any question upon further consideration as to rests." To entitle a mortgagor to an account with rests against a mortgagee in possession, special circumstances must be shewn. Here there are special circumstances: the rents and profits were more than sufficient to cover the interest, and that was held sufficient in *Shepherd v. Elliot* [1819]¹ and *Cartier v. James* [1881].² Moreover, the mortgagee here denied the plaintiff's right to redeem, and in such a case rests may be directed by way of penalty—*Incorporated Society v. Richards* [1841],³ *Montgomery v. Calland* [1844],⁴

(1) 4 Madd. 254.

(2) 29 W. R. 437.

(3) 1 Dr. & W. 258.

(4) 14 Sim. 79.

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and *National Bank of Australasia v. United Hand in Hand &c. Co.* [1879].⁵ See *Seton's Judgments and Orders* (6th ed.), vol. 3, p. 1975, where the cases are collected, and *Fisher's Law of Mortgage* (5th ed.), p. 849 foll.

But even if there are not special circumstances here, yet it is clear that, the mortgagee having sold a portion of the mortgaged property, the mortgagor is entitled to an account with a general rest as well of the rents as of the proceeds of sale, as at the date of such sale—*Thompson v. Hudson* [1870].⁶ A mortgagee in possession who sells part of the mortgaged property ought to apply the proceeds first in payment of interest and costs, and should then either pay the balance to the mortgagor or apply it in reduction of the principal due—*Thompson v. Hudson*.⁶ In the present case no interest was in arrear in November, 1899, and the whole of the purchase-money was available for reduction of principal. The Master should therefore be directed to take the account with a general rest as on November 24, 1899, as well of the rents as of the proceeds of sale.

Rowden, K.C., and *Austen-Cartmell*, for the defendants. — The Master was right in allowing compound interest on the mortgage of March, 1893. The mortgagor was in the mortgagee's debt, and was more than twenty-one days in arrear. The mortgagor thinks it sufficient to reply, "But you went into possession, and the rents were sufficient to keep down the interest." The mortgagee's answer—and it is an adequate one—is that receipt of rents by a mortgagee is not payment of interest by the mortgagor—*Cockburn v. Edwards* [1881],⁷ *Union Bank of London v. Ingram* [1880],⁸ and *Bright v. Campbell* [1889].⁹

On the question of rests, *Thompson v. Hudson*,⁶ which is relied on by the other side, was a very special and exceptional case. The contention of the mortgagor comes to this—that whenever there is a sale of a portion of the mortgaged prop-

erty by a mortgagee in possession it is an occasion for a general rest—not a rest of capital only, but of the rents and profits as well. No trace of any such practice is to be found in the text-books, whether *Seton* or elsewhere—see *Seton's Judgments and Orders* (6th ed.), vol. 3, p. 1975; *Coot's Law of Mortgages*, vol. 2, by *Robbins* (1897), pp. 1200, 1207-8; *Fisher's Law of Mortgage* (5th ed.), p. 849, s. 1794; and there almost necessarily must have been some mention of it if it had been the practice. There does, it is true, seem to have been a general rest in *Thompson v. Hudson*,⁶ but that is explained by the very exceptional nature of the circumstances.

[WARRINGTON, J.—There Lord Romilly, M.R., saw that a very large part of the principal had been paid off.]

Here the Court is not in a position to say that; upon the facts there is nothing like *Thompson v. Hudson*⁶ here. If the Court decides as the mortgagor claims, and directs a rest merely because the mortgagee has sold a part of the property, it will be establishing a new and general and very important rule, that in every case where there is a sale of a part of the property there is to be a rest. That was not what *Thompson v. Hudson*,⁶ with its special conditions, really decided. In *Wilson v. Cluer* [1840]¹⁰ there was something similar to the appropriation in *Thompson v. Hudson*.⁶

[WARRINGTON, J.—*Wilson v. Cluer*¹⁰ was a case of annual rests being asked. *Thompson v. Hudson*⁶ was a case of one rest, the Judge being satisfied on the accounts that there was a large sum of money in hand.]

Robbins, in vol. 2 of *Coot's Law of Mortgages*, p. 1200, cites *Thompson v. Hudson*,⁶ not on the subject of rests at all, and in chapter 54, section 5, sub-section 4, discusses rests, and does not suggest that a sale of part of the property establishes a case for rests. The principle is that a mortgagee need not take payment of his principal by dribblets. If the granting of rests is to be regarded as a punishment to a mortgagee, the mortgagee here would be punished for selling. The ordinary practice in chambers, on taking the

(5) 48 L. J. P.C. 50; 4 App. Cas. 391.

(6) 40 L. J. Ch. 28; L. R. 10 Eq. 497.

(7) 51 L. J. Ch. 46, 50; 18 Ch. D. 449, 456.

(8) 50 L. J. Ch. 74; 16 Ch. D. 53.

(9) 41 Ch. D. 388.

(10) 9 L. J. Ch. 333; 3 Beav. 136.

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account against a mortgagee in possession, is, unless rests are ordered, that there are two accounts—one of principal and interest, and the other of rents and profits—and if a portion of the property is sold the proceeds of sale are credited to the mortgagor in the first of these accounts, and the rents and profits account runs on. The course which the Master has adopted is in accordance with that practice, and the certificate ought not to be varied.

A. F. Peterson, in reply.—That the practice is as stated in an ordinary case is not disputed. But the construction attempted to be put on *Thompson v. Hudson*⁶ cannot be accepted. It is said that on a sale of part of the property the rents and profits are to be disregarded altogether, and only the proceeds of sale deducted from the principal and interest. If the facts of this case had been known, it is one in which a general rest ought to have been directed by the order. The mortgagee has in effect agreed to take his mortgage money in dribblets. Upon general principle, where a mortgagee voluntarily exercises his power of sale he ought to be subject to a general rest as at the date of sale.

WARRINGTON, J. (after stating the facts).—The first point raised by the summons is whether on the second mortgage of 1893 interest ought to be computed as compound or as simple. The plaintiff says it ought to be computed as simple interest, and the defendant says that the Master was right in computing it as compound interest. The question depends upon the effect to be given, in the events which have happened, to the proviso towards the end of the mortgage deed. Without saying exactly how the accounts stand (which I am not in a position to say), it appears at first sight sufficiently certain to justify me in assuming for the purposes of this judgment that the rents received by the defendant were sufficient to make up the half-yearly payment of interest, at any rate in some half-years. In that state of things, what is the rule which I am to apply? In the first place, I am dealing with a provision in a mortgage which imposes a special

and peculiar liability upon the mortgagor; and it is for the mortgagee to make out that the event has happened on which that provision takes effect so as to entitle him to the special and peculiar advantage which it gives him. What the mortgagee has to shew is that, in each half-year, or the particular half-year in which he says he ought to be allowed interest upon interest, the interest was in arrear for more than twenty-one days. The onus is on him to shew that affirmatively. This also is to be noticed—that, by taking possession, the mortgagee himself takes the rents, to which presumably the mortgagor would look as providing the fund out of which he would pay the interest on the mortgage; and under these circumstances, unfettered by authority, I should come to the conclusion that where, *prima facie* at all events, the rents are enough to keep down the interest, the mortgagee has not made out the affirmative case which he has to make out, that the interest is in arrear.

How far am I bound by authority? There have been three cases referred to. The first is *Union Bank of London v. Ingram*.⁸ What the learned Judge, the Master of the Rolls (Sir George Jessel), was dealing with there was a provision contained in the mortgage deed for reduction of interest. The provision was this (reading it shortly)—that if the mortgagor should on every April 20 and October 20, so long as the principal sum remained unpaid or within forty days, pay to the mortgagees interest at 5 per cent., then they would accept that interest instead of the higher rate which was secured by the deed. In that case, therefore, unlike the present, it was the mortgagor who had to establish affirmatively that the event had happened which entitled him to the advantage secured to him by the special provision, and the event which he had to establish affirmatively as having happened was that he had paid the interest. On that the Master of the Rolls held that, inasmuch as he had paid no interest at all, but the mortgagee had been receiving the rents which, when the accounts were taken, were applicable not only to interest, but also to principal—were applicable generally to discharge what was due

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under the mortgage—it could not be said that the mortgagor had paid the interest within the forty days, and accordingly he had not made out his case to be entitled to the privilege given him by the mortgage deed. The second of the three cases was *Bright v. Campbell*,⁹ which was really the same as *Union Bank of London v. Ingram*.⁸ The *Law Reports* headnote says, “A proviso in a mortgage for reduction of interest on punctual payment does not apply to the case of the mortgagee taking possession and receiving the rents, whether he does so by arrangement with the mortgagor or otherwise.” In that case Mr. Justice Kay felt himself bound by the decision to which I have referred, although he did not like it, and said he did not like it, and was not at all sure he would have decided in the way he did if he had not been bound by authority; but he did decide in that way, feeling himself bound by the previous decision of the Master of the Rolls. The third case, *Cockburn v. Edwards*,⁷ is one that gives rather more trouble. It was a case the nature of which I can state shortly. A mortgage was taken by a solicitor from his own client, and he had inserted in it a power of sale not containing the usual restriction on the exercise of the power, which is to the effect that it shall not be exercised unless the interest is in arrear. The mortgagee had taken possession and had been receiving the rents; and a question arose as to whether, assuming that the mortgagee had inserted a power of sale with a proper restriction, as the Court held he ought to have done, the power of sale had arisen. To put it in another way, the question arose, was the interest in arrear? It was not necessary to decide it, but the Master of the Rolls did in his judgment hold that the interest was in arrear, because, if the mortgage had contained the restriction, the interest must be treated as in arrear, because the receipt of the rents was not sufficient to discharge the interest. What he says is this, after referring to the omission of the clause and saying it ought to have been inserted: “The sale then was improper unless there was interest three months in arrear, and I think that there is great weight in the

argument for the respondent, that it was improper whether there was interest in arrear or not, for that the client had a right to be informed what the terms were upon which the estate could be sold, and that the absence of such information made the sale improper. I am disposed to think that this argument ought to prevail. But was there any interest in arrear? It has been argued that a mortgagee in possession, if he receives rents to an amount more than sufficient to pay the interest, must be taken to have been paid his interest. I cannot accede to that argument. A mortgagee in possession first deducts expenses, and then what remains goes against principal and interest; but till an account is taken there is no set-off, there is no appropriation of the rents.” Then he goes into and discusses some of the authorities, which I need not go through, and says this: “But the receipt of rents by the mortgagee is not a payment by the mortgagor, or by any one on his behalf. The mortgagee receives rents which are his own, subject, of course, to the right of redemption; he is not receiving interest or principal, but receiving the rents of property which belongs to him subject to the right of the mortgagor to redeem it.” The result was that he treated the interest as in arrear notwithstanding the receipt of rents. The other two learned Judges dealt with the point in a different way. Lord Justice Brett said this: “It has been urged that there is no damage because interest was in arrear for three months, so that if the power had been in the ordinary form the property might have been sold. But was there any interest in arrear? The argument on behalf of the mortgagee went so far as this, that when a mortgagee is in possession there must be interest in arrear, unless an actual appropriation of the rents to payment of interest has been made. It is not necessary to decide that point, for we have here accounts which shew actual appropriation. . . . If, therefore, the power of sale had been in the proper form, the defendant would not have been entitled to sell under it.” Lord Justice Brett holds therefore that the interest was not in arrear, for the rents had been appropriated to the interest, and

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that it had been paid. Lord Justice Cotton, after stating his conclusion on the first part of the case as to the improper omission of the restriction to which I have alluded, says this: "This being so, we must come to the conclusion that the sale was improper unless six months' notice was given or interest was three months in arrear. It is clear that notice was not given, but interest was in arrear unless the rent received by the defendant can be treated as applied in payment of interest. Now, receipt of rents by a mortgagee is not, as a general rule, equivalent to a payment by the mortgagor. If a mortgagee enters into possession, his receipt of rents is not payment of interest by the mortgagor so as to entitle the latter to the benefit of a proviso for reduction of interest on punctual payment; and I quite agree with the remarks of the Master of the Rolls as to the *dictum* in *Brooklehurst v. Jessop* [1835].¹¹ If, however, a mortgagee receives rents which are all along more than sufficient for payment of interest and expenses, so that his account, if he were to render one, would shew that there was in his hands at every time a balance applicable to reduction of the principal, I am not prepared to decide that he can merely, because there has been no actual appropriation of the rents to payment of interest, say that there is interest in arrear within the meaning of the proviso in the power of sale. It is not, however, necessary to determine that question in the present case, for the accounts rendered by the mortgagee treat the rents as applied in payment of interest, and, that having gone on for several years, I think it must be taken as established that there was an arrangement that the rents should be so applied; and, this being so, the accounts shew that there was not any interest in arrear for three months when the sale was effected." I have read those portions of the judgments because it is quite clear on Lord Justice Cotton's judgment that he did not accept the *dictum* in the judgment of the Master of the Rolls, but, on the contrary, said he was not prepared to decide that that was the law; and Lord Justice Brett, though not so emphatic as Lord Justice

(11) 7 Sim. 438, 442.

Cotton, was obviously not prepared at the moment to follow what the Master of the Rolls had said. The result is, I think, that, in dealing as I have to deal here with a provision like the present one—namely, a provision in which it is for the mortgagee to shew that an event has happened which entitles him to the special and peculiar privilege of compound interest—I am entitled to say that I am not fettered by authority and am entitled to give effect to my own opinion, which is that in the present case the mortgagee has not shewn that the interest is in arrear so as to entitle him to compound interest. The result is that, in reference to the mortgage of 1893, I think the interest ought to have been computed as simple interest at 6 per cent., and not as compound interest.

The second point that has arisen on the summons raises a very important point of practice. A mortgagee in possession sells a part of the mortgaged property. The judgment directs the ordinary account, an account of the money due on the security, an enquiry as to the proceeds of sale, and an account of the rents and profits, with the usual direction to set off against what shall be found due on the first account the amount found due on the rents and profits account. I have ascertained, and I think it is substantially admitted, that under such a judgment in the ordinary course the practice in chambers is that the first account is treated as separate from the account of rents and profits; and, if money is received from an exercise of the power of sale, that money is credited to the mortgagor under the first account at the date at which it is received; but unless rests have been directed in the judgment the account of rents and profits, following the usual rule, goes on without rests. That, I think, is ordinarily the common practice in chambers under the usual mortgagee's account. But the argument before me is that, having regard to the reservation in the judgment, that the direction to set off what is found due on the account of rents and profits is to be without prejudice to any question upon further consideration as to rests, I am now to deal with the case as if I had at the hearing to determine whether rests

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ought to be ordered or not. The ordinary rule is admitted, that, in the absence of special circumstances, the account against a mortgagee in possession is not directed with rests—that is to say, the account of the rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not; the reason being that a mortgagee is not bound to accept payment by dribblets, but is entitled to have the account taken as a whole and not to be treated as repaid until the account has been so taken.

It is said there are certain exceptions. One of those is where the mortgagee has himself claimed the property—that is to say, has insisted that the mortgagor is not entitled to redeem. So far as I can make out, the only principle upon which an exception is made in that case is that it is by way of punishment to the mortgagee; there can be nothing else, because his receipts have been the same whether he has been insisting upon his title to the property or not. I think it is merely a means whereby the Court has penalised the mortgagee in order to shew dissatisfaction with the case he has set up. That is one exception, and it is sought to bring the present case within that. Now it is quite true the mortgagee did originally say that the property had been sold, but when the case came on for trial—in fact, when the defence was put in—no such case was set up; and, in my judgment, where that is so I am not in a position to say that I am bound to impose that penalty upon the mortgagee which has in some cases been imposed where he has insisted on his ownership of the property. I think in all those cases he has insisted on that till the trial, and the Court, that being so, has imposed that penalty upon him. It was suggested that there is another exception—I think I am using counsel's own words—where the excess of the rents and profits over the interest is great and notorious. I think the only case really which supports that is *Thompson v. Hudson*,⁶ which we have discussed so much to-day. In reality that was not a case of rests at all. What happened in that case was that it appeared, when the

accounts came to be taken, that at a certain date, at the end of June, 1861, the mortgagees, having exercised the power of sale, were found to have in their hands a sum of 20,000*l.* or thereabouts more than was due to them for interest and costs. Lord Romilly, the Master of the Rolls, analysed the accounts and found that at that date that was the fact; and, finding that that was the fact, and finding that there was that large excess at that moment of receipts over expenditure, took what I think one is bound to say is the exceptional course—and there I am only speaking on the authority of *Nelson v. Booth* [1858]¹²—of drawing a line at that date, on seeing there was at that date 20,000*l.* in the hands of the mortgagees, which they ought either to have applied in discharge of the principal or have paid over to the mortgagor. Now am I at liberty in this case to take that view? I have looked at the accounts, to form an opinion as far as it is possible to do so, and I cannot find, on an inspection of the accounts, that on November 24, 1899, the receipt of rents, having regard to the money expended for repairs, had more than discharged, or had discharged, the interest due under the mortgage; on the contrary, as far as I can see—again only from such inspection as one is able to make here in Court—they were not quite sufficient for that purpose at that time, and at all events there is no excess so great and so notorious that, if the matter were now before me on motion for judgment or notice of trial, I should, in my opinion, have been justified by the authorities on this point in regarding the case as so exceptional as to direct rests; and without directing rests I do not see how I could do what the plaintiff now asks me to do with regard to this 250*l.* On the accounts as they have been taken the 250*l.* has been dealt with in the ordinary way—that is to say, it has been brought in on the first account (the account of what is due on the mortgage) as at the date of its receipt, the account of rents and profits running on without interruption. In my opinion that is right, and in that respect the Master's certificate cannot be varied.

(12) 27 L. J. Ch. 782; 3 De G. & J. 119.

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[His Lordship proceeded to deal with other questions not calling for report.]

Solicitors—Scott, Spalding & Bell, agents for William Lees, Oldham, for mortgagor; Bower, Cotton & Bower, agents for Longbotham & Sons, Halifax, for mortgagee.

[Reported by Arthur Lawrence, Esq.,
Barister-at-Law.

KEKEWICH, J. } EDWARDS v. HOOD-
1904. } BARRS.
Nov. 26. Dec. 2. }

Trustee—Breach of Trust—Joint and Several Liability—Compromise with one Trustee—Release—Insolvency of Co-Trustee's Estate—Right to Prove for Whole Debt.

Where an action has been brought by plaintiffs as beneficiaries under a settlement to enforce liability against trustees for a breach of trust, and a sum has been certified to be due from the insolvent estate of a deceased trustee, and from the other two trustees, the plaintiffs will be entitled to prove against the insolvent estate for the full amount of the sum certified to be due. The liability of all the trustees being joint and several, until the plaintiffs have received 20s. in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment by way of compromise in respect of his several liability.

This was an action brought by Alice Morris Edwards (widow) and her five infant children against the two existing trustees of her marriage settlement (dated May 2, 1882) and the executors of a deceased trustee, Henry Hollier Hood-Barrs, to enforce liability against them for breaches of trust. The facts are shortly as follows, and are substantially taken from the judgment of the Court. By an order dated July 18, 1902, the executors of Henry Hollier Hood-Barrs admitted that his estate was liable, and the two other trustees of the settlement—namely, John William Barrs and Hugh Montgomery Drake—admitted that they were jointly and severally liable to make good to the trust estate two sums of 4,830l.

and 4,500l.; and by the same order an account was directed of what was due from the estate of Henry Hollier Hood-Barrs, and from the other two trustees, on the footing of the foregoing admissions. The enquiry was answered by the Master's certificate, dated August 4, 1904, which found that there was a balance of 10,004l. 7s. due from the estate of the deceased trustee, and from the other two trustees. Meanwhile, by two orders dated November 11, 1902, and March 23, 1903, two compromises were sanctioned by the Court. The first of these was with the defendant John William Barrs, from whom was accepted 1,900l. in full settlement and discharge of his liability to the plaintiffs in the action. The second compromise was with William Edwin Barling, a former trustee, who was charged, in common with Hugh Montgomery Drake, with having received, but not accounted for, a sum of 1,500l. There was accepted from him 700l. in full settlement and discharge of his liability, and he was dismissed from the action. Nothing was done as regarded Hugh Montgomery Drake, who remained liable for the 1,500l. as well as for the sum mentioned in the certificate. On October 28, 1904, the plaintiffs took out a summons asking for an order in the terms of annexed minutes, and on this summons the point was raised whether the plaintiffs were to be at liberty to prove against the insolvent estate of the late defendant Henry Hollier Hood-Barrs, in a pending action, for the sum of 10,004l. 7s., being the amount certified by the Master's certificate to be due, from the estate of H. H. Hood-Barrs jointly with the defendant Hugh Montgomery Drake, to the estate, subject to the trusts of the settlement; or whether proof could only be made for the balance, after deducting the 1,900l. paid in discharge of his liability by John William Barrs.

H. M. Drake entered an appearance, but was not represented at the hearing of the summons.

P. O. Lawrence, K.C., and E. Ford, for the plaintiffs.—The plaintiffs can prove for the full amount against the estate of Henry Hollier Hood-Barrs without giving

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credit for the sums received in compromise from two of the trustees. This is a joint and several liability by all the trustees, and the plaintiffs are entitled to recover from each and every one of them the whole amount. Until the plaintiffs receive 20s. in the pound they are entitled to get what they can from each. There is little authority upon the point, but the nearest case is that of *Bagnall v. Carlton* [1877].¹

Stewart-Smith, K.C., and *Ribton*, for the executors of H. H. Hood-Barrs.—It is not denied that this is a joint and several liability, but a *pro tanto* release by payment of one trustee would *pro tanto* release all. It is the same debt. There is a case which throws some light upon this point—namely, *Commercial Bank of Australia v. Wilson & Co.'s Official Assignee* [1893].² But, upon principle, it must be held here that there has been a release to the extent of the payment made, although it cannot be said that it operates as a release of the whole debt.

P. O. Lawrence, K.C., in reply.—It was not the intention of the Court, when it sanctioned the payments being received in compromise, to waive any liability against the estate of H. H. Hood-Barrs.

Cur. adv. vult.

Dec. 2, 1904.—KEKEWICH, J., delivered a written judgment on this point, in which, after stating the facts, he proceeded: On the hearing of the summons now before me, which really is the further consideration of the action, the plaintiffs claimed to prove against Henry Hollier Hood-Barrs's estate, admittedly insolvent, for the full amount certified to be due as above mentioned, and it is contended by the executors on behalf of that estate that the proof ought not to be allowed for the full amount, but that a deduction ought to be made of the sums paid by others in reduction of the sum certified, and that the proof should only stand for the balance. It escaped notice on the hearing of the summons that the payment made by William Edward Barling was in respect of a separate claim for 1,500*l.*, with which Henry Hollier Hood-Barrs's estate was not concerned. That

fact disposes of the argument as regards the 700*l.*, but it remains to be considered as regards the 1,900*l.* paid by John William Barrs.

Two cases were cited. In *Bagnall v. Carlton*¹ it was endeavoured on behalf of defendants held liable to the plaintiffs to deduct from the amount claimed a sum of 31,000*l.* satisfied by other defendants, and the Court of Appeal held that such sum of 31,000*l.* was paid in respect of a claim entirely different from that sought to be enforced, and that therefore no deduction was possible. The decision of the Court, proceeding on that ground, has really no bearing on the present case. In *Commercial Bank of Australia v. Wilson & Co.'s Official Assignee*² the only question was whether certain sums provided by two sureties had been paid or not. It was admitted that if they had been in fact paid, these sums must be deducted from the amount recoverable from another of the co-sureties; but it was held that no payment had been made, and that, therefore, there could be no deduction. This case, therefore, also has no bearing on the present. I have searched in vain for any other authority to which reference could usefully be made, and the point must be disposed of on principle.

Here there is no contract of suretyship or question between co-sureties. We are concerned only with the liability of trustees, which is joint and several; and it seems to me that until the plaintiffs have received 20s. in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment in respect of his several liability, and whether in or towards satisfaction of that liability. Therefore the plaintiffs are, in my opinion, entitled to prove against the estate of Henry Hollier Hood-Barrs for the full amount found due by the certificate, and to receive dividends on such proof until, by means thereof and payments by the other trustees, that amount has been wholly satisfied. The order must be framed on that footing.

Solicitors—Beyfus & Beyfus, for plaintiffs;
Rutter, Veitch & Bond, for defendants.

[Reported by G. Macan, Esq.,
Barrister-at-Law.]

(1) 47 L. J. Ch. 30; 6 Ch. D. 371.

(2) 62 L. J. P.C. 61; [1893] A.C. 181.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 7, 8, 9, 10, 11, 12, 14.

Dec. 5.

LAW, *In re*;
LAW v. LAW.

Partnership—Sale by one Partner to Co-Partner—Fiduciary Relation—Duty to Disclose Assets—Action to Set Aside Sale—Consent Order—Confirmation of Sale—Election.

In a transaction between co-partners for the sale by one to the other of a share in the partnership business there is a duty resting on the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows. Unless such information has been furnished the sale is voidable.

After the sale by one partner to his co-partner of his interest in the partnership business the selling partner discovered that certain partnership assets had not been disclosed to him at the time of the sale, and brought an action for misrepresentation against the purchasing partner. This action was settled by a consent order, by which all charges of fraud were withdrawn and a sum was paid to the selling partner in discharge of every claim between the plaintiff and defendant. The selling partner alleged the subsequent discovery of further assets of the partnership, and brought an action to set aside the sale and the consent order:—Held, that the plaintiff had elected not to avoid the transaction, and that the sale could not, after the consent order, be re-opened.

Clough v. London and North-Western Railway (41 L. J. Ex. 17; L. R. 7 Ex. 26) followed.

Appeal by the plaintiff John Law against a decision of Kekewich, J. The action was to set aside an agreement, dated July 2, 1900, whereby James Law purchased the interest of his brother, the plaintiff William Law, in the goodwill and business of John Law & Sons.

Prior to the year 1874, William Law, James Law, Samuel Law, and Joseph Law carried on the business of woollen manufacturers at Greetland, Halifax, as co-partners with their father, John Law, under the style of John Law & Sons; and after the death of their father the business was carried on by the four sons under the same style. This business was carried on without any articles of partnership, the four sons being entitled to the business in equal shares. The business consisted largely in making cloth for Government departments. Samuel Law died on March 18, 1893, and after his death the three surviving brothers continued to carry on the business as before. In 1899 Joseph Law died, and by his will he gave his estate equally between his surviving brothers. After his death the business was carried on by William Law and James Law as co-partners without any articles of partnership.

William Law had for a great many years lived in London, and had taken no active part in the conduct of the business beyond dealing with matters requiring attention in London. The accounts of the partnership were kept very irregularly, but for many years Joseph Law had been in the habit of paying to William Law sums amounting on the average to about 50*l.* a month in respect of his share in the profits of the business. In November, 1899, Arthur William Law, as executor of Joseph Law, sent to William Law a balance-sheet of the business which was said to be required for probate, and shewed a surplus of assets over liabilities of 33,814*l.*

In March, 1900, James Law offered to purchase William's share in the business for 10,000*l.* William Law then consulted a solicitor, C. E. Lacy, who went down to Greetland on behalf of his client for the purpose of negotiating for the sale of his share, and was shewn the above-mentioned balance-sheet. He had an interview with James Law and his daughter, Miss Rachel Law, and James Law's solicitor, Mr. Garsed, and the result of that interview was that Lacy, on behalf of William Law, agreed to sell his client's interest in the business and in the estate of Joseph Law for 21,000*l.*

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This agreement was carried into effect by two deeds dated July 2, 1900, and under these deeds the purchase-money was paid as to half on the execution of the deeds, and as to the remaining half was secured by bond to be paid on January 2, 1901.

Subsequently to the execution of these deeds William Law alleged that he discovered that some assets of the partnership, consisting of mortgages in favour of the firm for 10,750*l.*, had not been disclosed. On January 8, 1901, the second instalment of the purchase-money had not been paid, and William Law, with certain assignees of the bond, commenced an action in the Queen's Bench Division on the said bond. This action was stayed on January 18, 1901, on payment by James Law to the plaintiff of the moneys secured by the bond. On January 22, 1901, William Law brought an action in the Queen's Bench Division against James Law for damages for fraudulent misrepresentation upon the sale of the business. On February 25, 1901, a consent order was made staying all further proceedings in that action upon the terms of an agreement whereby the plaintiff withdrew all charges of fraud or fraudulent misrepresentation, and the defendant was to pay to the plaintiff the sum of 3,550*l.* in full discharge of all claims. This sum was duly paid. Subsequently to the date of this order William Law alleged that he discovered that some further assets of the partnership, amounting, it was said, to 12,250*l.* at least, had not been disclosed. He brought this action against the executors of James Law, who died in August, 1901, and the executor of Joseph Law, for a declaration that the two deeds of July 2, 1900, and the consent order of February 25, 1901, were not binding on him, and ought to be set aside, and for consequential accounts and enquiries.

The defendants admitted that in June and July, 1900, there were in existence certain mortgages executed in favour of James Law and Joseph Law, but denied that they formed part of the partnership assets. They submitted that James Law owed no duty to the plaintiff to inform him of the existence of these mortgages, and that he did not improperly conceal their existence from him. They further submitted that the plaintiff was aware in

January, 1901, that there were or had been securities executed in favour of James Law and Joseph Law, or one of them, the details of which had not been disclosed to William Law by James Law, and the settlement came to by the consent order was come to on the footing that there were in existence such securities. They contended that the consent order of February 25, 1901, operated as an estoppel as regarded the relief claimed in the present action. On behalf of the plaintiff it was contended that there was a fiduciary relation subsisting between James and the plaintiff by reason of the partnership. The plaintiff William Law had died since the commencement of the action, and the action was continued by his executor, John Law.

Kekewich, J., held that some allegations of fraud made in the statement of claim were disproved by the evidence. He disposed of the case upon the settlement which was made in February, 1901, of the action in the King's Bench Division. The plaintiff brought that action knowing at that time that there had been what he called "fraudulent misrepresentations," knowing that there were assets outstanding which had not been taken into account, and knowing that he had not received his full share of the assets. With that knowledge, and with the knowledge that he could obtain full discovery in the action, he chose to take 3,500*l.* in settlement of all claims, and to put an end to the litigation. The plaintiff could not be allowed to say that he accepted that sum only in settlement of his claim in respect of the non-disclosure of certain assets, and now to claim to go into the question of the non-disclosure of other assets. Judgment was accordingly given for the defendants, with costs.

The plaintiff, the executor of William Law, appealed.

Neville, K.C., and *F. Thompson*, for the appellant.—A fiduciary relation exists between partners, and any dealing of purchase between them can only be valid if full information is given—*Lewin on Trusts* (11th ed.), pp. 566, 576, and *Dunne v. English* [1874].¹ In the case of one

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partner buying out another the purchasing partner is bound to give the selling partner as full particulars as he himself possesses. There is a fiduciary duty of making full disclosure, without which the purchase cannot stand.

If a party after he has become aware of a misrepresentation does something which tends to confirm it he is bound by that, and he cannot afterwards set up another act of misrepresentation—*Campbell v. Fleming* [1834]² and *Clough v. London and North-Western Railway* [1871]²—but he must be aware of all the circumstances, otherwise he cannot know whether he is making a good settlement.

[ROMER, L.J., referred to *Duncan, In re*; *Terry v. Sweeting* [1899].⁴]

The principle to be applied as regards dealings between partners is the same as that to be applied as regards dealings between principal and agent, and trustee and *cestui que trust*. The utmost good faith is due from every member of a partnership to every other member. If a partner knowing more about the affairs of the partnership than another partner enters into an agreement with that other with regard to partnership matters concealing his knowledge, the agreement will not stand. That applies although the partnership may have been dissolved, so long as the partnership affairs have not been completely wound up—*Lindley on Partnership* (3rd ed. p. 595; 6th ed. p. 314). That was the case here. William Law had no means of knowing the facts, and they were not disclosed. The bargain therefore cannot stand.

[VAUGHAN WILLIAMS, L.J.—What is meant by concealing the facts?]

Not disclosing them, knowing that the other party is ignorant of them. The relation between partners may not be completely analogous to that between trustee and *cestui que trust*, but it is as regards the duty of disclosure in dealings of this kind; a partner cannot evade this duty by employing a person to negotiate for him who does not know the facts. The duty of partners in this respect is shewn by section 28 of the Partnership Act,

(2) 3 L. J. K.B. 136; 1 Ad. & E. 40.

(3) 41 L. J. Ex. 17; L. R. 7 Ex. 26.

(4) 68 L. J. Ch. 253; [1899] 1 Ch. 387.

1890. The cases as to election do not apply in the case of a trustee buying from his *cestui que trust*. There cannot be confirmation without full disclosure of all the material circumstances—*Levin's Law of Trusts* (11th ed.), pp. 566, 567, 577; see *Fox v. Mackreth* [1788, 1791].⁵ An agreement in settlement of an action can be set aside on the ground of mistake of one party induced by the other—*Wilding v. Sanderson* [1897].⁶

P. O. Lawrence, K.C., and George Lawrence (Sir E. Clarke, K.C., with them), for the executors of James Law.—The basis of the relation between partners is that of mutual confidence. It is going too far to say that that can never be put an end to. When once the mutual confidence is destroyed the parties are at arm's length, and the relation in the nature of that of trustee and *cestui que trust* is determined. The mutual confidence in this case was destroyed before the settlement of July, because William was making enquiries as to the assets not in the balance-sheet of Joseph without applying to James. The parties then were quarrelling, so no fiduciary relation-ship can be relied upon.

Both parties had access to the partnership books, and if William chose to sell without making proper enquiry he must be taken to have waived his right to investigation. The ground of relief here is non-disclosure, but a partner can waive the right to have disclosure from his co-partner—*Knight v. Marjoribanks* [1849].⁷

[VAUGHAN WILLIAMS, L.J., referred to *Redgrave v. Hurd* [1881].⁸]

There was waiver here. Lacy agreed on a sum of money in lieu of investigation. Partners can enter into any dealings with one another so long as mutual confidence is maintained. They can deal more freely than a trustee can with his *cestui que trust*.

[VAUGHAN WILLIAMS, L.J., referred to *Maddeford v. Austwick* [1826].⁹]

(5) 2 Bro. C.C. 400; 2 Cox, 320; 2 Wh. & Ta. L.C. (7th ed.), 709, 716.

(6) 66 L. J. Ch. 684, 687; [1897] 2 Ch. 534, 550.

(7) 11 Beav. 322; 2 Mac. & G. 10.

(8) 51 L. J. Ch. 113; 20 Ch. D. 1.

(9) 1 Sim. 89.

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Assuming that everything was present to make the contract voidable, the party defrauded must elect to affirm or to disaffirm it. If a man believes that he has been defrauded, and he elects to stand by the bargain, he cannot afterwards say that he did not know the extent of the fraud. He must elect once for all—*Scarf v. Jardine* [1882],¹⁰ *Campbell v. Fleming*,² *Elsey v. Adams* [1864],¹¹ and *Clough v. London and North-Western Railway*.³ In this case there were three acts of election—first, the dealing with the bond; secondly, the action for the instalment; and thirdly, the action for damages for fraudulent misrepresentation. These together make a strong case. The actions could not have been brought except on the footing that the bargain stood.

[VAUGHAN WILLIAMS, L.J., referred to *Calisher v. Bischoffsheim* [1870],¹² commented on by Brett, L.J., in *Banner, Ex parte*; *Blythe, in re* [1881].¹³]

[COZENS-HARDY, L.J.—Those observations of Brett, L.J., were not quite accepted in *Miles v. New Zealand Alford Estate Co.* [1886].¹⁴]

The Court can, no doubt, go behind a compromise if it has been obtained unfairly—*Hawkins, In re*; *Troup, ex parte* [1894]¹⁵; but the transaction in the present case ought not to be re-opened after this length of time.

Younger, K.C., and *Austen-Cartmell (Warrington, K.C., with them)*, for the executor of Joseph Law.—At the time of the second settlement James Law was in a state of physical collapse. Without wishing to minimise the duty of a partner buying from his co-partner to disclose what he knows as to the partnership property, it is only fair to remember, when dealing with the case of a man who is dead, that it was very difficult for any one at that time to say what was then the value of the share in the partnership, and that James Law was not then in a condition in which he could

state what it was. If neither side has done equity, matters must be left as they are.

The strongest act of election was the issue of the writ in the action for misrepresentation. There was the unequivocal act referred to by Lord Blackburn in *Scarf v. Jardine*¹⁰ in the issue of the writ in the first action, or, at all events, at the latest, in the issue of the writ in the second action. The relation of the parties was then permanently fixed. They were then at arm's length. The action on the bond was brought after the advice of counsel that an action could be brought for fraudulent misrepresentation.

Neville, K.C., in reply.—The representation made as to the value of the assets was never withdrawn. No complete disclosure took place, and what did take place was calculated to lead William to suppose that the balance-sheet set out all the assets. James Law must shew that William was supplied with full information. The burden of proof is on James. *Campbell v. Fleming*² and such cases have nothing to do with cases where an equitable relation exists between the parties. An agreement embodied in a consent order is as liable to be upset as a simple contract between the parties. Where a misrepresentation is material the Court infers that it influenced the contract. The agreement to compromise was secured by the withholding of information which James should have disclosed. There could be no bargain in this case which would bind until full information had been given.

Cur. adv. vult.

Dec. 5.—COZENS-HARDY, L.J., read the judgment of the Court:

This is an appeal from the judgment of Mr. Justice Kekewich, who dismissed with costs an action seeking to set aside a sale by William Law to James Law of his interest in a partnership business carried on between William and James. The vendor and purchaser are both dead, but their representatives are before the Court.

Now it is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the

(10) 51 L. J. Q.B. 612; 7 App. Cas. 345.

(11) 2 De G. J. & S. 147.

(12) 39 L. J. Q.B. 181; L. R. 5 Q.B. 449.

(13) 51 L. J. Ch. 300, 302; 17 Ch. D. 480, 490.

(14) 55 L. J. Ch. 801; 32 Ch. D. 266.

(15) 64 L. J. Q.B. 373; [1895] 1 Q.B. 404.

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purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows, and that, unless such information has been furnished, the sale is voidable and may be set aside—see *Maddeford v. Austwick*.² The original sale on July 2, 1900, by William to James was for 21,000*l.*, payable half in cash and half at six months secured by a bond. Now we will assume that this sale could have been set aside by William on the ground that James had not disclosed the existence of partnership assets represented by mortgages and other securities to a very large amount standing in the names of James and his late brother Joseph, who had also been a partner. But shortly after the completion of the sale William undoubtedly ascertained the existence of some of what we will call “the suppressed assets.” He thereupon consulted counsel, and his case then was, not merely that there had been no proper disclosure by James of the assets in question, but that the sale had been brought about by an actual representation by or on behalf of James that there were no partnership assets beyond those appearing in certain probate valuations, which certainly did not disclose the assets in question. We may here observe that the appellant does not raise any case of misrepresentation before us. He bases his case solely on the ground of non-disclosure, giving rise to a right in equity to a rescission of the contract of sale. The counsel who was consulted advised that an action should be brought for damages for misrepresentation, the measure of damages being one-half of the value of the omitted assets; and counsel added that, as there was some doubt whether all the assets had even then been discovered, it would be well to ask that an account be taken of all further assets belonging to the partnership, and to claim half of their value also. Following this advice, which was given on November 8, 1900, William, on January 22, 1901, issued a writ in the Queen's Bench Division. This action was settled by an agreement dated February 15, 1901, which was embodied in a consent order on

February 25, 1901, staying the action. All charges of fraud or fraudulent representations being withdrawn, the sum of 3,550*l.* was paid by James to William in discharge of every claim relating to any matter whatsoever between the plaintiff and defendant and in full discharge thereof. Before this settlement was arrived at William had ascertained that there were still further partnership assets not disclosed by James, and he surmised and believed that there might be others, though he was not aware of their particulars or amount. Under these circumstances it was, of course, open to William, if he chose, not to insist on his full rights, and in particular not to obtain full disclosure of what the assets consisted of, and to come to a settlement or compromise with James on that footing. And this is what he did. What his reasons were for so doing concerned him alone, and it would be idle now to speculate whether he was influenced by fraternal affection, or by an idea that his partnership drawings may have been greater than those of James, or by some other reason. But after the settlement so come to, in our opinion it was not possible for William to re-open the transaction. He deliberately made his election, and by that election he is bound—see *Clough v. London and North-Western Railway*.³ It cannot be sufficient to allege and prove that, if the action had been fought out, the plaintiff would have recovered damages greatly in excess of 3,550*l.* No separate and independent fraud is even alleged in bringing about the settlement of February, 1901. William may have been induced to settle largely by reason of representations made by the daughter of James as to her father's health, but these representations were not untrue. He was not induced by any statement or assurance on the part of James or his advisers that there were no other suppressed assets.

But the case against the appellant's claim now to rescind does not even rest solely on what we have just stated. We have purposely passed over two facts of great importance. William Law, after he had been advised by counsel, assigned the bond to secure the second instalment of 10,500*l.* to trustees, and subsequently, on

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January 8, 1901, William joined with the trustees in an action on the bond to recover this instalment. Proceedings in this action were stayed on January 18 on payment by James to the trustees of 10,532*l.* 1*s.* 8*d.*, being the balance of all principal moneys and interest, with costs amounting to 3*l.* 5*s.* This was four days before the writ in the action for damages was issued. In point of fact, William, with knowledge that the sale might be upset or that damages might be recovered, deliberately postponed proceedings with that view until after he had obtained payment of the balance of the purchase-money, to which he had no title except on the footing that the sale was not to be set aside. It is now too late for William to repudiate the contract of which he has thus deliberately secured the benefits.

It has been strenuously argued that the duty resting on the purchasing partner continued in full force and effect up to and after the settlement of the action, so that James could not rely upon a binding election by William unless and until full disclosure had been made. We know of no authority which supports this proposition, and it seems to us to be contrary to principle. It seems impossible to hold that under such circumstances as existed here William could not, if he chose, come to a binding settlement or compromise or make a binding election not to rescind without full disclosure by James. In our opinion Mr. Justice Kekewich was right in the view which he took as to the effect of what was done in January and February, 1901, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors—Barfield & Barfield, for appellant; Bower, Cotton & Bower, agents for Longbotham & Sons, Halifax; Robbins, Billing & Co., agents for J. L. Garsed, Elland, for respondents.

[Reported by A. J. Spenser, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Dec. 8, 9, 13, 14, 15.

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*Easement — Light — Prescription —
Extent of Right—Actionable Nuisance—
Mandatory Injunction—Damages.*

The result of the decision in Colls v. Home and Colonial Stores (73 L. J. Ch. 484; [1904] A.C. 179) is that the plaintiff in an action for the obstruction of light to his premises must, in order to succeed, establish a nuisance, and a Judge in directing himself or a jury as to what constitutes an actionable nuisance must take the law to be that the owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of it if it is a place of business; and to constitute an actionable nuisance the obstruction must be such as substantially to interfere with that right. The mere proof that a given percentage of light has been taken away is not sufficient, but in considering the sufficiency of the light the locality ought to be borne in mind, and also light coming from quarters other than that where the obstruction is.

In an action by the owner of a dwelling-house for obstruction of the light to one of the rooms in the house, KEKEWICH, J., found that the room had been exceptionally well lighted, and still was well lighted, and there was sufficient light to enable it to be used for the purposes for which it was designed; but that there had been a large obstruction of light by the erection of the defendant's house, and a large interference with the cheerfulness of the plaintiff's room, so that the character of the room had been altered, and it had lost in the obstruction of light one of its chief charms and advantages; and that the obstruction of the light had caused a substantial depreciation in the letting value of the plaintiff's house:—Held, by VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J. (dissentiente ROMER, L.J.), on these findings, that an actionable nuisance had been committed.

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Held, by ROMER, L.J., as an inference from the findings and on the evidence as a whole, that it was not shewn that an actionable nuisance had been committed.

In the opinion of the Court, the defendant had not been guilty of any sharp practice or any high-handed or un-neighbourly conduct towards the plaintiff, or shewn any desire to evade the jurisdiction of the Court; and the case was not one in which damages could not be considered a reasonable and adequate compensation:—Held, that the remedy should be in damages, and not by a mandatory injunction.

Appeal from a decision of Kekewich, J.

The action was brought for an injunction to restrain the defendant from erecting or permitting to remain erected any building in such manner as to obstruct the access of light to the windows of the plaintiff's house, or to cause any nuisance to the plaintiff in the use and enjoyment of her premises, and damages.

The plaintiff was the owner of a house and ground at Acton, in which she resided with her family. She alleged that her house had two windows on the ground floor on the west side thereof, which were ancient lights, and that the defendant had recently erected and maintained a high building near to the windows in question which obstructed the light coming thereto, and thereby interfered with the use and enjoyment of her house. It was stated that, before the plaintiff's house was built, the property of which its site formed part was laid out as a building estate, and there was a plan of the estate produced. The plaintiff's house was built by the owner of the freehold, and the plaintiff bought it from his representatives.

The defendant alleged that he had completed the building complained of prior to the date of the writ to the knowledge of the plaintiff. He denied that the building obstructed the light coming to the plaintiff's house or interfered with the use and enjoyment thereof, and alleged that the plaintiff had abundance of light for her house for all ordinary purposes of habitation; but in case he should be under any liability in respect

of the matters complained of, he paid 12*l.* 10*s.* into Court as sufficient to satisfy the same.

The case originally came on for trial in December, 1903, but pending an appeal the decision of the House of Lords was given in *Colls v. Home and Colonial Stores* [1904],¹ and the Court of Appeal, having regard to that, remitted the case for re-trial.

The plaintiff complained of the obstruction to the light of three rooms—the drawing-room, the morning-room, and the hall.

Kekewich, J., was of opinion that the obstruction in the case of the drawing-room was not such as to create an actionable nuisance, nor in the case of the hall taken alone, but taking that with the morning-room the obstruction did create a nuisance. In dealing with the evidence he said: "The great cause of complaint has been of the obstruction of light to what has been called the morning room. It was an exceptionally well-lighted room, and even now is well lighted, so that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question. As I understand the judgments in the House of Lords, that is not the test, though it is a matter for consideration. I have evidence, confirmed I venture to think by universal experience, that in suburban or country residences not rising to the dignity of mansion-houses, the third room on the ground floor is the living or sitting room in addition to the drawing and dining rooms, and is the most important of all, the one most used, the one most devoted to family life, and the one most intimately associated with the sentiments of home. For the complete enjoyment of such a room cheerfulness is essential. During the darker hours that may be attained by artificial means, but during the day it depends mainly on external light. That there has been a large obstruction of light by the erection of the defendant's house is abundantly clear, and I think it also clear that there has been a large interference with the cheerfulness of

(1) 73 L. J. Ch. 484; [1904] A.C. 179.

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the room. There is conflict of evidence respecting the capability of the room as it now is for reading purposes. Experiments not conducted on strictly scientific lines are invariably untrustworthy and generally misleading. It is impossible with any advantage to compare any experiment with another unless assured that the materials and conditions were precisely identical in both. In the reading experiments reported to me no one has given me the means of comparison on a basis pretending to any accuracy. The evidence about reading must be dismissed altogether. Nevertheless there is a considerable body of evidence touching the altered character of the room. Mr. Reid was impatient and did not assist me much, but his wife was a better witness, and some of her detailed evidence, especially about the sewing, was pertinent. The family may have been hasty in abandoning the morning-room, but I cannot suppose that they would have continued the abandonment if further experience had shewn them that it was not after all much deteriorated. They have had the experience on the weekly adjournment from the dining-room, and it has not tempted them to return. Fortunately there is no lack of independent evidence. I have seen many witnesses, including Mr. Virgo, who knew the house and this particular room before the erection of the defendant's house and have visited it since; and after making large allowance for inaccuracy in reading experiments and the exaggeration which always enters into evidence on such questions, I am bound to treat their testimony as fully confirming that of Mrs. Reid. I am convinced that the character of the room is altered and that, though still a well-lighted room, it has lost in the obstruction of light one of its chief charms and advantages. In determining whether this is a nuisance or not I must take into consideration all the surrounding circumstances, not forgetting that the plaintiff purchased a house with the knowledge which must be imputed to her that it was one of a projected row of houses and that sooner or later there was sure to be erected on the adjoining plot, then vacant, another house which was not unlikely to be of a size and character

similar to her own. Having given all these circumstances full consideration, I have come to the conclusion that the obstruction of light to the morning-room is a nuisance within the meaning of the authorities on that subject."

His Lordship was of opinion that the nuisance had caused a substantial depreciation in the letting and selling value of the plaintiff's house, amounting to probably 300*l.* to 400*l.*, and he granted a mandatory injunction ordering the defendant to pull down so much of his house as caused a nuisance to the plaintiff by the obstruction of light to the windows of the morning-room and to the hall as the same existed previously to the erection of the defendant's house.

The defendant appealed.

Hughes, K.C., and *W. E. Vernon*, for the appellant.—The findings of Kekewich, J., were extremely favourable to the plaintiff, but even on his findings the defendant has committed no actionable wrong. The learned Judge finds that the morning-room is still well lighted: that must be according to the standard of light expected in the country. That is all that the plaintiff is entitled to. The comfort and convenience of the room has not been interfered with, and there is no cause of action. The fact that some of the light has been obstructed is no cause of action if sufficient remains for the convenient use of the room—*Clarke v. Clark* [1865]² and *Colls v. Home and Colonial Stores*.¹

[VAUGHAN WILLIAMS, L.J.—Subject to anything that may be said on the other side, we do not think this is a case for a mandatory injunction.]

It is not a case for damages either. There is no cause of action at all. The right is only to have that amount of light through the window which is sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of the house as a dwelling-house—*Kell v. Pearson* [1871]³ and *Colls v. Home and Colonial Stores*.¹ The plaintiff has got that. The fact that a room may have

(2) 35 L. J. Ch. 151; L. R. 1 Ch. 16.

(3) L. R. 6 Ch. 809, 811.

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been used for a special purpose gives no higher right.

P. O. Lawrence, K.C., and Cann, for the respondent.—The judgment of Kekewich, J., was a pronouncement on the facts, and if he has not misdirected himself as to the law this Court will not interfere with his decision. According to his findings there has been a sensible diminution of the light coming to this window, and the plaintiff is entitled to complain. The law on the subject of obstruction of light must be taken now to be as laid down in *Colls v. Home and Colonial Stores*,¹ and the House of Lords there, in effect, adopted the test applied in *Back v. Stacey* [1826],⁴ *Parker v. Smith* [1832],⁵ and *Wells v. Ody* [1836]⁶—namely, that to give a right of action the diminution of light must be such as to sensibly affect the plaintiff's premises and make them less fit for business or occupation. The right of action is very old—*Aldred's Case* [1611]⁷; but, as Lord Macnaghten points out in *Colls v. Home and Colonial Stores*,¹ it is not every diminution which gives a right of action. The House of Lords in that case took the view that the right to light was not in the nature of property, but in the nature of a negative easement—a right to prevent the neighbour so using his property as to interfere with your light.

[VAUGHAN WILLIAMS, L.J., referred to the definition of "nuisance" in *Les Termes de la Ley* (ed. of 1721), p. 460.]

The question whether there has been an infringement giving a right of action must be a question of comparison between what there was in the particular place before the act complained of, and what there is afterwards—*Pringle v. Wernham* [1836].⁸

[ROMER, L.J.—Can that case stand after *Colls v. Home and Colonial Stores*?¹]

All that the Court has to do is to see whether there has been such a diminution of light as to make the house sensibly less comfortable and convenient for use, according to the ordinary notions of

mankind—*Clarke v. Clark*² and *Kelk v. Pearson*.³ There is nothing in *Colls v. Home and Colonial Stores*¹ to shew that those cases are wrong; and if they are right, there is abundant evidence to shew that there is a right of action in the present case. The question is not whether the plaintiff has such an amount of light as she can manage with, but whether there has been such a diminution of light as to make her house sensibly less comfortable and convenient.

Both *Warren v. Brown* [1901]⁹ and *Colls v. Home and Colonial Stores*¹ were treated as cases depending upon special circumstances. The question whether or no a man could prescribe for a special right to light after twenty years was not really decided.

[VAUGHAN WILLIAMS, L.J.—The Prescription Act, 1832, did not alter the nature of the right to light.—His Lordship referred to the passage in *Gale on Easements* (3rd ed. p. 575, 7th ed. p. 537), cited by Mellish, L.J., in *Kelk v. Pearson*.³]

The rule as to an angle of forty-five degrees may be a *prima facie* working rule, but it is not an absolute rule of law that that is sufficient. It has never been applied except in towns.

As regards the remedy, the defendant has acted in a high-handed and unneighbourly manner, and that is a ground for granting an injunction. In some cases of trade premises there can, no doubt, be adequate compensation by money damages, but the plaintiff here wants to live in her house, and a money payment on the basis of the injury to the letting value is no real compensation to her.

[VAUGHAN WILLIAMS, L.J.—Do you say that in an action by an occupier he is always entitled to an injunction if successful?]

Yes. The cases in which damages ought to be given are stated by A. L. Smith, L.J., in *Shelfer v. City of London Electric Lighting Co.* [1894],¹⁰ but the present case does not come within any of those.

(4) 2 Car. & P. 465.

(5) 5 Car. & P. 438.

(6) 7 Car. & P. 410.

(7) 9 Co. Rep. 57b.

(8) 7 Car. & P. 377.

(9) 71 L. J. K.B. 12; [1902] 1 K.B. 15.

(10) 64 L. J. Ch. 216, 229; [1895] 1 Ch. 322.

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Hughes, K.C., in reply.—In any view of the case this is not a case for a mandatory injunction after what was said by Lord Macnaghten and Lord Lindley in *Colls v. Home and Colonial Stores*.¹ The injury, if any, is not great—it is nothing like 300*l.*—and it can be adequately compensated by a money payment. There is nothing special which calls for an injunction, and it would be oppressive on the defendant to grant an injunction, as his building was partly up before any complaint was made. Assuming *Shelfer v. City of London Electric Lighting Co.*¹⁰ to be applicable, this is not within any of the cases put by A. L. Smith, L.J., as cases where an injunction ought to be granted. The defendant has not done anything contrary to law.

[COZENS-HARDY, L.J., referred to *Cross v. Lewis* [1824].¹¹]

The result of the cases seems to be that, although there may have been a substantial diminution in the amount of light, there will be no cause of action if there is enough left for the ordinary purposes for which the building was intended. The findings of Kekewich, J., are in the defendant's favour in this respect.

[ROMER, L.J.—Do you say that there is any difference between business premises and occupation premises for this purpose?]

No.

[They also referred to *Birmingham, Dudley, and District Banking Co. v. Ross* [1888].¹²]

VAUGHAN WILLIAMS, L.J.—The question of what tests are to be applied in an action brought for obstruction of ancient lights, in order to ascertain whether the plaintiff has a good cause of action, has recently been very much discussed in *Colls v. Home and Colonial Stores*,¹ and I think that the House of Lords there intended to lay down rules which should be applied in future cases of this nature. I do not think that I am saying anything disrespectful of Judges in days gone by, whether common-law Judges or Chancery Judges, in saying that the cases which have been decided are not quite consistent

as to the tests that should be applied; and, under these circumstances, it was obviously very desirable that the differences, such as they were, in the principles laid down by these cases should be settled once and for all. This being the first occasion on which the Court of Appeal has had to apply the principle which has now been laid down by the House of Lords, I hope that we may be able to apply that principle—I say deliberately “that principle,” because I think that in substance there was only one principle laid down in the various speeches of the law Lords in *Colls v. Home and Colonial Stores*¹—so as to shew that the law has now been reduced to sufficient clearness to make it capable of practical application.

The main distinction which runs through the two lines of cases which one finds in days gone by is this: The right of a house-owner to light gained by prescription, whether before or after the Prescription Act, 1832, was regarded by one school as being a mere right of property, and by the other school not as a right of property in light, or, as it is sometimes inaccurately stated, in light and air, but as a negative easement, being a right to prevent some landowner from using his land so as to constitute a nuisance to the owner or occupier of a house upon adjoining land. As the result of the decision of the House of Lords in *Colls v. Home and Colonial Stores*,¹ we must now apply the view of that school which held that the only right that was gained by the prescription was a negative easement—a right to prevent your neighbour from so using his land as to injure you, who happened to be the adjoining owner or to occupy the adjoining land. This view is shortly expressed by saying that the rights which are to be enforced in respect of this prescriptive easement are rights which would properly be enforced by an action of nuisance. An action of nuisance is different from an action of trespass. An action of trespass is the action which was brought where the body or the land of a person had been invaded. An action of nuisance is the action which was brought where there was no invasion of the property of

(11) 2 B. & C. 686.

(12) 57 L. J. Ch. 601; 38 Ch. D. 295.

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somebody else, but where the wrong of the defendant consisted in so using his own land as to injure his neighbours. This action of nuisance was not in any way limited to cases where the plaintiff had acquired a legal right, and still less was it limited to cases in which the plaintiff had acquired a legal right in the nature of prescription. The action in the most popular, as well as the precise legal sense of the word, would lie if a man so used his own land as to cause the air which passed over his neighbour's land, in which he had and could have no special right of property whatsoever, to be noxious and harmful. There was some doubt about that down to the case of *Angus & Co. v. Dalton* [1881].¹³ That was an action brought against a defendant who, by digging on the edge of his own land, had let down the surface of his neighbour's land. There there was no right dependent on prescription, because the right of lateral or subjacent support for land uncovered with buildings is a common-law right, and one which exists independently of any property in anything vested in the plaintiff. The action in that case was not and could not be an action of trespass; it was in the nature of an action of nuisance. But, supposing the land to be burdened by buildings, buildings of such weight that the subsidence of the land would not have occurred but for the buildings, in that case the plaintiff would have a prescriptive right, and it would be his prescriptive right, and his prescriptive right only, which enabled him to bring the action. Nevertheless, his action would be an action of nuisance. I mention this case of the subsidence of land in particular, because it seems to me to illustrate the proposition that the action is equally an action of nuisance whether the plaintiff is relying upon his common-law rights, or whether he is relying upon a prescriptive right.

In all these cases of nuisance one has to consider what it is that must be proved by the plaintiff in order to support his action. It seems to me that the House

(13) 47 L. J. Q.B. 163; 48 L. J. Q.B. 225; 50 L. J. Q.B. 689; 3 Q.B. D. 85; 4 Q.B. D. 162; 6 App. Cas. 740.

of Lords went upon the principle that, whether the plaintiff is relying upon his common-law rights or whether he is relying upon his prescriptive rights, or his rights of property of any sort or kind, the conditions precedent to constitute a cause of action are really identical. The Courts have always been unwilling in these cases of nuisance to hold that every nuisance, apart from the rule which prevents the law concerning itself *de minimis*, should be a cause of action. On the contrary, in all these cases of nuisance which involve a limitation of a man's right to use his own land, the Courts will not enforce the alleged rights of the plaintiff, unless that which has occurred is a substantial interference with his comfortable or profitable occupation of his dwelling-house, or warehouse, or house of business, as the case may be. Whether or not this rule, which has, according to my view, been applied in *Colls v. Home and Colonial Stores*,¹ is logically justifiable, I do not take upon myself to say, and I do not think that it is very important, because it seems to me that there can be no doubt that such a rule, whether logical or not, is a rule which owes its existence to the convenience and comfort of the people at large. It is convenient that people should not be allowed to enforce rights to such an extent as to interfere with the good and the progress of the community. That is what I understand the meaning of the judgment in the House of Lords to be; and I cannot bring myself to the conclusion that that rule is wrong because for reasons of convenience or any other reason the Judges have thought fit to refer the origin of easements to grant, in such a way that easements may be rightly spoken of as conventional rights. They are conventional rights, and it may be that in strict logic conventional rights ought to be enforced according to their verbal definition; but I take it that that is not the law. I think we must bear in mind that, in these cases which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts

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relied upon as constituting a nuisance are such as interfere with the ordinary rights that according to the ordinary notions of people they have a right to exercise in relation to one another and in relation to their property.

Having said that, I will try to apply what was said by the law Lords in *Colls v. Home and Colonial Stores*¹ to the facts as found by Mr. Justice Kekewich in this case. Lord Halsbury there says: "The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action."

Lord Macnaghten in his speech refers to the summing-up of the Judges at Nisi Prius in *Back v. Stacey*,⁴ *Parker v. Smith*,⁵ and *Wells v. Ody*,⁶ and he adopts them as supplying a definite test. The definition by Chief Justice Tindal in *Parker v. Smith*,⁵ which he cites, is as follows: "That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises is such as really makes them to a sensible degree less fit for the purposes of business or occupation." Lord Macnaghten, having quoted *Wells v. Ody*,⁶ tried before Baron Parke, says: "In his charge to the jury the learned Judge said that he entirely adopted the law as laid down by Tindal, C.J., in *Parker v. Smith*.⁵ And then, after reading a passage from *Parker v. Smith*,⁵ he concluded his address to the jury by saying: 'The question, therefore, which I shall leave to you is whether the

effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation.'" Although Lord Macnaghten deals, and deals very clearly, with the various difficulties that may arise in cases, he never at any point in his speech departs from the definition of the circumstances under which such an action will lie as they appear in *Back v. Stacey*,⁴ *Parker v. Smith*,⁵ and *Wells v. Ody*.⁶ Later on he cites the judgments in *Kelk v. Pearson*³ and *City of London Brewery Co. v. Tennant* [1873],¹⁴ but they seem to me only to follow out the definitions in the three Nisi Prius cases which I have cited. The passage in the judgment of Lord Justice James in *Kelk v. Pearson*³ to which Lord Macnaghten refers is as follows: "Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement"—Lord Justice James, it is to be observed, states it properly as a negative easement—"a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable."

Lord Davey's judgment, in respect to the definition of what is essential to constitute this cause of action, does not, I think, in any way differ from the judgment of Lord Macnaghten. He relies upon the same cases, and he sums it up thus: "According to both principle and authority, I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a

(14) 43 L. J. Ch. 457; L. R. 9 Ch. 212.

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quantity of light, the measure of which is what is required for the ordinary purposes of inhabitation or business of the tenement according to the ordinary notions of mankind." That is general to all cases, and contains the definition generally of what is essential to constitute this right to light.

Lord Lindley, in his judgment, says: "*Kell v. Pearson*³ shews that in ordinary cases a person does not necessarily acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required." That is to the same effect as a passage in the judgment of Lord Halsbury: "The question may be very simply stated thus: after an enjoyment of light for twenty years, or if the question arose before the Act for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period?" He answers that by saying that he would be entitled to all the light.

Lord Lindley quotes *Kell v. Pearson*³ and *City of London Brewery Co. v. Tennant*¹⁴ approvingly. The doctrine as stated in *City of London Brewery Co. v. Tennant*¹⁴ is the same as that stated in *Kell v. Pearson*.³ "That doctrine," Lord Lindley says, "as stated in *City of London Brewery Co. v. Tennant*,¹⁴ is that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a business house, a shop, or other place of business. The expressions 'the ordinary notions of mankind,' 'comfortable use and enjoyment,' and 'beneficial use and occupation' introduce elements of uncertainty; but similar uncertainty has always existed and exists still in all cases of nuisance, and in this country an obstruction of light has commonly been

regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement."

I think I have read sufficient to shew that, in principle, the result of all these cases is that the interference with the access of light through the ancient windows of the plaintiff must be of such a character as sensibly to interfere with the comfort and convenience or usefulness of the building, according to its character as a residence, or a place of business, or warehouse, or whatever else it may be, according to the ordinary notions of mankind. Unless it amounts to that, there is no cause of action; the mere proof that a given percentage of light has been taken away is not sufficient; and in order to support the action of nuisance it must be shewn not only that there has been this or that considerable percentage of light abstracted, but also that the abstraction of this quantity of light has interfered with the comfortable or convenient occupation of the premises according to the notions of the citizens of this country.

In applying that test, I am going to take into consideration the light coming from other sources than through the particular window, the obstruction of the access to which is complained of in this action. I need not discuss that at length, because the defendant can hardly complain if I, in his favour, have taken into consideration light coming from other sources, even if I ought not to have done so in this particular case; but I do not feel any doubt about the matter, and it seems to me that in *Colls v. Home and Colonial Stores*¹ the law Lords came to the conclusion not only that we might, but that we must, take into consideration the light coming from other sources.

I will now read the facts which are found by Mr. Justice Kekewich in his judgment. [His Lordship referred to the part of the judgment set out above, dealing with the amount of light in the room and the obstruction to it, and continued:] I do not think that Mr. Justice Kekewich meant to find anything definite as to how far reading was interfered with by the obstruction, or how far sewing was interfered with by the obstruction, and I do

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not propose to do so myself. But he does point out that these people actually ceased to use the room; he treats them as honest witnesses, and he thinks that they ceased to use the room because they personally honestly found the room much less convenient to use, and not for any strategic reasons in view of an action, or in that sort of temper which might make a man find every possible wrong or bad result present in a case in which he was making a complaint. [His Lordship then referred to the remarks of Kekewich, J., as to the alteration in the character of the room, observing that he did not understand the learned Judge to mean that the mere fact that a room had lost its charm would be sufficient to constitute a cause of action, but only that the same obstruction which had made the room less convenient and less comfortable to use had also naturally diminished the charm of the room, and that in his Lordship's opinion he would have arrived at the same conclusion without any consideration of what effect the obstruction had upon the charms of the room. His Lordship then referred to the portion of the judgment dealing with the fact that the plaintiff had purchased this house with the knowledge, which was to be imputed to her, that it was one of a projected row of houses, and continued:] I think that the learned Judge was perfectly right in supposing that he must not leave out of consideration the fact that the plaintiff had purchased with the knowledge that the house that she purchased was one of a projected row of houses that sooner or later was sure to be erected on the adjoining plot. I think that, whether one treats this as a matter of prescription under the Act or on the theory of lost grant, the grant always in theory had to be qualified in accordance with the surrounding circumstances; but we have had no real evidence as to what the knowledge was that was to be imputed to the plaintiff. No contract or plan binding on the owner of the land has ever been produced to us. All we know is that there was certainly an idea of cutting up this estate into plots, and this house was built, and for some twenty or thirty yards there was no other house

built; but, assuming the knowledge that Mr. Justice Kekewich imputes to the plaintiff, the building of a house in this row, having regard to these plots, could have been perfectly well carried out without obstructing the light coming to the plaintiff's windows.

On these facts I have to ask myself, applying the test laid down in *Colls v. Home and Colonial Stores*,¹ whether there has been an obstruction which has rendered the house substantially less comfortable and convenient. I do not say that I should have come to the conclusion in fact that Mr. Justice Kekewich has come to, but I think there is evidence on which he could have come to that conclusion; and I have to bear in mind that he saw the witnesses and was able to judge of their demeanour, and I do not think that I ought to go behind the conclusions in fact of the learned Judge. Of course there are things in his conclusions which cause some little trouble to my mind. He says that this room is, notwithstanding the obstruction, still a well-lighted room. One cannot help asking oneself whether a house can be substantially less comfortable and convenient when the learned Judge says that the room is still a well-lighted room, but I am not prepared to say that a room may not be still a well-lighted room after the obstruction, and yet be a room which is substantially less comfortable and less convenient according to the ordinary notions of mankind in this country. I think that may be so. I do not know what the exact standard is that one applies when one uses the word "well-lighted." "Well-lighted" is obviously a comparative expression; it may mean well-lighted taking the average of rooms, or it may mean well-lighted taking the average of the opinions of people of the present day as to the quantity of light that is required. I do not know in which sense it is used here; but if it means merely that the room is well-lighted taking the average of rooms of houses in the suburbs or the average of rooms in the metropolis, or in large towns, it seems to me that, notwithstanding that the room is well-lighted in that sense, it still might be that the obstruction has rendered

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the house substantially less comfortable and convenient according to the ordinary notions of mankind. Under those circumstances there is nothing in this finding in fact by the Judge which prevents my adopting it. Again, he says, "If the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed, there would be no further question." As I understand, he means to find that there is sufficient light left to enable this room to be used for the purpose for which it was designed. There, again, it seems to me that, notwithstanding that there may be sufficient light left, it may be that the obstruction has changed a room which had ample light for all the purposes likely to be carried out in it into a room in which there is a bare sufficiency of light for its occupation for the purpose designed. In that case, again, I think it may be true to find, as the learned Judge has found, that, according to the ordinary notions of mankind, the house has been substantially made less comfortable and less convenient.

In dealing with this question of fact I do not think that we can leave out of consideration the evidence of the experts as to value. These experts are men who very often can tell with great accuracy and certainty what effect the taking away of a particular convenience in a house may have upon its letting or selling value. It is not suggested here that these witnesses were prejudiced, or that there was any ground for distrusting them. They say that the house has diminished in value to the extent of (I think) 20% or 25% a year; and even if it were taken at a less sum, I cannot doubt but that the house must have been made substantially less comfortable and convenient, according to the ordinary notions of mankind, by reason of the obstruction. In one sense I entirely agree with what was said by Mr. Justice Kekewich about the leaving of sufficient light not being a test, though a matter for consideration. It seems to me that it is absolutely impossible to apply the test which has been defined by the House of Lords without taking into consideration, amongst other things, the amount of light which is left in a

particular room at the time when the obstruction takes place.

Under these circumstances, I do not see my way to differ from the judgment of Mr. Justice Kekewich that there is a cause of action here. Then one has to consider whether there ought to be damages or a mandatory injunction. With regard to that, I propose to apply either the test laid down by Lord Macnaghten in *Colls v. Home and Colonial Stores*,¹ or that laid down by Lord Justice A. L. Smith in his judgment in *Shelfer v. City of London Electric Lighting Co.*¹⁰ It seems to me here impossible to say that there ought to be any injunction by reason of any act by the defendant which could be properly termed high-handed, or from which any one could impute to him the desire to steal a march upon the plaintiff or to evade the jurisdiction of the Court. I think—and I wish emphatically to state this—that both parties honestly acted in accordance with what they believed, and not unreasonably might believe, to be their legal rights. Some suggestion was made that the plaintiff might have lost her right to an injunction by reason of delay; but I think the delay has been accounted for.

The only other matter which, according to Lord Macnaghten's judgment, remains to be considered, is whether this injury cannot be fairly compensated by money damages. I think it can be, and under those circumstances I think there ought to be no mandatory injunction. I will not refer in detail to the rules laid down for general application in the judgment of Lord Justice A. L. Smith in *Shelfer v. City of London Electric Lighting Co.*,¹⁰ but the observations I have made will make it plain that, according to my view, there is nothing in any one of those rules which makes it right that a mandatory injunction should be granted here.

There remains the question of damages. With regard to that, I do not think that Mr. Justice Kekewich has definitely found any sum for damages, and I think the amount of damages ought to be the subject of an enquiry in chambers, unless, of course, the parties can agree them. Notwithstanding the evidence of the experts—evidence to which attention

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ought to be given by reason of their knowledge, and also by reason of, I think I may say, their impartiality in this matter—I have great difficulty in agreeing with them, myself, in putting the damage quite as high as 25*l.* a year, or at the capital sum which is placed on this house by them. I think it is only right, therefore, that there should be an enquiry, if the parties cannot agree upon the amount.

ROMER, L.J.—This case is a simple one in one respect. It is a case where the house which is alleged to be injured is occupied by ordinary persons for the common purposes of domestic life. It is not the case of a business being carried on, nor a case of extraordinary user of any kind. The case is further narrowed by this—that practically the only part of the plaintiff's premises that we need consider is that which is called the morning-room. As I understand it, it is in respect of that room alone that the learned Judge has thought the plaintiff entitled to relief. That being so, I have to consider what is the law applicable to this case.

That law has recently been expounded by the House of Lords in the case of *Colls v. Home and Colonial Stores*.¹ I have carefully considered, as was my duty, the addresses of the noble Lords who decided that case, and I think I am enabled to gather from those addresses on what principle I am to deal with the case now before us, and I think I may state that principle shortly. The case has to be approached undoubtedly, now, from the point of view that the plaintiff has to establish what might fairly be called a nuisance. That of course, in itself, is no sufficient guide; but I am enabled to gather from *Colls v. Home and Colonial Stores*¹ how a jury should be directed, or how a Judge should direct himself in trying to determine in each case what would constitute a nuisance. I think all the noble Lords were agreed that, at any rate for the purposes of such a case as this, the law is laid down, though not quite in the same language, yet for all substantial purposes in the same way, and accurately, in the four cases of *Back v. Stacey*,² *Parker v. Smith*,³ *Kell v. Pearson*,³ and *City of London Brewery Co. v. Tennant*.¹⁴ I take

the law to be now, as stated in *City of London Brewery Co. v. Tennant*,¹⁴ as follows, strictly limiting the statement to such a case as we have now before us: An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house. That I take to be in the present case a sufficient and proper direction of law, coupled only with this further statement, which I think is essential. I think that, in considering what, according to the ordinary notions of mankind, is sufficient light for the comfortable use and enjoyment of the house, one ought to bear in mind the locality, and, further, I think that in considering what is sufficient light one must bear in mind the statement made by Lord Lindley in *Colls v. Home and Colonial Stores*,¹ and approved of, as I gather, by the other Lords: "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by Vice-Chancellor James in *Dyers' Co. v. King* [1870],¹⁵ the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable"; and he goes on, "I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." It appears to me that those are sufficient directions to me as to the law on the subject, and all I have to do is to see how the facts of the present case are to be dealt with in accordance with that law.

I think it is impossible to say that the present case, on the facts, is free from difficulty. It appears to me to be one which may fairly be said to be on the border-line. That it is difficult, I think, may fairly be said, owing to the fact that I, unfortunately for myself, have come to a different conclusion of fact in this case from that taken by my brothers. After considering the evidence in this case, and doing my best to arrive at a conclusion as

(15) 39 L. J. Ch. 339; L. R. 9 Eq. 438.

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to whether, according to the law, the defendant's building has caused a nuisance to the plaintiff, trying to come to the conclusion which an intelligent jury ought to come to in such a case, I can only say that the conclusion I have come to is that the plaintiff has failed to prove that the defendant has committed a nuisance in respect of these lights.

I will shortly state my reasons for coming to that conclusion, and I will first deal with the question irrespective of the judgment of Mr. Justice Kekewich. I have no doubt whatever that the defendant's building, by its erection, caused less light than before to come to the west window of the morning-room in question, and that not to an immaterial extent; and I bear in mind in the conclusion I have come to what the locality is here, and how matters stood before the erection of the defendant's house. I will first deal with the evidence that arises from an inspection, as it were, of the premises themselves. We have not the advantage, of course, of being able to go and see the premises themselves, but we have very good models before us, and it is not suggested that those models do not accurately give a proper representation of the two houses, and enable the Court to judge how the defendant's house interferes with the lights of the plaintiff's premises; bearing in mind, as one ought to do, that the defendant's house is to the left of the plaintiff's. To my mind, the evidence that a jury could get from an inspection, or that a Judge could get if he saw the premises himself, or from seeing a fair and proper representation of the premises, is very important. And I say this, not only because it is my own opinion, but because in *Back v. Stacey*⁴ Chief Justice Best told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone; and Chief Justice Best's address to the jury has been approved by the House of Lords. When I look at these two premises, and consider the defendant's house with relation to the plaintiff's,

and particularly with relation to the morning-room, I notice that the morning-room is a comparatively small room extremely well lighted by two windows—the north window and the west. The north window is wholly uninterfered with by the defendant's premises, and it is an ancient light; and therefore, bearing in mind what was said by Lord Lindley, I am entitled to consider for present purposes that that light remains. Then, with regard to the west light, I notice that to the north, even the west window of the plaintiff's morning-room has light coming from nearly the whole, if not the whole, of a quarter of a circle—that is to say, due north to nearly due west, wholly uninterfered with. Of course, that would not be direct sunlight, but it is light coming from the north, and even the defendant's house does not interfere with all the light from the west and south; there is a margin wholly uninterfered with from the south, and to a certain extent from the south-west. Therefore, there is only a partial interference with the west window itself, between west and south-west. Moreover, the height of the defendant's house is not excessive, in my opinion. It is not a case where it takes away forty-five degrees of light. So far as even the highest point may be said to affect the west window of the morning-room, it does not interfere to that extent. If, then, I had to answer the question before me by reason of a knowledge of these premises, when I saw how the north light was wholly uninterfered with, and the west light was only partially interfered with, I should myself have been disposed to come to the conclusion on that evidence that the room would still remain well lighted, and would have sufficient light, according to the ordinary notions of mankind, for its comfortable use and enjoyment as a dwelling-house. At any rate, I could not come to the opposite conclusion, or say that I was satisfied from looking at these models that any nuisance had been committed. Then how does the evidence stand, apart from the most important evidence that arises with regard to the premises themselves? I must say that, so far as the experts are concerned, speaking for myself, they give evidence, no doubt, in accordance with

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their opinions, but they are of course influenced, naturally, by the side on which they are called. It is not possible that that should not be so, otherwise how could one explain what we have here, and what we have in every case—experts on one side giving one view, and experts on the other side giving another? I do not think that the expert evidence removes the impression on my mind caused by a knowledge of the two houses together.

Now I come to the other evidence—the evidence of certain residents in this house. They gave certain evidence with regard to reading, which, if it could have been accepted, would have been most material. Personally, I must say that I should have had very great difficulty in accepting it, but I am fortunately excused, if I may say so, from arriving at the conclusion, because Mr. Justice Kekewich, having heard the witnesses, has said, “The evidence about reading must be dismissed altogether.” The rest of the evidence of the occupiers of the house is open, to my mind, to this observation: They are not considering, of course, a question of nuisance: they are comparing the morning-room as it now is with the room without any obstruction whatever to the west; and they would naturally think, if they got any interference with their light, that it interfered with their comfort. They would naturally not appreciate the point that there may be an interference with light which is not a nuisance at law; and, speaking for myself, having regard to their evidence, coupled with the evidence of the expert witnesses and with the evidence derived from looking at the models, I am not satisfied on the evidence as a whole that there has been what amounts to a nuisance in this case. If I had thought that the learned Judge had come to an opposite conclusion of fact, I should have hesitated to give effect to my view; but, doing the best I can with the judgment of the learned Judge, I do not come to the conclusion that his findings of fact do shew that a nuisance has been committed. In fact, I think, on a fair interpretation of his judgment, he has made certain findings which negative the idea of nuisance. The very first finding he has with regard to this morn-

ing-room is this: “It was an exceptionally well-lighted room, and even now is well lighted.” Then he goes on, “So that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question”; in other words, he holds as a fact that this is a well-lighted room still, and well lighted for the purposes for which the room was built; and the purpose for which that room was built we know was that of occupation as a morning-room for ordinary family domestic purposes. Therefore this is, to my mind, a clear finding that, notwithstanding anything the defendant has done, the plaintiff still has, following the words used in *City of London Brewery Co. v. Tennant*,¹⁴ sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of her house as a dwelling-house, and of this morning-room in particular. That is, I think, the conclusion at which he has arrived on that finding, and I think there is nothing in the rest of his judgment to negative that. He certainly finds that there has been a large obstruction of light. As regards that, I am as well able to judge as the learned Judge himself to what extent there has been an obstruction. I do not think it can be said that there is a large obstruction. That there has been an obstruction I agree, and the amount of it I am aware of; but, even taking it that there has been a large obstruction of light to the west window, that does not decide the question. Then he says that the cheerfulness of the morning-room is essential. I am not sure what he means by that; but what I think he means is that, like every morning-room, the lighter it is the more cheerful it is. Then he says that there has been a large interference with the cheerfulness of the room—not with its comfortable use and enjoyment as part of the dwelling-house, but with its cheerfulness. He makes it clear later on what he means, because he says, “I am convinced that the character of the room is altered”—that means in respect of the cheerfulness —“and that though still a well-lighted

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room it has lost in the obstruction of light one of its chief charms and advantages." In other words, when the plaintiff had use of the morning-room with a look-out to the west wholly unobstructed it had a charm and advantage in its special cheerfulness, and by reason of the deprivation of that the character of the room to that extent has suffered; but the Judge does not find that which amounts to a nuisance. On the contrary, as I have pointed out, he finds as a fact that which, in my own opinion, shews that there was no nuisance. That being so, it appears to me that the judgment of the learned Judge, far from enabling me to depart from the opinion that I should otherwise have formed on this case, confirms it; and I come to the conclusion on the whole of this case that the plaintiff's case fails, and that the action ought to have been dismissed.

COZENS-HARDY, L.J.—This is a very important and extremely difficult case, and, as there is a difference of opinion, it is necessary that I should shortly state why I agree with the judgment given by my Lord.

It is needless to say that I approach this case with an anxious desire to follow loyally the decision of the House of Lords in *Colls v. Home and Colonial Stores*,¹ so far as I can gather the principles which ought to govern it. I am not sure that I entirely agree with my Lord when he says that there was in substance only one principle laid down by the law Lords in that case. I think I can trace several points of difference, though they are not, perhaps, material for the purposes of the present case. It may be that in the very lengthy and interesting and elaborate discussion which we have had over that case we have somewhat forgotten that all the law Lords based their judgments upon the findings of fact by Mr. Justice Joyce. There was there a clear finding that the proposed building would not affect the selling or letting value of the respondent's premises; and there was also a finding that the diminution of light would not materially affect the respondent's comfort or convenience. The decision in *Colls v. Home and Colonial Stores*,¹ therefore, does

not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house nor materially affects the comfort or convenience of the occupier does not in law justify an action, even though a large proportion of light previously enjoyed has been lost.

In the present case I think it is clear that the learned Judge has held that the letting or selling value of the house has been affected by the defendant's building, and he has also certainly found that the comfort or convenience of the occupier has been affected by it. That being so, there is nothing, I think, in the decision in *Colls v. Home and Colonial Stores*¹ which in any way prevents me from arriving at the conclusion which I propose to adopt. It has been strenuously argued on behalf of the appellant that all we have to consider is the amount of light which has been left. I cannot accept that view of the law. It seems to me that the law as approved by the House of Lords, particularly by Lord Macnaghten, cannot be better stated than it was by Baron Parke in *Wells v. Ody*⁶: "The question, therefore, which I shall leave to you is whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises and make them less fit for occupation." Is it any answer to say that the room is still a well-lighted room? I think not, if the building makes the room less fit for occupation; and I do not think that we can bring in the phrase "according to the ordinary notions of mankind" to cut down the effect which would otherwise result from a finding of this nature. I, for my part, accept the findings of fact of Mr. Justice Kekewich. He has found, as I read his judgment, that the letting and selling value has diminished, and that the plaintiff's morning-room is materially affected so far as the comfort and convenience of the occupiers are concerned. That being so, I agree with my Lord that there is a good cause of action. I pass from the judgment with this sole remark, that it seems to me that the learned Judge applied the law quite correctly, or, to use a common phrase, he directed himself properly as to the law.

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When I come to the relief which he gave I am bound to say that I think this is not a case for a mandatory injunction. There is no case of sharp practice or unfair conduct on the part of the defendant. It is not a case of irrecoverable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable and adequate compensation. I think it is impossible to doubt that the tendency of the judgments of the House of Lords in *Colls v. Home and Colonial Stores*¹ is to go a little further than was done in *Shelfer v. City of London Electric Lighting Co.*,¹⁰ and to indicate that as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by.

Then, assuming that there is no mandatory injunction, are we in a position to assess the amount of damages? I think not. Although Mr. Justice Kekewich held that the plaintiff had suffered damages, he did not quantify them. That being so, it seems to me that we are driven, even at this late stage, to say that there must be a reference to the Master in chambers, or to the official referee, to ascertain the amount of damages.

Order varied.

Solicitors—Graham Gordon, for plaintiff;
Redfern & Hunt, for defendant.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905.
Jan. 17. }

W. W. DUNCAN & Co.,
In re.

Company—Winding-up—Proof—Right to Interest—Stockbroker's Customers—Deposit on Wagering Transactions—Accord and Satisfaction—Compromise—Civil Procedure Act, 1833 (3 & 4 Will. 4. c. 42), s. 28—Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18.

On the winding-up of a company, creditors from whose course of dealing with it there can be implied a contract to pay interest are entitled to interest on admitted debts to the date of paying a final dividend, provided there be surplus assets.

This is so notwithstanding the debt is for money deposited to secure a wagering contract.

Universal Stock Exchange v. Strachan (64 L. J. Q.B. 723; 65 ib. 429; [1895] 2 Q.B. 329; [1896] A.C. 166) followed.

The duty of a liquidator is to distribute the assets according to the rights of the parties; therefore a receipt for final dividend expressed to be in full discharge of all claims is no release of a claim for interest if the liquidator knew the question was to be raised.

The amount of a debt admitted to proof is the amount at the date of winding-up; therefore, if the amount has been settled by compromise under order of the Court, this does not negative a right to subsequent interest.

Summons for directions as to payment of interest on the amounts admitted to proof by the liquidator of W. W. Duncan & Co., Lim., a company carrying on the business of outside stockbrokers, which was wound up by order dated May 22, 1901, William George Blakemore being appointed liquidator by order of June 28, 1901.

Among the creditors were a number of persons who had been customers of the company in its stockbroking transactions; and in a list of admitted creditors exhibited to the liquidator's affidavit their names appeared in schedules distinguished respectively by the letters D, E, and F.

In the course of dealing between the company and their customers it was the

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rule that the latter should deposit sums of money as cover to provide for possible losses in the carrying over of stocks and shares, and that the company should allow interest at 4 per cent. on the balance of such sums while in their hands.

The customers in Schedule D had presented proofs for the amount of cover unexhausted at the date of the winding-up order, and these the liquidator had admitted in full. Those in Schedule E had claimed for unexhausted cover and in some cases for interest at 4 per cent. to the same date, and so far their claims had been allowed; but they had also claimed for profits on purchases and sales of stock, and these claims had been disallowed as being under gaming and wagering contracts. The proofs of the customers in Schedule F had been wholly rejected by the liquidator, but afterwards compromised and admitted for unexhausted cover, the amounts of which were fixed by an order of the Court.

The company turned out to be fully solvent, and the liquidator declared and paid a first dividend of 10s. in the pound in 1903, and a second and final dividend of the same amount in 1904, making 20s. in the pound.

These dividends were paid to the customers in all three classes on the amounts admitted to proof as above stated, and each of them signed a receipt in the following form:

"In the matter of W. W. Duncan & Co., Ltd. July 1904.

Received of William George Blake-more, Liquidator in the above matter, the sum of _____ being the amount payable to me in respect of the second and final dividend of ten shillings in the pound on and in full discharge of my claims against this company."

Certain of the customers claimed to be entitled to interest at 4 per cent., from the date of the winding-up order to that of payment of the final dividend, on the amounts for which their claims had been admitted to proof, and the object of the present summons was to determine the question whether such right existed.

An affidavit was filed by Mr. W. H. Robertson, a creditor under Schedule E, shewing that he had at first refused to

sign a receipt in the above form, and only consented to do so on receiving an express assurance from the liquidator that the question of interest should remain open for subsequent determination.

Another creditor in the same class, Dr. F. Le Coque Thorne, made an affidavit to the effect that when he signed the receipt he had no intention of abandoning any claim he might have for interest.

By an order of Mr. Registrar Hood, dated August 25, 1904, the said Dr. Thorne was appointed to represent the customers in Classes D and E, and Mr. H. T. Stewart, whose claim was included in Schedule F, those in that class.

J. R. Atkin, for the liquidator.—The question is whether these are the original debts bearing interest. In so far as the claims are for cover only, the customers have repudiated the original contract, and have claimed only as for money had and received. The Civil Procedure Act, 1833 (3 & 4 Will. 4. c. 42), s. 28, gives a right to interest by way of damages in cases where it could not otherwise be claimed; but the conditions of the section have not been fulfilled, for neither was the money payable under a written instrument at a time certain, nor has any demand in writing been made for it—unless a proof is a demand. Rule 100 of the General Rules made under the Companies (Winding-up) Act, 1890, is in similar terms. The right to interest further depends upon whether there are surplus assets—*Humber Ironworks and Shipbuilding Co., In re; Warrant Finance Co.'s Case* [1869].¹

Frank Russell, for Dr. Thorne, represented the creditors in Schedules D and E.—Interest is payable where a contract to pay it can be implied from the custom of dealing between the parties—see *Seton's Judgments and Orders* (6th ed.), vol. ii. p. 1386—*De Havilland v. Bowerbank* [1807],² per Lord Ellenborough. It can be proved that this company paid interest on their transactions. The onus is on them to prove that the implied contract

(1) 38 L. J. Ch. 712; L. R. 4 Ch. 643.

(2) 1 Campb. 50.

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to pay interest was conditional on the whole bargain—that is, the wagering transaction—being carried out. As to repudiation, it is the company who have repudiated the contract in refusing to pay profits.

C. L. Attenborough, for H. T. Stewart, representing the creditors in Schedule F.—The Gaming Act, 1845, does not affect these deposits—*Strachan v. Universal Stock Exchange* [1895].³ We are equally entitled to recover the interest as the deposits themselves. The question of interest is not compromised by the order fixing the amount due for cover.

Sargent, for the contributories.—These debts are not debts bearing interest; but, if they are, then in all three classes there has been accord and satisfaction, and as to F there has also been a compromise. As to the first point, the customers are not getting back their money under a contract, for the contract was bad. They are getting it back as money had and received. It is admitted that they cannot recover the principal under the contract, and it must be the same with the interest, otherwise the two claims are incompatible.

Then the receipts given were an accord and satisfaction, and the reservation of the question of interest by Mr. Robertson cannot apply to the other claimants. The rule that a smaller sum cannot be held a satisfaction of a larger does not apply when the payment is by a negotiable instrument such as a cheque, as in this case—*Goddard v. O'Brien* [1882].⁴ As to Class F the compromise fixed the total sum to be paid, and it must be taken to include interest. The sum so fixed could not be in the same position as that originally claimed so as to bear interest.

BUCKLEY, J.—The company in this case carried on business as outside brokers, and they received from persons who were minded to be their customers deposits of sums as cover. They then entered into transactions for those customers, which

have been held to be wagering and gaming transactions, and therefore illegal. As a result of the course of dealing between the company and its customers, I think it is fully made out that the contract between them was that interest should be allowed upon the amounts deposited by the customers by way of cover. In the winding-up the claims of the customers have been admitted for certain amounts, and the particular cases with which I have to deal are those which are contained in Schedules D, E, and F in an exhibit to the liquidator's affidavit. For the purposes of this judgment I do not think there is any difference between those three classes. Counsel for the contributories has pressed one point with regard to Class F which I will deal with separately, but, subject to that, I do not think there is any difference in point of principle between the three classes of cases with which I have to deal.

I think it is made out that there was, by reason of the course of dealing between the parties, a contract that the company would pay interest to the customer on the amount of his cover. The result of the winding-up is that happily there has been enough to pay the creditors twenty shillings in the pound, and the only question I have to determine is whether the customers are entitled to interest in addition. In my opinion they are. In *Strachan v. Universal Stock Exchange*,³ which went to the House of Lords, and which was an action to recover back securities deposited as cover for differences which might arise on gambling transactions in stocks and shares, it was held that the Gaming Act, 1845, applies only to money or valuable things deposited as the stake to abide the event of a wager, and does not apply to money or valuable things deposited as security for the observance by the loser of the terms of the wagering contract. Rigby, L.J., says: "The claim" (that is, to get back the valuables) "may be called a claim in trover or detinue, or it may be called, and I rather lean to that point of view myself, redemption. Here is a man who claims to be a mortgagee." That is to say, this company is here claiming to hold these securities as mortgagees. "Directly the transactions are held to be gaming

(3) 64 L. J. Q.B. 723; [1895] 2 Q.B. 329. In H.L. *sub nom. Universal Stock Exchange v. Strachan*, 65 L. J. Q.B. 429; [1896] A.C. 166.

(4) 9 Q.B. D. 87.

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transactions, it follows as a matter of course that his claim in respect of them fails; and where from the nature of the transaction itself nothing can be due on the mortgage, the mortgagee must deliver up the security." It is quite plain there that the Lord Justice is dealing with it as a claim made in contract. It was a contract between the parties, with the result that there was no mortgage debt in respect of which the mortgagee could hold the securities. Here the proof and the subsequent claim for interest in the winding-up are in the form in which, under the circumstances, the customer asserts his right to work out the obligations arising under the contract, including, as it seems to me, his right in respect of interest. I think therefore—the company proving to be a solvent company—that the depositors are entitled to the interest, which, as part of the course of dealing, was payable by the company to them in respect of their cover.

But then it is said that, even supposing that is so, they have released it because the receipts they have signed contain the words "being the amount payable to me in respect of the second and final dividend of 10s. in the pound on, and in full discharge of, my claims against this company." It is said that was a release of the right to interest if it existed. Now there is one of these gentlemen, a Mr. Robertson, who was asked to sign that, and there is exhibited to one of the affidavits a bundle of correspondence which shews it to be absolutely plain that before the liquidator was going to pay this dividend he knew there was this question in respect of interest, and that Robertson appended his signature to that form of receipt on the terms that the question of interest should be left wholly open. I am asked to say that, notwithstanding that, the liquidator intended, by taking this form of receipt, to entrap every other creditor of the concern and get a release from him, when he knew all the time that there was really a question to be determined whether these creditors were entitled to interest or not. I decline to attribute so dishonest an intention to any liquidator. It is the liquidator's duty

to see that the estate in his hands is distributed according to the rights of the parties, and not to induce somebody to let slip a right as to which the liquidator knows there is a real question to be determined. I do not think that the receipt was ever taken, or given, with the intention of precluding this question at all. Over and beyond that, the party who signed that receipt got no consideration at all for giving up his right to interest if he had any. He was entitled to receive the 10s. in the pound; it was his as the distribution in the winding-up of the company, and in respect of that he received no consideration whatever for the release of his right to any further sum, if any was payable. I do not think there is any doubt that the right to interest was left open.

That disposes of the case as regards Classes D and E. With regard to Class F this further point is made. The creditors of that class made proofs which the liquidator rejected altogether; the matter was then brought before the Court, the decision of the liquidator rejecting the proofs was reversed, and the proofs were admitted to rank for dividend in the winding-up of the company for certain amounts. Now what do you admit to proof for dividend in the winding-up of a company? The amount of the debt at the commencement of the winding-up. That has nothing whatever to do with the payment of interest after the winding-up if the company is solvent. There could not be a proof for that. The sum for which proof can be made is the amount which is entitled to rank for dividend as against the assets so far as they will go. A compromise in respect of that right of proof is no compromise, in my judgment, of any right of the creditor to have interest if the company turns out, as it has done, to be solvent.

I think, therefore, that the liquidator ought to pay to the creditors in Classes D, E, and F, out of the surplus assets of the company, after paying 20s. in the pound, interest according to the rate which prevailed during the course of dealings between the company and the customers, such interest to be calculated on the

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amounts admitted to proof so far as they represent unexhausted cover.

Solicitors—Tyrrell Lewis, Lewis & Broadbent, for liquidator; Emmet & Co. and Attenborough & Son, for customers; Nathaniel Reynolds, for contributories.

[Reported by R. Hill, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. } COHEN & COHEN,
1904. } In re.
Dec. 13. }

Solicitor — Costs — Taxation — Third-party Order — Compromise of Litigation — Agreement to Pay Costs — Practice — Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38.

By an agreement compromising two actions one of the parties agreed to pay the costs of the other party "as between solicitor and client relating to the matters in dispute in the said two actions." On taxation upon petition by the party agreeing to pay, the Taxing Master disallowed all costs of an unusual or extraordinary nature, although incurred by the solicitors at the request of their client, the other party:—Held, that this was not an indemnity taxation, but that when once the items for which the third party was liable under the agreement had been ascertained, the taxation of those items must be on the footing of a taxation between the solicitor and the party chargeable—that is, the client; and not as between the solicitor and the party liable to pay—that is, the third party.

Adjourned summons.

By an agreement of January 12, 1904, compromising two actions to which the same persons were parties, one of the parties (herein called the "third party") agreed to pay the costs of the other party, a lady, "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed."

The bill of costs (amounting with disbursements to 486*l.* 12*s.* 2*d.*), which was delivered by the lady's solicitors, the present applicants, included costs of an extraordinary nature—for example, fees paid to leading counsel for settling pleadings and advising on evidence in consultation—incurred by the solicitors on the express instructions of their client. On May 2, 1904, an order of course for taxation of this bill was made upon the petition of the third party, under section 38 of the Solicitors Act, 1843. On the third-party taxation, the Taxing Master, following the principles laid down in *Gray, In re* [1900],¹ disallowed all costs of an extraordinary nature, and taxed off 11*l.* 9*s.* 3*d.*

The solicitors carried in objections to the taxation, and the first of their general objections was based on the ground that the bill of costs was payable by the third party under the above-mentioned agreement, by which it was provided that he should pay the costs of their client as between solicitor and client relating to the matters in dispute in the said two actions. Their remaining general objections were based mainly on the ground that the agreement did not distinguish between costs reasonably incurred and other costs; and that it was not open to the Master on this reference to construe the agreement so as to limit it to the former costs; that it was an agreement by the third party to indemnify their client against all costs actually incurred; and that all items properly chargeable against their client were properly chargeable and ought to be allowed against the third party.

In his answers, dated July 13, 1904, to the solicitors' objections the Taxing Master, referring to the agreement, said, "I am unable to construe it as an indemnity for all costs incurred between the solicitor and his own client which are payable by a third party." Then, after stating that the items of unusual expenses should have been explained to the third party, and his express consent to them first obtained, which had not been done, and that he had had the parties before him on several occasions and considered the

(1) 70 L. J. Ch. 133; [1901] 1 Ch. 239.

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costs in dispute item by item, the Master said that he had "followed the principles laid down in *Gray, In re*,¹ wherein it is stated 'the Court was bound to look at the nature of the items and to consider apart from the order whether the applicant was under any liability to pay them.'" The Master then referred to *Negus, In re* [1894],² *Abbott, In re* [1861],³ *Morecroft, In re* [1885],⁴ *Holliday and Godlee, In re* [1888],⁵ *Gray, In re*,¹ and *Longbotham & Sons, In re* [1904]⁶ (then only reported in the *Weekly Notes*), and continued: "I have followed the practice in the Taxing Office in taxations under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay, and I have disallowed several items which did not come, in my opinion, within the scope of the said agreement and that the third party did not contract to pay all these costs, only specified charges which I have carefully allowed item by item." After dealing with the applicant's objections in detail, the Master in conclusion said: "In the exercise of my judgment I do not see (after hearing the parties and careful perusal of the papers) that the items disallowed by me were reasonably incurred, but on the other hand were extra costs increased through over-caution and the special fees paid were unusual and unnecessary expenses and were luxuries of which the client ordering them must herself bear the expense."

The applicants subsequently took out this summons asking that the Master's certificate of taxation might be varied or discharged, on the ground that the taxation had proceeded on a wrong principle, and that the taxation might be reviewed in respect of the items mentioned in the objections carried in before the Master; and this summons was now adjourned into Court.

Maonaghten, K.C., and *H. Greenwood*, for the solicitors.—These charges ought to be allowed both on the construction of

the agreement and because the third party, having chosen to tax, must pay what the client would have had to pay. *Holliday and Godlee, In re*,⁵ where, as here, there was an express agreement, and *Morecroft, In re*,⁴ cover this case. *Gray, In re*,¹ and *Longbotham & Sons, In re*,⁶ were cases respectively of mortgagor and mortgagee and vendor and purchaser, and the agreement in those cases was implied by law. *Gray, In re*,¹ really supports *Holliday and Godlee, In re*,⁵ and reiterates the argument of North, J. In *Longbotham & Sons, In re*,⁶ the argument went the whole length, but this claim is not put so high. The third party, who agrees to pay the costs, can, if he so desire, tax the bill himself, and if he does he has to pay such costs as are included in the agreement. The Master has gone on the lines that this is a "solicitor and client" taxation, and not on the lines that it is a taxation as between the client and the solicitor. He ought not to have paid attention to the words "as between solicitor and client." The view that the third party must pay as on a taxation between the solicitor and the client is rather borne out by the proviso at the end of section 40 of the Solicitors Act, 1843; for under that section, if the bill has once been taxed and settled between the solicitor and his client, a third party cannot get it again referred without the consent of the Judge.

A. F. Peterson, for the third party.—The Taxing Master was right, and his ruling is in accordance with *Longbotham & Sons, In re*,⁶ and the practice as there settled. Anything unnecessary or unusual cannot be charged for—*Brown, In re* [1867].⁷ The client is only liable to pay under the agreement "solicitor and client" costs, and that would not cover such items, for instance, as the fees of leading counsel for settling pleadings. The directions given in Order LXV. rule 27, sub-rule 29, apply to such costs as these, which "have been incurred through over caution . . . or merely at the desire of the party." The Taxing Master has a discretion as to the allowance of special fees—*Ermen, In re*;

(2) 64 L. J. Ch. 79; [1895] 1 Ch. 73.

(3) 4 L. T. 576.

(4) 29 Sol. J. 471.

(5) 58 L. T. 301.

(6) 73 L. J. Ch. 681; [1904] 2 Ch. 152.

(7) 36 L. J. Ch. 842; L. R. 4 Eq. 464.

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Tatham v. Ermen [1903],⁸ and he has complied with the provisions of the rule, and has not allowed luxurious items.

Macnaghten, K.C., replied.

SWINFEN EADY, J.—In this case I have communicated with the Taxing Master, and I am not satisfied that he has proceeded upon a wrong principle, but his certificate is, I think, open to the criticism that has been addressed to it. There is no difficulty, having regard to the practice, in determining exactly what should have been done. The difficulty I have had was in appreciating exactly what has been done, having regard to the language of the certificate and to the notes to the objections and the answers carried in. In the answer to the first objection there is a note of the Master, dated July 6, as follows: "By consent these objections are disallowed *en bloc* and need not be answered by me in detail, the question for the Court being on what principle these costs are to be taxed, on an indemnity as between the solicitor and his own client, or what is fair and proper for a third party to pay." That note was dated July 6, and was made while the matter was still proceeding before the Master, and is in effect superseded by the answers which were ultimately signed on July 13. Now in the Master's answers to objections he says, "I have followed the practice in the Taxing Office in taxations under this section, and I have taxed apart from the order as between the solicitor and the party liable to pay"; and it is upon the language of this part of the certificate that the difficulty has arisen. It is quite clear from the decision in *Gray, In re*¹—the principle of which was affirmed by the Court of Appeal in *Longbotham & Sons, In re*⁶—that where a third party obtains an order to tax, that does not alter the nature or enlarge the scope of his liability. Mr. Justice Cozens-Hardy (as he then was) stated that in terms, and all the Lords Justices in *Longbotham & Sons, In re*,⁶ affirmed that decision; and Lord Justice Vaughan Williams says, "I think that all that is necessary for us to do in our present judgment is to

affirm the principle of those two decisions"—that is, the decisions in *Negus, In re*,² before Lord Justice Chitty, and in *Gray, In re*.¹ At the same time it is equally clear in *Gray, In re*,¹ that a taxation on the application of a third party is a taxation that must proceed on the condition of the third party paying in respect of items for which the third party is liable, what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party. Lord Justice Romer in *Longbotham & Sons, In re*,⁶ says the same: "it is clear, both from the wording of the section itself and the authorities, that the taxation must be on the footing of a taxation between the solicitor and the client"—that is to say, that the bill must be taxed between the solicitor and the client, and not as between the solicitor and the third party. I think that it is quite clear that this is not an indemnity taxation. The cases of *Gray, In re*,¹ and *Longbotham & Sons, In re*,⁶ followed older authorities, as was pointed out by Lord Justice Romer and Lord Justice Vaughan Williams in the Court of Appeal. In the case of *Brown, In re*,⁷ Lord Romilly was dealing with a taxation on the application of a third party, a *cestui que trust* taxing a solicitor's bill which had been paid, and the solicitor had charged and the trustee had paid the bill; but on the application of the *cestui que trust* to tax, the Taxing Master disallowed a considerable number of items, and, in particular, charges for certain attendances upon the trustee, and for letters written to him or to third parties by his direction. That affords a very good illustration of the rule that there may be a considerable number of items for which the client may be liable to the solicitor as having been items incurred, on express instructions of the client, for instance, but yet that the third party may not be liable to pay. That is quite consistent with the rule that, when once the items for which the third party is liable are ascertained, the taxation of those items for which he is liable must proceed upon the footing of a taxation as between the solicitor and the party chargeable, and

(8) 72 L. J. Ch. 492; [1903] 2 Ch. 156.

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not as between the solicitor and the third party. The case of *Negus, In re*,² before Mr. Justice Chitty, is another illustration of the same rule. There it was held that the lessee was not liable to pay for the costs of the counterpart lease, but it did not at all follow that the solicitor was not entitled to recover them from his client, the lessor, for whom he had acted. It was an item for which the third party, the lessee, was not liable to pay, but which, nevertheless, the party chargeable was liable to pay to his solicitor; and Lord Justice Chitty, dealing with the point, says, "this is a third-party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable"—that is to say, as regards the taxation. Then he goes on: "But that rule does not prevent the Taxing Master from considering the question of the liability of the third party"—that is to say, from considering for what items the third party is properly liable.

Under these circumstances, I am of opinion that the practice as laid down by all the four cases to which I have referred is clear; but I am not satisfied with the language of the Master's certificate, and if he has followed that practice, in my opinion he has not stated that he has followed it, and his certificate is open, certainly as a matter of language, to the criticism which counsel addressed to it. He does not say that he has taxed as between the solicitor and the party chargeable, but as between the solicitor and the party liable. Under these circumstances, I think that it would not be satisfactory to allow the matter to stand in its present position, but that it should be sent back to the Master. It will be for him to consider whether the slip made has been in the language of his certificate, or in the principles upon which he has in fact taxed the bill. Under the agreement the third party is liable to pay the costs of the lady as between solicitor and client "with relation to the matters in dispute in the said two actions," and it is those costs that have to be taxed; but, in my opinion, this is not an indemnity

taxation, and it does not follow that because on this taxation there are disallowed items for which the third party is not liable, those items have not been authorised by the client. It may well be that the solicitor will be entitled to recover them over against his client; but the liability of the third party is not enlarged or increased by reason of his having obtained the third-party order.

Under these circumstances, I think the proper order will be to send the matter back to the Master to review, and he will amend the certificate. Whether the ultimate result of the taxation will be altered will depend upon whether he has in fact proceeded upon the principles I have indicated. If he has, it may be that the result will be the same; but the language of the certificate must be altered.

In conclusion, I think that I should say that the Master appears to have followed the language of the certificate given by the Taxing Master to Mr. Justice Kekewich as set out in *Longbotham & Sons, In re*.⁶ The Taxing Masters appear to have been of opinion that *Gray, In re*,¹ had altered the practice, and they stated that "since that case, the practice in the Taxing Office in taxations under this section has been to tax, apart from the order, as between the solicitor and the party or estate liable to pay." The matter was put as clearly as possible by Lord Justice Romer when he said that the taxation must be on the footing of a taxation between the solicitor and the client.

The proper way of dealing with the costs will be to make them the applicants' costs in the taxation.

Solicitors—Cohen & Cohen, for applicants;
Slark, Edwards & Co., for respondents.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
 1904. } DOUGLAS, *In re*;
 Dec. 9, 16. } DOUGLAS v. SIMPSON.

Charity—Gift for Repair of Churchyard—Validity—Mortmain—Act of Parliament—Implied Repeal—Gifts for Churches Act, 1803 (43 Geo. 3. c. 108), s. 1—Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 7.

*The gift by a testatrix of "any little money left" for the repair of a churchyard is a valid charitable bequest of her residue under the Mortmain and Charitable Uses Act, 1891, and is not limited to the sum of 500*l.* by virtue of the Gifts for Churches Act, 1803.*

By her marriage settlement dated April 16, 1891, Sybilla Lucy Douglas had, in the events which had happened, a general power of appointment by will, subject to the life interest of her husband, Robert Gordon Douglas, over the funds comprised in the settlement.

By her will dated August 3, 1898, S. L. Douglas appointed her husband to be the sole executor of her will, and gave and bequeathed to him for his life the whole of her moneys and effects. The testatrix then gave numerous legacies amounting to about 5,770*l.*, and after making certain specific bequests she gave the residue as follows: "Any little money left for Milstead Churchyard."

The property comprised in the marriage settlement amounted to 8,386*l.*, and the free personal estate of the testatrix to 1,046*l.* The residue consequently amounted to 3,662*l.* The testatrix died on October 19, 1902.

An originating summons was taken out by Robert Gordon Douglas, as sole executor and beneficiary under the will, to have it determined, *inter alia*—first, whether the will operated as an exercise of the general power of appointment reserved to the testatrix by her settlement; and secondly, whether the bequest of the money for Milstead Churchyard was a valid charitable bequest, and, if so, what property passed thereunder.

C. Church, for the plaintiff.—There is a good charitable bequest, at any rate to

the extent of 500*l.*, under the provisions of the Gifts for Churches Act, 1803. That has been held in the case of *Vaughan, In re; Vaughan v. Thomas* [1886].¹ But it is contended that the whole of the bequest is valid, so far as the object is concerned, to the extent of the money required to keep up the churchyard. The word "money" includes all her personalty—*Cadogan, In re; Cadogan v. Palagi* [1883],² *Champney v. Davy* [1879],³ and *Mortmain and Charitable Uses Act, 1891, s. 7.*

J. Adams, for the pecuniary legatees under the will.

MacSwinney, for the next-of-kin.—The will does not operate as an appointment of the trust funds under the settlement. The residuary bequest to the churchyard is bad, as exceeding the limit of 500*l.* prescribed by the Gifts for Churches Act, 1803. That Act is not impliedly repealed by the Mortmain and Charitable Uses Act, 1891. A general Act cannot repeal a special Act unless the latter is expressly mentioned. That was the effect of the decision in *Smith, In re; Clements v. Ward* [1887].⁴

R. J. Parker, for the Attorney-General, referred to *Manseer, In re; Att.-Gen. v. Lucas* [1904],⁵ as shewing that a gift for the repair of a burial-ground was good.

KEKEWICH, J.—The first thing to do is to ascertain what the testatrix intended according to the language which she has used in her will. Without guessing more than I am obliged to do, I must say that she never really intended to give for the repairing or improving of the churchyard so much as her residuary estate appears now to consist of. She says "any little money." It was not her intention to leave between 3,000*l.* and 4,000*l.* for a purpose which would have been well answered by a small proportion of that sum. But I have to construe as well as I can the will as it stands. It is a thoroughly inartistic will, and contains a gift in the first instance of the whole of her money

(1) 83 Ch. D. 187.

(2) 53 L. J. Ch. 207; 25 Ch. D. 154.

(3) 48 L. J. Ch. 268; 11 Ch. D. 949.

(4) 56 L. J. Ch. 726; 35 Ch. D. 589.

(5) *Ante*, p. 95; [1905] 1 Ch. 68.

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and effects to Robert Gordon Douglas for his life, shewing that the testatrix had before her the intention of disposing of the whole of the property which she had to give; and the fact that she afterwards proposed to give legacies indicates that she was acting under the same idea that she was disposing of all her property. She gives pecuniary legacies, certain specific legacies, and then she uses these words: "any little money left" is for the repair of Milstead Churchyard. To my mind, I think it is a practical way of putting it to say that the question is, If she did not mean to dispose of the residue of her personal estate, what did she intend to dispose of? That question must be answered if you are to come to a right conclusion upon this will. It is for those who say that she did not dispose of the whole residue to make out what she did not dispose of. That is enough to compel me to come to the conclusion that this is a true residuary gift. That is not interfered with by the fact that it is followed by specific gifts, and there is one specific gift which is pecuniary.

That being so, the real question, on which the assistance of counsel for the Attorney-General has been afforded to-day, is whether it is a good gift, and how effect is to be given to it. The argument, which is well worth attention, is this: Before the Gifts for Churches Act, 1803, you could not have given money in this way at all—it would be bad as a gift in perpetuity. Then that Act enables personal estate to be given for such purposes to the extent of 500*l.*; and if the gift rested entirely on that Act, then the rest of the estate, less the 500*l.*, would be undisposed of. It is not denied that the gift is good to the extent of 500*l.* The question is as to the balance above that sum. The restriction in the Act of 1803 is to prevent any one person making several gifts of 500*l.* That is the only real meaning to be attached to it.

Counsel for the next-of-kin says that the Act of 1891, which is an enabling statute, cannot be read as repealing the Gifts for Churches Act, 1803, which it does not expressly mention; and he refers to the case of *Smith's Estate, In re; Clements v. Ward*,⁴ where it was held that this

very statute of 1803 was not impliedly repealed by the provisions of the Married Women's Property Act, 1882. I think there is a complete answer to that, and the case before Mr. Justice Stirling has no application to the present. It has been pointed out that the Act of 1891 abolishes the distinction between pure and impure personalty, and expressly enacts in section 7 that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land. Treating this as money in mortmain, you have the express direction that the pure personal estate or the impure may be devoted to charitable uses; and the intention of the Legislature was that this should be done. But in the case before Mr. Justice Stirling the learned Judge was dealing with an Act enabling certain things to be done which without that Act could not be done, and the learned Judge held that the provisions of this Act of 1803 were not affected by the Married Women's Property Act, 1882. But here we are dealing with an Act which purports to be an Act to amend certain Acts which were passed before on the same subject, and it must be assumed that the Legislature was aware of those Acts, and intended to lay down an entirely new code upon the subject. Therefore, upon that ground I am not guided by the decision of Mr. Justice Stirling, and am of opinion that this is a good gift. Being good, it is unfortunate that, as the amount is more than would be required for the purpose specified, I must consider this as a subject for an application for a scheme on the death of the present tenant for life.

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Solicitors—Church, Adams & Prior, for the plaintiffs; Soames, Edwards & Jones and Solicitor to the Treasury, for the defendants.

[Reported by G. Macon, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
 1905. } FRANCIS, *In re* ;
 Jan. 11. } BARRETT v. FISHER.

Trustees — Remuneration Received by Trustees as Directors of a Company—Capital or Income—Tenant for Life and Remaindermen.

Where trustees hold shares belonging to the trust, and they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remaindermen as an accretion to their shares.

Noble v. Cass (2 Sim. 343) distinguished.

Adjourned summons.

Testator, who at the time of his death was entitled to a large number of shares in a limited company, bequeathed them to trustees upon trust for certain persons for life, with remainders over. The shares, on the death of the testator, were transferred into the names of the trustees of the will, by virtue of which holding they became directors of the company, and, as such directors, became entitled to and received remuneration. There was no provision in the will enabling the trustees to retain the remuneration for their own benefit. The remuneration was paid out of the profits of the company.

When the summons first came on for hearing, the Court declared that the trustees were not entitled to retain the remuneration for their own benefit. The summons now came on a second time to determine whether the remuneration to be accounted for by the trustees was to go to the tenant for life as income, or to the remaindermen as capital.

P. O. Lawrence, K.C., and H. T. Methold, for the trustees.

T. T. Methold, for the infant remaindermen.—These moneys are not casual profits which go to the tenant for life—*Gover on Capital and Income*, pp. 4, 5, and *Noble v. Cass* [1828].¹ If the action in the latter case had been brought by the tenant in fee the damages would have been capital.

(1) 2 Sim. 343.

The remuneration is not a casual profit like fines and heriots, which go to the tenant for life—*Cowley (Earl) v. Wellesley* [1866].²

Stewart-Smith, K.C., and Johnston Edwards, for the tenant for life.—It is not unimportant to see from what source this money comes. It comes out of the company's income, and leaves the company as income. There is nothing to alter its character, and it therefore goes to the tenant for life as the person entitled to the income of the shares. *Noble v. Cass*¹ is really in favour of the tenant for life, and the case of *Bouch v. Sproule* [1887]³ shews that the action of the company determines what is capital and what is income. What the company says is income is income, and what the company says is capital is capital.

•KEKEWICH, J.—The short point in this case is a new one. The trustees hold a large number of shares belonging to the trust estate, which qualify them to become directors of the company. They were duly appointed directors, and, as such directors, have received certain sums of money as remuneration for their services. It is clear that as regards these moneys they are accountable to the trust estate, there being no provision in the will which enables them to retain the money for their own use and benefit.

The question then arises whether they are to account for such moneys as capital or as income. *Prima facie*, all money received by trustees is capital, unless it can be shewn that it is paid out of income. In the case of a settled manor the fines and heriots go to the tenant for life as casual profits, because, though they are irregular and uncertain payments, they are still profits. How can it be said that these directors' fees are rents and profits or income? They were paid to the trustees for their services as directors, and might have been paid in a lump sum. The character of the moneys therefore is remuneration for services rendered. The principle governing these cases is illustrated by *Noble v. Cass*,¹ where it was held that a tenant for life was entitled to

(2) L. R. 1 Eq. 656.

(3) 56 L. J. Ch. 1037; 12 App. Cas. 385.

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damages recovered by trustees for breach of covenant; but in that case the trustees were only trustees of the life estate, and were not trustees for the remaindermen, the limitations in remainder being legal limitations. In the present case there is no ground for saying that these moneys are income, notwithstanding that they were paid yearly or half-yearly. The remuneration therefore is capital, and goes as an accretion to the shares. The costs of all parties as between solicitor and client will come out of the fund so accounted for.

Solicitors—Byfield & Son, for trustees and remaindermen; H. A. Graham & Wigley, for tenant for life.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.

JOYCE, J. } SEDDON v. NORTH-
1904. } EASTERN SALT CO.
Dec. 2, 3, 5, 6, 7, 8. }

Contract — Rescission — Misrepresentation — Absence of Fraud — Election — Delay.

A completed contract for the sale of the shares in and business of a company will not, in the absence of fraud, be set aside on the ground of misrepresentation.

The plaintiff contracted to buy all the shares in a trading company on certain statements as to the trading profits and losses. Three months after taking over the business he commenced an action to set aside the contract, alleging misrepresentation by concealment, but not alleging fraud, and claiming rescission of the contract and an injunction:—Held, that such a contract was not one which, in the absence of fraud, the Court would set aside either in equity or at law; and that, even if it were, the plaintiff had delayed in repudiating it, and had not proved either concealment or misrepresentation or that he had been induced by misrepresentation.

Wilde v. Gibson (1 H.L. C. 605, 632), *Brownlie v. Campbell* (5 App. Cas. 925), and *Kennedy v. Panama, New Zealand,*

and *Australian Royal Mail Co.* (36 L. J. Q.B. 260; L. R. 2 Q.B. 580) *applied.*

Witness action.

The plaintiff Henry Seddon was a salt merchant and manufacturer, carrying on business at Middlewich, in Cheshire, and in London, and he claimed a declaration that a contract for the purchase by him of the shares of the London Salt Co., Lim., which was joined as co-plaintiff, was not binding on him and ought to be rescinded, and that he was entitled to be repaid the sums paid by him for the said shares or to be paid compensation for the loss he had suffered by acquiring the said shares. He also claimed an injunction against the defendants to restrain them from selling their salt in the London market to persons who were customers of the London Salt Co. prior to the date of his contract, which contained a covenant by him to take all the coarse salt he required from them.

The London Salt Co. was formed on February 11, 1903, to carry on a salt-selling business previously belonging to a firm which became bankrupt in 1902, when the trustee in bankruptcy sold it for 3,250*l.* to one Watson, who in November, 1902, sold it to the company, which started with a capital of 5,000 shares of 1*l.* each. The company traded in London, and part of its business was to sell in the London market salt consigned to it by the defendants, the North-Eastern Salt Co., the Cleveland Salt Co., the Tees Salt Co., Sir Christopher Furness, and the owners of the Middlesbrough Estate, and another firm called the Salt Union, Lim. The whole of the shares in the North-Eastern Salt Co. were held by the other firms, and the whole of the shares in the London Salt Co. were, at the time of the plaintiff's purchase, held by or under the control of all the defendant firms (except the Salt Union, Lim.) and of the defendant George Hewett, who was its managing director and held 1,680 of its shares.

The defendants carried on the business at a net loss until September 30, 1903, when the plaintiff came into contact with the defendant Hewett, who proposed to sell his interest for the par face value—namely, 17*s.* 6*d.*—of the shares, with a

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bonus of 200*l.* The negotiations were also conducted by one Storr on behalf of the other defendants (excepting the Salt Union, Lim., who were joined as defendants because they were shareholders in the North-Eastern Salt Co., and were trading in competition in London). Storr was a director of the Cleveland Salt Co. and of the North-Eastern Salt Co., and also chairman of the London Salt Co.

The plaintiff alleged that during the course of the negotiations the defendant Hewett represented to him, when Storr was present, but silent, that up to September 30, 1903, the London Salt Co. had made a net trading loss not exceeding 200*l.* or at the outside 250*l.*, and that on the faith of such representation he ultimately purchased the whole of the shares at the price of 4,575*l.* In a letter dated October 8, 1903, and addressed by the plaintiff to Storr and accepted by him, the plaintiff undertook in consideration of the sale to take from the North-Eastern Salt Co. all the coarse or common salt required by the London Salt Co. for a period of seven years; and it was agreed that in the event of the North-Eastern Salt Co. ceasing to exist, the guarantee was to be a continuing one to the defendants, the Tees Salt Co., the Cleveland Salt Co., the Middlesbrough Owners, Lim., and Sir Christopher Furness.

On October 9, 1903, he took over the undertaking of the company and commenced to carry it on; he at once ascertained from the books, which were put under his control, that the losses must be larger than 250*l.*, and on October 12 he wrote to Storr as follows: "I have spent some little time in endeavouring to ascertain the position, and must say that, whilst I was prepared for something pretty startling, the position disclosed by the books exceeds all anticipation. . . . Mr. Hewett in your presence said he estimated, at the outside, 250*l.* As a matter of fact, the period ending September 30 will more probably show a loss of anything between one and two thousand." It was further proved that on October 9 the plaintiff had said to the defendant Hewett, "I know I am buying a pig in a poke." An audit of the company's affairs was meanwhile being pre-

pared by Messrs. W. B. Peat & Co., who had acted as auditors in the defendants' time, and their audited balance-sheet and profit and loss account made up to September 30, 1903, was sent in on December 18, 1903, when it appeared that, excluding certain legal expenses, the interest on the purchase price and the audit fee, a loss of over 900*l.* was shewn. The plaintiff also became aware of considerable debts due from the company, including 1,000*l.* due to the North-Eastern Salt Co., and he alleged that it was to meet these claims that he made and paid a call of the remaining 2*s.* 6*d.* due on each of his shares.

The plaintiff continued to carry on the business at a net profit, and then on January 20, 1904, issued a writ claiming the declaration and injunction above referred to.

Gore-Browne, K.C., and *Muir Mackenzie*, for the plaintiffs.—We are entitled to rescission and to have the purchase moneys repaid, together with 2*s.* 6*d.* on each share, on the ground of misrepresentation in not disclosing facts relating to the purchase of the bankrupt stock, the disclosure of which would qualify the statement as to losses that was in fact made. No fraud is alleged; but a misrepresentation of this kind, even if totally innocent, entitles the plaintiffs to relief. In this case there can be a *restitutio ad integrum*. With regard to the injunction, the defendants avowedly sold the whole of the shares in the company to the plaintiff with the expressed intention that he should have the goodwill, and they are not entitled to deal with the customers of that goodwill in competition with the company. If unable to grant rescission, the Court should grant the injunction.

Younger, K.C. (A. M. Talbot with him), for the North-Eastern Salt Co.—There is no case against us, for we made no representation at all.

Montague Lush, K.C., and *Sargant*, for the Cleveland Salt Co., the Tees Salt Co., Sir Christopher Furness, and the Owners of the Middlesbrough Estate, Lim.—No *prima facie* case is made by the plaintiff, who had full notice that Storr was only acting for the companies, and

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not for Sir Christopher Furness; and as against the companies there is no case in which it has been held that an innocent misrepresentation may consist of saying nothing. Silence cannot, in the absence of fraud, give rise to any action for rescission, because the basis of an innocent misrepresentation is that you say something which you honestly believe to be true. Fraud was imputed in *Brownlie v. Campbell* [1880]¹; see also *Smith v. Hughes* [1871].²

[JOYCE, J. — In *Walters v. Morgan* [1861]³ Lord Campbell says that a nod, a wink, a shake of the head, or a smile may do.]

A smile calculated to create an innocent misrepresentation is rather dangerous, but there is none here.

Further, the plaintiff here elected at first to keep the shares and sue for compensation; such election is final—*Scarff v. Jardine* [1882],⁴ where Lord Blackburn refers to the judgment in *Clough v. London and North-Western Railway* [1871].⁵ Moreover, he cannot rescind after actual conveyance. The Court may relieve a plaintiff who proves misrepresentation from further compliance with his contract when something still remains to be done, but the contract must not be concluded. In this case the contract was as much executed as a conveyance of land; it had no executory character. Lastly, there is no evidence on which a jury could find that the alleged misrepresentations were incorrect; the evidence is that the plaintiff knew of the weekly balance sheets, even if he had not seen them, and was aware of their crucial character.

W. F. Hamilton, K.C., and *T. A. Nash*, for the defendant Hewett.—The plaintiff waited fourteen weeks after learning the true losses before commencing proceedings; he should have repudiated the contract at once—*Sharpley v. Louth and East Coast Railway* [1876].⁶ As to the effect of innocent misrepresentation, where the contract is concluded, the rule

laid down by Lord Selborne in *Brownlie v. Campbell*¹ was applied by Cotton, L.J., in *Soper v. Arnold* [1887].⁷ Nor can rescission be obtained where the parties cannot be substantially restored to their original position, and here this defendant cannot be restored to his position of managing director.

Gore-Browne, K.C., in reply.—The law as to approbation and repudiation of a contract has been totally altered by the decision of the House of Lords in *Mutual Reserve Life Insurance Co. v. Foster* [1904],⁸ which shews that, though a man may go on paying under a contract for years, that does not of itself prevent him from obtaining rescission. Again, no case shews that a chattel or a *chose in action*, once conveyed, cannot be transferred back, and there can be a direction to re-convey, although the contract is wholly executed, as in the case of a grant of an annuity—*Att.-Gen. v. Ray* [1874]⁹—and although the business handed back may be worthless—*Adam v. Newbigging* [1888]¹⁰; see also *Rawlins v. Wickham* [1858].¹¹ The doctrine of *caveat emptor*, which applies to cases on a conveyance where the time elapsing before completion permits an opportunity for detecting a misdescription, does not apply to a case of a sale of shares—see the *dicta* of Lindley, L.J., in *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate* [1899].¹² As between himself and the company the plaintiff had no claim, and was obliged to carry on the business. As to the misrepresentation, what was actually said might have been materially true, but it omitted something the omission of which gave an untrue significance to what was said—that is, *suppressio veri* within the meaning of *Oakes v. Turquand* [1867].¹³

JOYCE, J.—The litigation in this case arises out of an arrangement for the acquisition by the plaintiff, Mr. Seddon, of the property of the London Salt Co., by the purchase of the shares of that

(1) 5 App. Cas. 925, 937.

(2) L. R. 6 Q.B. 597.

(3) 3 De G. F. & J. 718, 724.

(4) 51 L. J. Q.B. 612; 7 App. Cas. 345.

(5) 41 L. J. Ex. 17; L. R. 7 Ex. 26.

(6) 46 L. J. Ch. 259; 2 Ch. D. 663.

(7) 57 L. J. Ch. 145; 37 Ch. D. 96.

(8) 20 Times L. R. 715.

(9) 43 L. J. Ch. 478; L. R. 9 Ch. 397.

(10) 57 L. J. Ch. 1066; 13 App. Cas. 308.

(11) 3 De G. & J. 304.

(12) 68 L. J. Ch. 699; [1899] 2 Ch. 392.

(13) 36 L. J. Ch. 949; L. R. 2 H.L. 325.

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company from the persons who really owned those shares. The claim made by the statement of claim is of a twofold nature. In the first place it asks for a rescission of the arrangement and for restitution on the ground of misrepresentation. The second part of the claim put forward is for an injunction to restrain the defendants from selling on the London market, to persons who were customers of the London Salt Co. prior to the date of the said arrangement, salt made or consigned by the salt manufacturing concerns.

On the latter part of the case—the second part of the case—it is a little difficult to say on what theory it is founded; but certainly no evidence has been adduced before me in support of the theory upon which that claim is founded, and in point of fact there is no evidence at all upon the second part of the claim made, and I need not say anything more about it.

As to the misrepresentation, a claim is founded upon an alleged misrepresentation, and it appears to me, as it has done all through, that the plaintiff's way of succeeding in his claim is beset with difficulties. In the first place, there is no allegation of fraud, and, in point of fact, the imputation of fraud upon the defendants has been expressly disclaimed, and properly so. It is a claim to rescind or set aside, for an innocent misrepresentation, a contract for the sale of property, not executory, but executed, and under which nothing whatever still remains to be done. Lord Campbell states what is the rule on the question in *Wilde v. Gibson* [1848],¹⁴ where he says: "After the very attentive and anxious consideration which this case has received, I have come to the clear conclusion that the decree appealed against ought to be reversed; and I must say that in the Court below the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that has been executed, has not been very distinctly borne in mind. With regard to the first: if there be, in any way whatever, misrepresentation or concealment, which is material to the purchaser, a Court of equity will not compel him to

(14) 1 H L. C. 605, 632.

complete the purchase; but where the conveyance has been executed, I apprehend, my Lords, that a Court of equity will set aside the conveyance only on the ground of actual fraud." Lord Selborne, in *Brownlie v. Campbell*,¹ says, after explaining the circumstances of that particular case: "The contract is ultimately entered into upon those terms. Passing from the stage of correspondence and negotiation to the stage of written agreement, the purchaser takes upon himself the risk of errors. I assume them to be errors unconnected with fraud in the particulars, and when the conveyance takes place it is not, as far as I know, in either country"—that means in Scotland and England—"the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud." I do not entertain the slightest doubt about that being the correct statement of the law. It has been acted upon, I think I may say, by Lord Justice Cotton in *Soper v. Arnold*.⁷ The rule is not only a rule of equity, but it is a rule of law. In *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co.* [1867]¹⁵ Lord Blackburn delivers the judgment of the Court. He says: "There is, however, a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to shew that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that

(15) 36 L. J. Q. B. 260; L. R. 2 Q. B. 580, 587.

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both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract," and of course there can be no successful claim for damages for misrepresentation unless the misrepresentation was fraudulent.

It appeared to me from the first in this case that the absence of fraud and of any allegation of fraud is a fatal objection to the action, and I should be perfectly justified in disposing of it on this ground, and this ground alone, and saying no more about the facts of the case; but I will add just a few words about the facts as they have been gone into so fully. If the plaintiff be right, the contract in question, of course, is not a void contract, but a voidable contract, and it was the duty of the plaintiff, bearing in mind the peculiar nature of the property, to repudiate the contract at the earliest possible moment, when he found out that any misrepresentation had been made, if, in fact, any misrepresentation was made. In my opinion, the plaintiff did not do this, but, taking possession, he went on treating the property as his own in many ways for many months, and continued to do so long after the time when he had the information which would lead him, and ought to have led him, at once to the conclusion that he had been misinformed, if, in fact, he had been misinformed. It is quite plain to my mind that the correspondence between the plaintiff and Mr. Storr does not amount to an arrangement that the plaintiff is to be entitled to go on dealing with the property as his own without prejudice to the question of whether he is to be entitled to rescind the contract and repudiate the property or not. Really, as far as I can see and understand, there never has been a suggestion about repudiating this contract or repudiating the property and rescinding the contract until, I believe, the commencement of the action. In the solicitor's letter which precedes the commencement of the action, there is not

even a suggestion of repudiating the property and rescinding, if I recollect rightly, but all that he says is, "I am going to commence an action and claim against you compensation in damages."

I think I ought to add also that upon the whole evidence I am not satisfied that there was any misrepresentation that induced the plaintiff to enter into the contract. I very much doubt whether there was any misrepresentation at all. His own account is that, in answer to his question, Mr. Hewett made some answer and Mr. Storr said nothing. In *Walters v. Morgan*³ Lord Campbell said that "a nod, or a wink, or a shake of the head, or a smile" may do, but, as far as I know, it has never been held that silence amounted to misrepresentation. Of course, however, there may be peculiar circumstances. But Mr. Storr and Mr. Hewett were both called, and they gave quite a different account of the matter to that given by the plaintiff. I think there is no reason to question the veracity either of Mr. Storr or Mr. Hewett, and upon the whole, comparing all the evidence, that practically the only representation that was made, if any, was in effect, "the weekly balance sheets do not shew a loss of more than or as much as 250*l.*," and that was a statement which, in my opinion, was not untrue or substantially inaccurate. Further, I am not satisfied that the representation made had the effect of causing the plaintiff to enter into the contract now sought to be rescinded. I think he wanted the business, and that he intended to take all the risk, whatever it was. Under these circumstances, of course that portion of the action founded on misrepresentation fails as well as the other, and it must be dismissed with the usual consequences.

Solicitors—Grant, Bulcraig & Co, agents for Parker & Ayre, Manchester, for plaintiff; Crump, Sprott & Co., agents for Archer, Parkin & Archer, Stockton-on-Tees; Field, Emery, Roscoe & Medley, agents for Batesons, Warr & Wilmshurst, Liverpool; and J. H. Hortic, for various defendants.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.

FARWELL, J. }
1905. }
Jan. 11. }

EVANS, *In re.*

Solicitor—Employment by Local Authority—Conveyancing Business—Remuneration—Election—Bill of Costs—Taxation—Scale Fees—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), rule 6.

A solicitor employed by a school board in a purchase of real estate duly elected under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, to charge under Schedule II. to the Order instead of taking the scale charge under Schedule I. The board assented to the election, but on taxation of the bill for the purposes of public audit the Taxing Master disallowed all the items, and in lieu thereof allowed only the scale fee, on the ground that a public authority dealing with public moneys occupied a fiduciary position and was not entitled to employ a solicitor for ordinary conveyancing work on other than usual terms. On a summons for a review of taxation,—Held, that there was no justification for modifying the express provisions of rule 6 so as to except from their operation local authorities or other public bodies, and that the bill must go back for taxation on the basis of the election.

Adjourned summons.

In 1903 the Llanywicke School Board agreed to buy a piece of land as a site for the Goodrergrraig school for 350*l.*, and on July 9 instructed their solicitor, the present applicant, to act for them in the purchase. On July 11, the applicant, in exercise of his right of election under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881,¹ and before undertaking any of the business, notified in writing to the board that his

(1) Rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, provides that: "In all cases to which the scales prescribed in Schedule I. hereto shall apply, a solicitor may, before undertaking any business, by writing under his hand, communicated to the client, elect that his remuneration shall be according to the present system as altered by Schedule II. hereto; but if no such election shall be made, his remuneration shall be according to the scale prescribed by this order."

charges in the matter would be "according to the present system as altered by Schedule II. of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881." This election by the applicant received the assent of the school board at a meeting held on August 27. On completion of the purchase the applicant delivered his bill of costs, amounting, with disbursements, to the sum of 50*l.* 2*s.* On June 30, 1904, an order of course was made for the taxation of this bill upon the petition of the Education Committee of the Glamorganshire County Council, who in the interval had succeeded the school board as the local education authority. The Taxing Master disallowed all the items in detail contained in the bill, and in lieu thereof allowed a scale fee of 5*l.* 5*s.* on the amount of the purchase-money, and a sum of 8*l.* 8*s.* for disbursements. On July 15, 1904, the applicant carried in objections to the taxation based on the ground that there was nothing unreasonable or improper on his part in making his election, or on the part of the school board in assenting thereto and employing him on those terms. On July 16, 1904, the clerk to the Glamorganshire County Council wrote to their solicitors saying: "I am directed by the Finance Sub-Committee of the Education Committee to state that they consider that if the principle of taxation of Mr. Moses Evans' bill is objected to by him, you should inform the Master that the County Council does not agree with his view and will not contest any appeal to the Court by the solicitor, and therefore they request him to tax the bill on the basis of scale 2 so that they may be in a position to pay it, if Mr. Evans gets rid of the present taxation. It appears to them that the School Board were entitled to employ whatever solicitor they thought proper, and that the option is with that solicitor to state in what scale he will accept the work."

In his answers to the present applicant's objections the Taxing Master said: "The objections raise a question of principle of some importance viz.—as to the right of a public body such as the Llanywicke School Board dealing with public moneys to employ a solicitor for ordinary convey-

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ancing work on other than usual terms and to act upon an 'election' by the solicitor to charge under Schedule II. to the Solicitors' Remuneration Order instead of taking the scale charge under Schedule I. The objections, if they are well founded, seriously affect the efficiency of the Supreme Court Taxing Office in dealing with a class of cases now coming in with increasing frequency viz :—the taxation of costs of solicitors acting for Local Authorities, and go a long way towards substituting the opinions and wishes of the Local Authority for the ordinary process of determining such question on taxation." The Master then stated the facts, and, setting out the letter of the clerk of the county council, continued: "I cannot accede to the contention that the School Board could employ any solicitor they thought fit leaving it to the solicitor to decide on what scale he would be paid. I think on the contrary that the Board as custodians of public funds to be applied for public purposes were bound to avoid unusual expense and to employ some one else if the solicitor they favoured would not work on ordinary terms. The solicitor in his objections says that a School Board cannot properly be said to occupy a fiduciary position and this I presume is the view of the School Board and their successors the Education Committee of the County Council. I differ from them entirely. This taxation, as are many similar ones, is for the purpose of satisfying the Local Government Board Auditor that the costs are proper to be allowed. If such bodies are free to make unusual terms with a solicitor or other person employed by them for analogous purposes and to tie the Taxing Masters' hands by their decisions on these subjects, taxation in such cases becomes a farce and the audit misleading." After referring to the cases of *Frank James & Sons, In re* [1903],² *United Kingdom Land and Building Association, In re* [1888],³ and *Rackham, In re; Carter v. Rackham* [1889],⁴ the Master continued: "I should not recognise such an election in ordinary trustees' charges and expenses, but it is in practice

not attempted. I can discover nothing in the circumstances of this case to make it an exception"; and in conclusion he said: "I think the School Board did occupy a fiduciary position and could not rightly act on this 'election,' and I should fail in my duty if I took the easy course of allowing these charges to pass the Auditor upon the direction of the Education Committee and contrary to my judgment. I therefore overrule the objections."

The solicitor then took out a summons asking that his objections to the taxation might be allowed, and that it might be referred back to the Taxing Master to vary his certificate accordingly, and this summons was now adjourned into Court.

Owen Thompson, for the applicant.—The cases relied upon by the Master do not support the view which he has taken. *Frank James & Sons, In re*,² was a case where an arbitrator claimed a commission, and is not *in pari materia*. In *United Kingdom Land and Building Association, In re*,³ there was a compulsory winding-up and a sale under the direction of the Court, and Chitty, J., held that in the circumstances it was the duty of the official liquidator to obtain the direction of the Court as to whether the solicitor should be employed on the more expensive footing. Again in *Rackham, In re; Carter v. Rackham*,⁴ the matter was also pending before the Court. That was a case of a sale of real estate in a creditor's administration action, and Chitty, J., again said that in such a case the solicitor should bring the matter to the attention of the Judge in chambers. Neither of those cases is any authority for what the Master has done here. Further, *Metcalf, In re; Metcalf v. Blencowe* [1887],⁵ and *Love, In re; Hill v. Spurgeon* [1889],⁶ are cases in which an election by the solicitor acting for trustees was assumed to be good; and in *Hester v. Hester* [1887],⁷ an election by the first mortgagees' solicitor bound the mortgagor and puisne incumbrancers; and in *Stewart, In re* [1889],⁸ an election, notice

(2) 88 L. J. N.C. 264; [1903] W. N. 99.

(3) 58 L. J. Ch. 132; 40 Ch. D. 471.

(4) 34 Sol. J. 97.

(5) 57 L. J. Ch. 82.

(6) 58 L. J. Ch. 272; 40 Ch. D. 637.

(7) 56 L. J. Ch. 247; 34 Ch. D. 607.

(8) 41 Ch. D. 494.

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of which had been validly given, was held good against a municipal corporation. That authority is directly in point. *Denne and Secretary of State for War, In re* [1884],⁹ shews that an election properly made would be good against a public department.

The county council did not appear.

FARWELL, J., referred to rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, and continued: In this case the Taxing Master has come to the conclusion, in some way which I fail to understand, that this rule must be qualified by adding the words, "except in the case of a school board or local authority, or of trustees or other persons in a fiduciary position." I do not see how he is justified in coming to that conclusion, or why words containing any such exceptions should be added to the express provisions of the rule in question. The case before Mr. Justice Kay of *Hester v. Hester*⁷ has a considerable bearing on the present case. That was a case of a mortgagee, and the decision was that where notice of election under the rule had been properly given by a solicitor to his client, a first mortgagee, it is binding on a puisne mortgagee and also on the mortgagor. Mr. Justice Kay says: "Election is a matter entirely between the client—here the clients are the first mortgagees—and his solicitor. An election only puts the solicitor in the position in which he was before the scale was adopted; and there appears to me to be no hardship in saying that if the election is properly made as between the solicitor and his own client, a first mortgagee, it would be binding as between the solicitor and a subsequent mortgagee. In my opinion it would be binding both as against the mortgagor and the second mortgagee." In the face of that, I cannot understand why it is that the Taxing Master has so adversely criticised the solicitor for making, and the local authority for assenting to, this election on his part. It often happens that in small matters it would not pay the solicitor to do the work for the scale fee under Schedule I.—for instance, in this very case, the scale fee only amounts to

five guineas—and he is not bound to do the work for the scale prescribed by the Order, but is free to exercise the option given to him by this rule; and, on the other hand, it is open to the client to assent to an election by the solicitor, and although he does so assent he still has the security that the Taxing Master on taxation will see what charges are proper to be allowed or not. Here, however, the Taxing Master says, "I should not recognise such an election in ordinary trustees' charges and expenses, but it is in practice not attempted"; but I confess that I do not see what justification he has for saying so, or for striking out the provisions of the rule in cases where the clients employing the solicitor are trustees or local authorities. *Hester v. Hester*⁷ was an express decision with reference to the case of a mortgagee. In *Metcalfe, In re*,⁵ there had been an administration judgment followed by a sale of real estate; and although it was held that the notice of election was not given to the trustees in time, it was not suggested that the solicitor could not elect when his clients were trustees. In the case of *Stewart, In re*,⁸ a local authority was the client, and no objection was taken on the ground that the client was a public authority. No case has been cited to me to shew why there should be any exception to the rule made in the case of local authorities or other public bodies, and I wholly fail to understand why any such exception should be made.

The Taxing Master relied on the two cases of *United Kingdom Land and Building Association, In re*,³ and *Rackham, In re*,⁴ but both those cases are quite distinguishable from the present. Where there is pending before the Court a matter in which resort can be had to the Judge, it may well be that the liquidator, or even the solicitor himself, ought to go to the Judge and obtain his sanction to the employment of the solicitor on these terms. The case of *Frank James & Sons, In re*,² is only reported in the weekly notes, and, so far as I can see, has reference to some particular item in the bill of costs which the parties wished to be paid according to an agreement between them, but which the Judge thought ought

(9) 1 Times L. R. 23.

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not to be allowed, and has nothing to do with rule 6.

I decide this case upon rule 6, and I do not see why the Taxing Master should not allow solicitors the option which is given to them by that rule, or why he should criticise the local authority for assenting to the exercise of that option. The bill must go back for taxation according to the election made by the solicitor.

Solicitors—Neave & Bretherton, for applicant.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

[IN THE CHANCERY DIVISION AND
IN THE COURT OF APPEAL.]

BYRNE, J.

1904.

Feb. 25.

WARRINGTON, J.

May 16.

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

Nov. 28, 29.

WHITING'S
SETTLEMENT,

In re;

WHITING v.
DE RUTZEN.

*Condition—Marriage at Any Time with-
out Consent—Forfeiture of Previous Gift
—Settlement—Condition Subsequent—Gift
Over—Validity—Practice—Summons—
Construction of Settlement—Interests of
Unborn Children—Representation by
Trustees—Rules of Supreme Court,
Order XVI. rule 32 (a).*

*A condition subsequent in a will or deed
requiring the forfeiture of a previous gift in
the event of a marriage at any time with-
out consent is a valid condition if coupled
with a gift over, and, where the original
gift is by way of settlement on the donee
for life with remainder to her children,
defeats the interest of the children as well
as that of the tenant for life.*

*Das
230) shwood v. Bulkeley (Lord) (10 Ves.
and Lloyd v. Branton (3 Mer. 108)
followed.*

*On a summons raising such a question
on the construction of a settlement the
trustees of the settlement sufficiently repre-
sent the interests of children otherwise un-*

*represented, whether in existence or not,
who may be entitled under the trusts of the
settlement.*

Appeal against a decision of War-
rington, J.

By a voluntary settlement dated Janu-
ary 23, 1886, and by certain subsequent
deeds-poll dated respectively March 29,
1887, May 22, 1891, and December 27,
1893, executed by the settlor in exercise
of powers of revocation contained in the
original settlement and also in the first
and second of the deeds-poll, Henry
Whiting declared that scheduled securi-
ties of about the value of 30,000*l.*, which
had been transferred into the names of
trustees, should be held by them upon the
trusts hereinafter mentioned.

By clause 4 of the original settlement
as altered by the subsequent deeds-poll,
after a proviso for varying investments,
it was declared that the trustees should
stand possessed of the scheduled and
varied investments (thereinafter referred
to as the trust fund) upon trust to pay
the income thereof unto H. Whiting for
his life, and after his death should stand
possessed of the trust fund and the income
thereof "upon trust that the trustees shall
(but subject to the proviso as to marriage
hereinafter contained) during so much
of the life of Juliette Elizabeth Mary
Whiting the daughter of the said Henry
Whiting and hereinafter called 'Juliette
Whiting' as shall elapse after she shall
have attained the age of 26 years or been
married under that age with such consent
as hereinafter required, pay the said
income unto the said Juliette Whiting
for her sole and separate use without
power of anticipation and from and after
the death of the said Juliette Whiting
shall stand possessed of the trust fund
and the income thereof (subject neverthe-
less to the proviso as to her marriage,
hereinafter contained)," upon certain
trusts in favour of the children and issue
of any such marriage. Clause 8, as it
originally stood, was as follows: "That
if there shall be no child of the said
Juliette Whiting who being a son shall
attain 21 years or being a daughter shall
attain that age or marry under it with
such consent as aforesaid then subject as

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hereinbefore mentioned and subject to the proviso as to her marriage hereinafter contained the said trust fund and income shall be as to 5,000*l.* sterling to be raised out of such portion of the trust fund or shall consist of pure personal estate In trust to pay the same to the magistrates or magistrate for the time being of the Police Court at Bow Street to be invested in any securities of any kind whatsoever which the said magistrates or magistrate may deem proper with power to vary the same investments at their or his discretion and to distribute the income arising from such investments in the same manner as the income of the Police Relief Fund established by the said Henry Whiting is distributed. And as to the residue of the said trust fund and the income thereof In trust for the said Henry Paul Whiting and Mathew Noel Whiting (the sons of the said Henry Whiting) in equal shares for their own absolute use and benefit." The only material alteration made in this clause was that by the deed-poll of December 27, 1893, for the gift of the residue in favour of the sons, the settlor substituted a gift of the same to the magistrates at Bow Street upon the same trusts as those declared of the 5,000*l.* By clause 9 of the original settlement it was provided that if Juliette Whiting should marry under the age of twenty-six without the consent in writing of H. Whiting during his life and after his death, without the consent of his wife Juliette Antoinette Whiting during her widowhood, and after her death or second marriage without the consent of the trustees, or if Juliette Whiting should either before or after the age of twenty, otherwise than with the consent of H. Whiting, marry a man who should not have been born of English, Welsh, or Scotch, or Greek parents, the trusts declared of the trust fund and the income thereof after the death of H. Whiting should, subject as next thereafter mentioned (meaning thereby clause 10 of the original settlement), cease and determine as from the date of such marriage. By the deed-poll of March 29, 1887, the word "Greek" was struck out of clause 9 and clause 12 hereinafter mentioned. By the deed-poll of May 22, 1891, clause 9

was revoked, and the following clause substituted for it: "That if the said Juliette Whiting shall marry without the consent in writing of the said Henry Whiting during his life or shall after his death and during the lives of Juliette Antoinette Whiting (the wife of the said Henry Whiting) and the said Henry Paul Whiting and Mathew Noel Whiting marry without the united consent of all three while living or without the joint consent of the two survivors or without the consent of the last survivor of them marry without their or her or his consent in writing then and in either of these cases the trusts of the principal indenture declared of the trust funds and the income thereof after the death of the said Henry Whiting shall subject as next hereinafter (meaning thereby Clause 10 of the Principal Indenture) mentioned cease and determine as from the date of such marriage." Clause 10, which remained unaltered, was in these terms: "And then subject to the life interest of the said Henry Whiting in the said trust fund and to any interest therein or in the income thereof that may then by virtue of these presents have been acquired by any previous issue of the said Juliette Whiting the trustees shall stand possessed of the sum of 5,000*l.* sterling to be raised out of such portion of the said trust fund as shall consist of pure personal estate In trust to pay the same to the said magistrates or magistrate," upon the trusts already mentioned.

By clause 11 the trustees were to stand possessed of the residue of the trust fund and the income thereof in trust for H. P. Whiting and M. N. Whiting in equal shares.

Clause 12 provided that until Juliette Whiting should attain the age of twenty-six, or marry with such consent as aforesaid such a person as was described in clause 9 of the original settlement, the trustees were to pay her after the death of H. Whiting 100*l.* a year for pocket-money. Finally, as a new clause, H. Whiting by the deed-poll of May 22, 1891, declared that "the consents or consent by the Principal Indenture as varied by these presents required to the marriage of the said Juliette Whiting shall apply to

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every marriage contracted by her during the life of the said Henry Whiting and after his death during the lives of the said Juliette Antoinette Whiting Henry Paul Whiting and Mathew Noel Whiting and the lives of the survivors and the life of the survivor of them. And in so far as the Principal Indenture and the said deed poll are not revoked altered or varied by these presents the said Henry Whiting doth hereby confirm the same."

By his will made in August, 1892, H. Whiting confirmed the original settlement as varied by the two earlier deeds-poll and subject to the power of revocation reserved to himself. The will did not contain any provision for Miss Whiting. H. Whiting died on December 8, 1894. His son, M. N. Whiting, died in September, 1897.

In March, 1902, Miss Whiting, who was then about thirty-four years of age, became engaged to General Sir A. Turner, K.C.B., with the consent and approval of her mother. The consent of her brother, H. P. Whiting, to the marriage had been asked for, but had been refused. The mother died on June 16, 1902. The daughter was on August 23, 1902, married to Sir A. Turner without the consent of H. P. Whiting. At present there was no issue of the marriage.

An originating summons was taken out by the trustees of the settlement of January 22, 1886, and the subsequent deeds-poll, for the determination of the questions whether the condition as to Lady Turner's marriage was valid, and whether by her marriage without H. P. Whiting's consent her interest and that of any issue she might have had been forfeited, and whether the trust fund ought to be transferred to the magistrates at Bow Street. H. P. Whiting was one of such trustees.

On February 25, 1904, the summons came on for hearing before the late Byrne, J.

It was in evidence that there were two funds, both established by H. Whiting—one being known as the Bow Street Reward Fund, which was administered by the magistrates at Bow Street, and the other the Police Relief Fund, administered by the Commissioners of Police.

In reply to enquiries as to what would be done with the settled fund should the Court be of opinion that there had been a forfeiture of the interests given to Lady Turner and her children, the police magistrates at Bow Street said that the fund was much too large for them to dispose of in the ordinary manner in which the Reward Fund was disposed, and that they could not usefully employ for such purposes more than about one-third of the income of the same; and the Commissioners of Police said that the settled fund was much too large to be used properly for the Police Relief Fund purposes.

Sir Edward Clarke, K.C., and *H. L. Manby*, for Lady Turner, at the commencement of the argument, said that no claim to the money would have been made by Lady Turner personally, but it was necessary to have regard to the interests of unborn children of the marriage.

[BYRNE, J., said the question must be argued in the interests of the unborn children and by some representative on their behalf, and he asked whether under the rules he could not appoint some person to represent that possible class.]

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees of the settlement.—It may possibly be that the ordinary rule that trustees represent unborn children has no application in the present case, inasmuch as Lady Turner is a party and in the same interest. The trustees are perfectly willing to discharge the duty.

Rowden, K.C., and *R. A. B. Marsham*, for the police magistrates.—Order XVI. rule 32 (a), which enables the Court to appoint some person to represent an unknown class, applies to unborn persons.

[BYRNE, J.—The difficulty here is that there is no person in existence who is a member of the class.]

In *Cardigan v. Curzon-Howe* [1901]¹ the trustees of the will were held to sufficiently represent unascertained persons. Apart from any statutory provision, unborn children, being an unascertained and unascertainable class, and one that cannot

(1) 70 L. J. Ch. 763; [1901] 2 Ch. 479.

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be represented at the time by any individual member of such class, are, according to the law of the Court, represented by the trustees—*Fussell v. Dowding* [1884].² In *Miles v. Jarvis* [1883]³ it was held that Order XVI. rule 46, enabling the Court to appoint persons to represent the estate of a deceased person who had no legal personal representative, did not apply to the representation of the estate of unborn children under legal limitations.

Sir Edward Clarke, K.C.—In view of the fact that one of the trustees, H. P. Whiting, refused his consent to the marriage of Lady Turner, it is very questionable how far the trustees could properly represent unborn children in the present case.

BYRNE, J.—This is not an unimportant point. [His Lordship then read the report of the case of *Miles v. Jarvis*,³ and continued:] In that case Mr. Justice Kay obviously adopted the view that he could not appoint a person to represent a class of persons entitled under legal limitations. The difficulty does not arise if there are trustees of the settlement who by virtue of their office represent *cestuis que trust* otherwise unrepresented, whether in existence or not. I think this is the solution. The right thing will be for me to hear counsel on behalf of Lady Turner, and then to call upon counsel for the trustees to say anything they may desire on behalf of unborn children.

The case was thereupon argued at length, without any person having been appointed to represent unborn children, and judgment was reserved, but before it was delivered *Byrne, J.*, died. The questions arising on the summons were on May 16, 1904, re-argued before *Warrington, J.*

Mulligan, K.C., and *Vaughan Hawkins*, for the trustees, and also for the unborn issue of the marriage.

Rowden, K.C., and *R. A. B. Marsham*, for the police magistrates.

Sir Edward Clarke, K.C., and *H. L. Manby*, for Lady Turner.

(2) 53 L. J. Ch. 924; 27 Ch. D. 237.

(3) W. N. (1883), 203.

R. J. Parker and *Tomlin*, for the Attorney-General.

WARRINGTON, J.—It is unnecessary for me to say what I should be prepared to do if I did not feel myself bound by authority, but in this case I consider myself bound by the decision in *Lloyd v. Branton* [1817]⁴ to decide that the interest taken by Lady Turner and by her possible issue has been forfeited in favour of the Police Relief Fund. [His Lordship referred to the material clauses of the settlement and deeds-poll, and continued:] It is admitted on the part of the trustees of the police fund, the magistrates at Bow Street, that the effect of these provisions is this—that there is a trust in favour of Lady Turner as to the income from the time she attains the age of twenty-six years for her life for her separate use without power of anticipation, with a gift over at her death in favour of her issue, and that the provision as to the interest ceasing in the event of her marrying without the specified consent is a condition subsequent. It is further admitted that the condition subsequent would be merely *in terrorem* but for the fact that there is a trust over which gives the fund, in the event of marriage without consent, to the magistrates at Bow Street. It is contended on the part of Lady Turner that that condition subsequent is not merely inoperative and *in terrorem* only, but that it is void altogether as infringing the rule of the canon law, which has to some extent been incorporated into the law of England, that a condition in restraint of marriage is a void condition.

It has, of course, as we all know, been frequently decided that conditions in restraint of marriage, limited as to time, as to place, and as to a person, have been held to be good conditions notwithstanding the rules of the civil law. But it has been contended on behalf of Lady Turner in the present case that the condition, if, upon the true construction of it, it extends to any marriage made by her at any time during her life, is not within the exceptions which have been so engrafted on to the rule of the canon law. If the case were without authority, that

(4) 3 Mer. 108.

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would be a very interesting question to discuss; but, as I have already said, I consider that I am bound by authority. The only authority that is really in point is the case which has been so much discussed to-day—*Lloyd v. Branton*.⁴

The facts in that case are sufficiently stated in the head-note: "Testator gives 24,000*l.*, upon trust, as to 6,000*l.* to pay the interest to S. B. (his niece) during her life, and, after her decease, the principal among her children; if she should die without issue, over. He declares similar trusts as to three other sums of 6,000*l.* (making the remainder of the 24,000*l.*) for his three other nieces and their children. Proviso, that, in case any of his said nieces should marry without such consent as therein prescribed, each, &c. so marrying, should forfeit the interest of her 6,000*l.*, and all other sums to which she may be entitled under his will; and the respective sums of 6,000*l.*, and all such other sums, &c. should fall into his residue." Then he gave the residue in trust for certain nephews and their children. It will be observed that in that case there was a trust, as there is here, for the lady in question and her children; and further, that the terms of the proviso imposing the condition as to marriage did on the face of them extend to a marriage at any time without the prescribed consent. The case seems to have been somewhat elaborately argued on behalf of the lady and her husband, and on two grounds: First, that there was no sufficient bequest over (with that ground, of course, we have nothing to do here); and secondly, upon the ground that the condition could not be held to extend to a marriage without consent if the party had attained the age of twenty-one. I do not think the reporter, in summarising the grounds upon which the contention is based, has quite correctly stated them, because I think he ought to have stated a third head—namely, that the condition, if held to extend to the marriage without consent after the party had attained twenty-one, would be a bad condition. He has not stated it in summarising the argument; but when you come to look at the argument under what the reporter calls the second head, it will

be found that the learned counsel who argued the case divided it into two parts: first, with regard to construction, they argued that the condition ought to be limited to twenty-one; and secondly, an argument founded on the general proposition of law, independent of construction, that if the testator had not so limited it, then the condition ought to be held to be bad. In the course of the argument they cite *Stackpole v. Beaumont* [1796],⁵ and in particular the passage of the judgment at page 97, which has been referred to here before me, and which passage, so far as it goes, was undoubtedly in favour of the arguments which counsel were then presenting to the Court, because it states, as a ground for holding that a condition requiring consent to a marriage after twenty-one is good, the fact that the law itself imposes restraints on marriages under that age without consent. So far, undoubtedly, that case was an authority for the proposition for which counsel were contending, and I only refer to it to shew that they did place before the learned Master of the Rolls (Sir William Grant) all the materials, so far as one can see, which were available at the time in support of their argument. Notwithstanding that, the Master of the Rolls, in giving his judgment, said this, at page 116: "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease. In the modern case of *Dashwood v. Bulkeley (Lord)* [1804] ⁶ the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under twenty-one." He then proceeded to discuss the other questions which had been argued: first, the question as to construction—namely, whether the condition could be limited to marriage without consent under the age of twenty-one years; and secondly, the question whether there was a sufficient gift over.

Now it is quite true that when *Dashwood v. Bulkeley (Lord)* ⁶ is looked at, it is not a decision in favour of the point then before the Master of the Rolls; but it is also

(5) 3 Ves. 89.

(6) 10 Ves. 280.

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quite true that in that case a very elaborate discussion was entered into on the facts as to whether consent had or had not been given, which would have been wholly irrelevant if the consent required was limited to marriage under the age of twenty-one years. It is quite true, as counsel for Lady Turner has pointed out, that the marriage in that case was arranged before the lady had attained twenty-one, and was solemnised immediately after she had attained twenty-one, but I do not think that accounts for the almost inexplicable fact that, if the counsel and the Judge before whom that case came thought that consent, if not limited to marriage under twenty-one, would be merely a condition *in terrorem*, that point was not argued. It comes to this, that, in my opinion, *Lloyd v. Branton*⁴ is a distinct authority for the proposition that a condition subsequent causing a forfeiture of the previous gift in the event of the marriage of the donee at any time without the consent of a specified person is a good condition provided there is a gift over. The case seems to me to be exactly in point, not only on the general proposition, but also on the smaller question as to whether the condition as to forfeiture and the gift over destroyed the interest of the children as well as that of Lady Turner, and on that point I think I must so decide.

There is another point which has been taken by counsel for Lady Turner. It is said that there is sufficient in the documents in this case to enable the Court to limit the condition by construction to a marriage under the age of twenty-six without consent. I confess to having been very anxious to find, if I could, some way out of giving effect to this condition, and I would have been glad to do so if upon the true construction of these deeds I could really satisfy myself that the settlor intended so to limit the condition. But I think that I am bound to read this original deed, together with the deeds-poll which were afterwards executed altering it, as if they were one deed. What I mean is this: I think I am bound to read the original deed, not as a separate document by itself, but to take the original deed, delete from it the

clauses which the settlor has revoked, and substitute for them the clauses which he has substituted by the several deeds-poll. The materiality of it is this—that, if I read the deed in that way, I must cut out altogether the original clause 9, and I must substitute for it the clause 9 which appears in the second deed-poll. I make those remarks with reference to the argument of counsel for Lady Turner, which I confess struck me at first as one bearing very considerable weight. The argument was this—that the real object of clause 9 of the second deed-poll, and all that it really did, was to alter the persons who were to give consent. Now I do not think, treating this original settlement and the deeds-poll as in my opinion I am bound to treat them, that that is the true view. I think the true view is, as I have already said, that you must cut out clause 9 altogether. That is what the settlor has already told you to do. He does not say, “I propose to alter clause 9 by inserting different persons to give consent to those originally mentioned in the clause,” but he says, “I tell you I am putting in a new clause,” which he puts in in inverted commas in the deed-poll; and which is obviously so intended, because there are the peculiar words at the end which rather puzzle one until one grasps what the settlor really means—namely, “shall subject as next hereinafter (meaning thereby Clause 10 of the Principal Indenture) mentioned.” Therefore you are obviously to read this new clause as being put into the settlement, otherwise the words “next hereinafter” have no meaning at all. Now if you read the deed-poll in that way I do not think that you can possibly read it as merely intended to alter the persons who are to give consent; and if you read it by itself, as inserted as the settlor says it is to be inserted in the settlement in place of the original clause 9, then I think it is impossible to come to any other conclusion than that the terms of it are general, that there is nothing whatever in the deed limiting it to a marriage before the age of twenty-six; and not only that, but there is the subsequent clause which I have already referred to, in which the settlor is careful to provide, and does by way of a new

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clause not in the original settlement carefully provide, that the condition is to apply to every marriage contracted by his daughter.

On the whole, then—I will not say with reluctance, because, as I say, I am bound by the decision in *Lloyd v. Branton*,⁴ and I am bound to follow it, but still with a certain amount of regret—I feel myself bound to come to the conclusion that the interest of Lady Turner and that of her possible issue have been forfeited, and that the magistrates at Bow Street are therefore entitled to have the fund according to the terms of the settlement transferred to them.

Lady Turner appealed from this judgment.

Sir Edward Clarke, K.C., and H. L. Manby, for the appellant.—The condition here against marrying without consent is a condition subsequent, and being *in terrorem* in restraint of marriage is void—*Godolphin's Orphan's Legacy* (3rd ed.), p. 45. *Prima facie* every condition in restraint of marriage is void—*Scott v. Tyler* [1788]⁷—though provisions for a widow or widower losing property on re-marrying have been held good—*Allen v. Jackson* [1875].⁸ In most cases before the Court there has been a limitation of age in the condition against marrying, and up to the age of twenty-one such a condition has been held good. In *Stackpole v. Beaumont*⁵ it was held that the canon law would not invalidate conditions against marriage if only applicable to the period before attaining twenty-one. Other cases on conditions in restraint of marriage are *Garret v. Pritty* [1698],⁹ *Stratton v. Grymes* [1693],¹⁰ *Underwood v. Morris* [1741],¹¹ *Morley v. Renmoldson* [1843],¹² *Channcy v. Graydon* [1743],¹³ and *Lloyd v. Branton*.⁴

[VAUGHAN WILLIAMS, L.J., referred to *Marples v. Bainbridge* [1816].¹⁴]

(7) 2 Dick. 712; 1 Wh. & Tu. L.C. (7th ed.), p. 535.

(8) 45 L. J. Ch. 310; 1 Ch. D. 399.

(9) 2 Vern. 293.

(10) 2 Vern. 357.

(11) 2 Atk. 184.

(12) 12 L. J. Ch. 372; 2 Hare, 570.

(13) 2 Atk. 615.

(14) 1 Madd. 590.

In *Lloyd v. Branton*⁴ the argument addressed to the Court was dealt with very summarily, and the point as to the validity of a condition restraining marriage without consent was decided on the authority of *Dashwood v. Bulkeley* (Lord),⁶ but the point was never argued in the latter case. It turned on whether there had or had not been a consent. In *Daley v. Desbouverie* [1738]¹⁵ the position of trustees who have a power of consenting was considered. The Court gradually allowed some departures from the strictness of the old law. In *Crommelin v. Crommelin* [1796]¹⁶ the condition against marriage was limited to the period before attaining the age of twenty-eight, but there was no decision on the question of validity. In *Nourse, In re; Hampton v. Nourse* [1898],¹⁷ the condition was held not to be *in terrorem* as the testator had provided for the son in any event; but in this present case the only provision made by the father for his daughter was the one now in question.

[Rowden, K.C., referred to *Stevenson v. Abington* [1863]¹⁸ as a case of a gift over where there was a condition against disputing a will.]

The civil law treated the requirement of consent as a fraud on the law—see *Scott v. Tyler*⁷ and *Story's Equity Jurisprudence*, ss. 279 and 280; and this doctrine has only been modified in our law to the extent of allowing reasonable restraints—see *Knapp v. Noyes* [1768],¹⁹ *Desbody v. Boyville* [1729],²⁰ and *Duggan v. Kelly* [1848],²¹ where the gift over was confined to marriage under twenty-one.

In any case a good gift over is essential to effect a forfeiture, but in the present case the whole of the money is not required for the purposes for which it is in terms given over, and to that extent there is no good gift over.

[*Per Curiam*.—The *cy-près* doctrine seems fatal to that contention. There is a gift over for charitable purposes.]

(15) 2 Atk. 261.

(16) 3 Ves. 227.

(17) 68 L. J. Ch. 15; [1899] 1 Ch. 63.

(18) 11 W. R. 935.

(19) 2 Amb. 662.

(20) 2 P. Wms. 547.

(21) 10 Ir. Eq. B. 473.

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Mulligan, K.C., and *Vaughan Hawkins*, for the trustees and also for infant children of Lady Turner.—It is more unreasonable to apply such a condition to the children than to the mother. It does not appear that the infants were represented in *Lloyd v. Branton*.⁴

[They also referred to *Cooke v. Turner* [1846],²² *Key and Elphinstone's Precedents* (6th ed. 1899), vol. ii. p. 860, and *Elphinstone's Introduction to Conveyancing* (5th ed.), p. 452.]

Rowden, K.C., and *R. A. B. Marsham*, for the Bow Street magistrates.—The law as stated by Warrington, J., in the Court below has been accepted in all the text-books—*Jarman on Wills* (5th ed. 1893), vol. ii. pp. 885, 886; *Theobald on Wills* (5th ed. 1900), p. 545; *White and Tudor's Leading Cases* (7th ed. 1897), vol. i. p. 561; notes to *Scott v. Tyler*⁷; and *Daley v. Desbouverie*,¹⁵ *Aston v. Aston* [1703],²³ *Dashwood v. Bulkeley* (Lord),⁶ and *Lloyd v. Branton*⁴ are direct authorities in our favour.

The effect of a gift over as making valid a partial restraint was also considered in *Stratton v. Grymes*,¹⁰ *Aston v. Aston*,²³ and *Cleaver v. Spurling* [1729].²⁴

[*VAUGHAN WILLIAMS, L.J.*, referred to *Jones v. Jones* [1876].²⁵]

[*COZENS-HARDY, L.J.*, referred to *Grant v. Dyer* [1813].²⁶]

*Morley v. Kennoldson*¹² and *Bellaire v. Bellaire* [1874]²⁷ were cases of general restraint.

Sir Edward Clarke, K.C., in reply, further cited *Reynish v. Martin* [1746]²⁸ and *Davidson's Precedents* (2nd ed. 1864), vol. iv. p. 304.

VAUGHAN WILLIAMS, L.J.—This is not a branch of the law with which it is very satisfactory to deal, nor in my opinion one which, looking to the mode in which it has been dealt with, is easily welded into one consistent whole. We are told

that the law has been partially imported into our system of law from the Roman Law through the Ecclesiastical Courts; and then we are told that the Court of Chancery did not entirely adopt the view of the law adopted by the Ecclesiastical Courts, just as the Ecclesiastical Courts did not adopt in its entirety the Roman Law; and eventually, as a matter of history, we find ourselves face to face with this state of the law—that the Courts of Chancery had to administer rules of law which they did not think very fair and very just, and that they were constantly straining the rules by which they declared themselves bound in order to avoid them. Under those circumstances we come down to modern times; but by the time that Lord Eldon was Lord Chancellor the rules of law applicable to the question whether a particular disposition—I think it is right to say whether in a will or in a deed *inter vivos*—was one which would be enforced by the law as not being inconsistent with the interests of the public or the policy of the law or the rules that had been laid down with regard to the policy of the law, had come to be tolerably well ascertained; and under those circumstances, if we find decisions of that date based upon the law being then settled, we ought not to depart from those decisions unless there is reason to suppose either that those decisions have been questioned in subsequent cases, or that they have not been accepted by conveyancers and by the profession generally as being sound decisions which could be safely acted upon. Speaking for myself, I cannot regard the present state of the law as very satisfactory. I do not suppose that any one would say that it is desirable in the interests of the community that gifts should be allowed to be valid which are gifts which distinctly encourage celibacy and discourage marriage. On the other hand, I do not suppose that any one would say that every partial restraint of marriage is an injury to society, and ought to be treated as null and void. Possibly there may be some middle line to be drawn, and one might say that in each case one has to consider whether the particular condition acting in partial restraint of marriage is a reasonable condition, looking at

(22) 17 L. J. Ex. 106; 15 M. & W. 727.

(23) 2 Vern. 452; *sub nom. Ashton v. Ashton*, Pr. Ch. 226.

(24) 2 P. Wms. 526.

(25) 45 L. J. Q.B. 166; 1 Q.B. D. 279.

(26) 2 Dow, 73.

(27) 43 L. J. Ch. 669; L. R. 18 Eq. 510.

(28) 3 Atk. 330, 335.

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matters from the point of view of the community. But one is not really, in my view, in a position to deal with such matters according to one's view of what might or might not be desirable for the community. I think that we are bound to follow the decisions of Lord Eldon and Sir W. Grant in the two cases of *Dashwood v. Bulkeley* (Lord)⁶ and *Lloyd v. Branton*,⁴ which have been cited to us. If I had to consider the question whether it is to the interest of the community to allow a restraint upon the freedom of marriage to be continued against a woman during the whole of her life, unless such marriage were with the consent of a named person, I might perhaps come to the conclusion that that was not to the interest of the public; but, as I have said, I do not think that I am entitled to consider any such question, and the only question that I have to consider is whether the authorities which have been cited lay down the law in such a way as to shew that the condition in the present case is valid and can be enforced. I have come to the conclusion that those authorities do establish this in the present case, and that, therefore, we are bound to give our decision accordingly.

With regard to these two authorities, I will deal first with *Lloyd v. Branton*,⁴ in which it was held that a condition under which a marriage without consent was to operate as a forfeiture, there being also a gift over in the event of forfeiture, was a valid condition, although the consent was a consent which would have to be obtained after the beneficiary had attained the age of twenty-one years, and that the forfeiture must take effect. Having shortly stated that that was the result in *Lloyd v. Branton*,⁴ let us examine the real ground upon which we are asked to reverse the decision of Mr. Justice Warrington. It seems to me that the outcome of it all is this: It is urged that if, in the present case, we construe the successive settlements so that the consent of the widow and the two brothers, or of the two survivors, or of the one survivor, is necessary during the whole life of the lady, such a condition is unreasonable, and that in such a case, although the restraint on marriage is partial and not general, and

although there is a gift over, the Court ought to say that such a provision for forfeiture is inconsistent with the freedom of marriage, and ought to be treated as null and void. It seems to me that that contention is rendered impossible by the decision of Sir W. Grant in *Lloyd v. Branton*⁴ and of Lord Eldon in *Dashwood v. Bulkeley* (Lord).⁶ I am not going to say anything at any length as to other points that have been made before us, one point being that we ought not to construe the settlements in this case as settlements under which it was intended by the settlor that the condition of obtaining the consents to the marriage would extend beyond the age of twenty-six. We heard the arguments upon that point, and I think we have all come clearly to the conclusion that we cannot put such a construction upon these settlements. It may be quite true—and I think is true—that in several of the cases cited before us there was a great straining of the words of the instrument in question in order to avoid a forfeiture, but we have come to the conclusion that there is no ground upon any of the words contained in these successive settlements which would justify us in saying that the settlement means that the necessity for consent should come to an end as soon as the lady arrived at the age of twenty-six. Then it was said that in this case there is no gift over. If there was no gift over I should quite agree that there would be great difficulty in supporting this condition and the forfeiture which is based upon the breach of the condition. But to my mind it is perfectly clear that there is a gift over, and, as was pointed out in the course of the argument, it is a gift over which is to take effect not only in the case of the breach of the condition with respect to marriage with consent, but also in the event of the death of Lady Turner. Under these circumstances it seems to me that it is perfectly impossible to say that there is no gift over. That leads us to this result: there is in the first place a condition necessitating the consent of the widow and the two brothers which continues during the whole life of Lady Turner, provided that the persons having to give the consent, or any of them,

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survive her; and secondly there is also a plain gift over. That being so, the question arises whether the law has been definitely settled by the cases of *Lloyd v. Branton*⁴ and *Dashwood v. Bulkeley* (Lord),⁶ so that we are bound by those decisions, and in my opinion the law has been definitely settled.

With regard to *Lloyd v. Branton*⁴ it was not suggested by counsel for the appellant that the facts were not such as to really involve a decision on this point directly against them. Nor was it said that the point was not there raised in argument. But it was said, and accurately said, that the decision of the Master of the Rolls does not in terms deal with the point. Let us see how that really stands. The question had been raised in argument, and the Master of the Rolls was extremely anxious, if he could, to support the settlement so as to prevent the forfeiture taking effect. At page 116 the Master of the Rolls says, "It is now too late to raise a doubt on the legality of the condition on which Mrs. Barnard's right to the bequests given her by the will is made to cease." Now the condition to which the Master of the Rolls is referring was a condition which was not limited to her infancy or limited to any specific time at all. Then he goes on: "In the modern case of *Dashwood v. Bulkeley* (Lord)⁶ the validity of such a condition does not seem to have been considered as at all open to controversy, although it was not confined to marriage under 21." These latter words shew how completely this question of whether it was essential to the validity of the condition that it should be confined to marriage under twenty-one was before the Master of the Rolls. Now the only objection that counsel for the appellant are able to take to this decision of *Lloyd v. Branton*⁴ is that it is not justified by the decision of *Dashwood v. Bulkeley* (Lord).⁶ I think I am not going too far in saying that the argument in terms admitted that the case of *Lloyd v. Branton*⁴ was a case which was conclusive against this appeal on the construction, which we adopt, of the words of the successive settlements, and that the only

way of getting rid of that decision was by saying that it was based upon the decision in *Dashwood v. Bulkeley* (Lord),⁶ which did not really determine the point which Sir William Grant assumed that it did.

I now propose to say a few words as to what was decided in *Dashwood v. Bulkeley* (Lord).⁶ The decision appealed from was a decree of Lord Rosslyn, which is set out on page 236, by which "it was declared, that the Plaintiff Elizabeth Dashwood was entitled to the sum of 400*l.* a year under the will"—that is to say, that she was entitled to the reduced sum which alone was to come to her in the event of the happening of the condition subsequent. The report goes on: "After the death of Mr. Dashwood a petition of rehearing was presented by his widow; insisting, that she did not by her marriage under the circumstances forfeit any of the bequests under the Will." Then there is the argument of the case, and in the argument of the case it is quite true that the point upon the validity of the condition was not the only point that was made. There was also an argument as to whether there had been any breach of the condition. When the Lord Chancellor comes to give his judgment it is equally true, as pointed out by counsel for the appellant, that Lord Eldon does not in the actual judgment deal with this point, whether a condition requiring consent to marriage during the whole life was a valid condition or not; but at the same time it is perfectly plain, from the report of the argument, that the point was raised before him in the most specific way possible; and when the Lord Chancellor comes to the end of his judgment he says this: "Upon the whole, I cannot reverse this decree without some principle, that will stand the test of general application; and, though I seriously wish I could, I dare not say, I have found such a principle." It is impossible to read that report without seeing that the very question, whether a provision requiring consent not only up to the age of twenty-one, but during the whole life of the lady, was a valid condition which could be enforced in law, was present to Lord Eldon. That matter having been brought prominently before him by the facts and by the argument, then, when we find the Lord Chancellor

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anxious if he can to avoid the forfeiture, and winding up his judgment with the words which I have read, can we avoid the conclusion that Lord Eldon meant deliberately to say that he could not accept the principle that a forfeiture upon marriage without consent was void unless the necessity for that consent was limited to infancy—limited to the man or the woman, as the case might be, attaining the age of twenty-one? Under those circumstances, I have no hesitation in saying that those two cases are directly in point, and bind us.

Now the Lord Chancellor and Sir William Grant both treat the point, not as a new point, but as one that had been settled before; and we have had our attention called to a decision of Lord Hardwicke (*Daley v. Desbouverie*¹⁵), which was said by counsel to have been the very case that was referred to by Lord Eldon when he dealt with the law as settled on this point. I daresay counsel was quite right; but there was no necessity for referring to that particular case as being the only case in which that decision had been arrived at, for the same decision was arrived at in *Aston v. Aston*²³ by the Lord Keeper in 1703, whose third conclusion was this: "Thirdly, That in case of marriage without consent, although but a condition subsequent, the Court cannot relieve against the forfeiture, by reason of the devise over; although it be a hard condition, no time being limited, but goes to a marriage at any time, even after the age of twenty-one." Under those circumstances it seems to me that it is not easy for us to quarrel with the historical accuracy of this view of Sir William Grant and Lord Eldon, that in their day it was too late to say that the extension of the necessity of the consent to a period after infancy had come to an end does not render the condition for the forfeiture of the property in question a void condition. Of course I am speaking of a case where there is a gift over.

In my opinion, therefore, we have nothing more to decide in this case than, first, that, according to the proper construction of these successive settlements, there is a condition which does not extend only to the time before Miss

Whiting attained the age of twenty-six, but extends to all her life during the continuance of the lives or life of the persons named or any of them; and secondly that there is in this case a gift over; and, having these conditions present here, it seems to me that we are bound by the two decisions of *Lloyd v. Branton*⁴ and *Dashwood v. Bulkeley* (Lord).⁶ I should have been very glad if it had been otherwise.

ROMER, L.J.—I am of the same opinion. First, on the question of construction of the deed of settlement varied by the deeds-poll, I can only say that I agree with the view taken by the learned Judge in the Court below. I cannot see my way to limit clause 9, as altered by the deed of May 22, 1891, so as to confine the gift over to a marriage under the age of twenty-six years. Further, in this case, to my mind there is a clear gift over, and no ground, in my opinion, therefore, for the argument that the gift over could be said to have been imposed merely in *terrorem*.

That being so, the only remaining question is, whether the gift over on the marriage of this lady without the consent of her mother and the two brothers, or of the survivors or survivor of them, can be held void as being in restraint of marriage. Now it is to be noticed that it is not in general restraint of marriage—it is in partial restraint only; and there are many cases where conditions subsequent which impose partial restraints of marriage have been held good. With reference to the form of condition which we have here—the limited restraint of marriage providing for a gift over when the marriage is not with such consent as we find in the instrument now before us—as pointed out by my Lord, there are two clear cases decided by Lord Eldon and Sir William Grant which shew that such a condition is not void.

My Lord has so fully dealt with the cases that I need not again refer to them. It is noticeable, as pointed out by my Lord, that in the case of *Dashwood v. Bulkeley* (Lord)⁶ Lord Eldon was anxious, if he could, to find any principle on which he could hold that the gift over did not

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take effect; and there is not only the passage which my Lord read in the report at the end of the judgment, but there is the passage with which the Lord Chancellor commenced his judgment at page 241 of the report, where he says, "I have looked through all the cases upon this subject, with a very anxious wish to find a principle for reversing this decree, which I dare trust as a principle to govern future cases; and though a review of the authorities has brought back to my mind many considerations, that formerly affected it in this case, I dare not say, this case will do within any such principle as the Court has acted upon." It is impossible to suppose that Lord Eldon, in the course of his consideration of the case, had not to consider the more general question as to whether such a condition as he had before him was void. He did not specifically deal with it in his judgment, obviously because he thought that at that time of day such a contention could not be satisfactorily raised, and it is equally clear that when we have to deal with Sir William Grant's judgment on the same kind of point which he had before him in *Lloyd v. Branton*,⁴ he regarded it as too late in the day to raise such a question.

That being so, how much more is it impossible for this Court, after the lapse of nearly a century, to take upon itself to reverse in principle those two decisions, not to speak of the earlier decision of *Aston v. Aston*,²³ which my Lord has also referred to? And the difficulty is increased by this—that though the counsel before us have exercised obviously great care in searching for authorities, there is not a single recorded case to be found in the books apparently which militates against the principle of the two decisions of Lord Eldon and Sir William Grant—not a single recorded case which would justify the contention for the appellants. I cannot help thinking, further, that after this long lapse of time these decisions must have been acted upon in many a settlement or will; and I think it would be lamentable if, when judgments like those two judgments have been acquiesced in for so long and acted upon, the deal-

ings on the footing of their being good law should now be upset by us.

It appears to me, under these circumstances, it is impossible for us, sitting here, to accede to the views of the appellants' counsel; and, that being so, I think the appeal must be dismissed.

COZENS-HARDY, L.J.—I agree. I do not wish to add a word on the question of the construction of these deeds, which, I must say, seems to me reasonably plain. With reference to the gift over, I think it is also reasonably clear that there is a perfectly good gift over. Let me suppose that the daughter (now Lady Turner) had died a spinster, or had died after marrying with consent without issue, would there in that event have been in these words a good gift over, or would the legacy have fallen into the residue? It seems to me perfectly plain that there was a good gift over for a charitable purpose, and that is the very same gift over which, assuming the condition to be good, is operative in the present case. The real point of substance which has been argued before us is as to the validity of this condition. Now in my view it is a point which has been settled two hundred years. In 1703, in *Aston v. Aston*,²³ Sir Nathan Wright, in the passage which my Lord has read, treated it as clear that a condition in partial restraint upon marriage without consent, although marriage might be either before or after twenty-one, was a good condition. In 1738, in *Daley v. Desbouverie*,¹⁵ Lord Hardwicke assumed that proposition, because he went into a very elaborate discussion as to whether a condition requiring consent to marriage not limited to twenty-one had been got rid of on the ground that the evidence proved that as a fact the consent had been given; all of which would have been entirely needless except on the footing that he adopted the view expressed by Sir Nathan Wright in 1703. Again, in 1768 Lord Camden, in *Knapp v. Noyes*,¹⁹ does not seem to have felt a doubt that a condition not limited to minority, but extending over the daughter's whole life, might be good, although he said it was not a probable condition to be found in a will; and in the construction of the will

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before him he held that that was not the true effect of the will. Then we come to 1788, the great case of *Scott v. Tyler*.⁷ As I read Lord Thurlow's judgment there, he treats this proposition again as settled. He says, "Therefore, an injunction to ask the consent, as I have said before, is a lawful condition; as not restraining marriage generally"—no trace to be found there of any limitation on marriage under twenty-one. Perhaps I may remark in passing that Lord Eldon was one of the counsel who argued *Scott v. Tyler*.⁷ Then we come in 1804—just a hundred years ago—to *Dashwood v. Bulkeley (Lord)*,⁶ a case which was argued by Sir Samuel Romilly and decided by Lord Eldon, and neither counsel arguing the case at the Bar nor the Lord Chancellor in dealing with it, although he was most anxious to help the lady—neither counsel nor Judge treated it as an open question. Then we come to 1817—*Lloyd v. Branton*⁴—where Sir W. Grant in terms says that it is too late to argue the proposition which is now contended for. Under those circumstances I think it is impossible for us to differ from the decision of Mr. Justice Warrington, unless we are prepared (which I certainly am not) to overrule this long series of decisions extending over two centuries. I may only add this—that, although our attention has not been called to any case in which the rule has been applied to a deed as distinct from a will, I can see no ground for drawing any distinction between the two.

Appeal dismissed.

Solicitors—Boxall & Boxall; Frere, Cholmeley & Co.; Treasury Solicitor.

[Reported by W. A. G. Woods and A. Cordery, Esqs., Barristers-at-Law.]

BUCKLEY, J. }

1904.

Nov. 18, 21,

22, 23, 24.

Dec. 3.

HARRINGTON (EARL) v.
DERBY CORPORATION.

Nuisance—Injunction—Pollution of River—Discharge of Sewage—Prescriptive Right of Inhabitants to Discharge into Sewers of Local Authority—Measure of Damages—Continuance of Injury—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 15, 17, 19, and 299—Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

Where householders have acquired a prescriptive right to drain into the sewers of a local authority through which sewage is discharged into a river, and an order has already been made against the local authority under the Rivers Pollution Prevention Act, 1876, and the local authority are taking steps to abate the nuisance caused by the pollution, the Court will refuse to interfere by injunction against the local authority.

Where a local authority have neglected their duty under the Public Health Acts, the remedy of a person aggrieved is not by action but by complaint to the Local Government Board under section 299 of the Public Health Act, 1875.

Owing to the pollution of a river by a local authority the plaintiff's lake, which was fed from it, became silted up, and the water-supply from the lake to the plaintiff's house destroyed:—Held, that the plaintiff was entitled to damages for the expense to which he had been put in obtaining another water-supply to his house, but not in respect of the silting up of the lake, as his remedy was to exclude the water when he found it was polluted, and claim damages for the loss sustained by not enjoying the supply.

By the Public Authorities Protection Act, 1893, an action against a person for an act done in pursuance of an Act of Parliament or in respect of an alleged neglect or default in the execution of any such Act must be commenced "in case of a continuance of injury or damage within six months next after the causing thereof":—Held, that the words "in case of a continuance of injury or damage" do not refer to a damage inflicted once and for

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all which continues unrepaired, but to a new damage recurring day by day in respect of an act done, it may be, once for all at some prior time, or repeated, it may be, from day to day.

Held, therefore, that where there was such a continuing injury, an action would lie, when instituted within six months after the ceasing of the continuing injury, for damages up to the period of six years limited by the Statute of Limitations.

Action by the plaintiffs for—first, an injunction to restrain the defendants from polluting the river Derwent by discharging sewage into it so as to be a nuisance to the plaintiffs or either of them; secondly, an order that the defendants should remove from the plaintiffs' land a certain deposit of foul matter and clean out a lake; and thirdly, damages.

The facts of the case are fully stated in the judgment of Buckley, J., and were shortly the following:

The plaintiffs were the legal owners, and the plaintiff Lord Harrington was the equitable tenant for life, of the Elvaston Castle and estate, situated on the banks of the river Derwent some five and a-half miles below Derby. In the park was an ornamental lake lying a short distance from the castle, which was fed by a watercourse from an intake from the river. Water from the lake found its way into an adjacent well, from which it was pumped into a tower at the castle by means of a water-wheel, for which power was obtained from the water which came in at the intake and flowed out at the lower end of the lake. This water was used for all purposes of water-supply to the castle, stables, gardens, and appurtenances. The pollution of the river had in recent years increased to such an extent that in 1902 the plaintiff Lord Harrington was compelled to cut off the supply of water from the river to the lake, and to make other arrangements for obtaining a supply of water to the castle and for watering his cattle.

The defendants were the urban sanitary authority for the borough of Derby under the Public Health Act, 1875, and the Acts amending the same, and were the authority for the execution of an Act

passed in 1825 (6 Geo. 4. c. cxxxii.) for the better paving and otherwise improving the borough of Derby. The sewage of the borough had for some years been discharged in an unpurified state through outfalls into the river. These outfalls were constructed many years ago, and the defendants denied all responsibility for their construction. From as early as 1872 down to the present time complaints of the pollution of the river were made by the Earl of Harrington and his predecessor in title, and in answer they were informed that the nuisance would be abated.

In 1898 an order was made by the County Court under the Rivers Pollution Prevention Acts, 1876 and 1893, on the application of the Derbyshire County Council, requiring the defendants to abstain from polluting the river, and giving them until December 31, 1902, to do what was required. This time had subsequently been extended to January 1, 1906.

In 1901 the defendants obtained an Act of Parliament authorising them to construct sewage works for their whole area.

Macmorran, K.C., and R. Cunningham Glen, for the plaintiffs.—It is the duty of the defendants to prevent the discharge from their sewers being a nuisance. The discharge of sewage into a river is absolutely prohibited by law. By the Public Health Act, 1850 (13 & 14 Vict. c. 90), provisional orders of the general board of health made under the Public Health Act, 1848 (11 & 12 Vict. c. 63), were applied to Derby, under which the defendants obtained their power to make the outfalls in question. By section 4 of the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), local boards were empowered to exercise the powers given by section 45 of the Act of 1848, but were thereby prohibited from constructing or using any outfall, drain, or sewer for the purpose of conveying any sewage or filthy water into any natural watercourse until it was purified. That provision was re-enacted by section 17 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). The defendants were

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therefore absolutely prohibited from discharging their unpurified sewage into the river after 1861. The plaintiffs here are not complaining that the defendants have made default in providing a system of sewers, and consequently the procedure provided by section 299 of the Act of 1875 is not applicable.

[BUCKLEY, J.—What order do you ask for at the Bar?]

We ask for a mandatory order requiring the plaintiffs to clean out the lake.

[BUCKLEY, J.—I do not see my way to make such an order.]

Then we ask for damages.

Danckwerts, K.C., and R. J. Parker, for the defendants.—The defendants admit that they pollute the river to some extent; but they contend that they have done so for many years, and have thereby acquired a prescriptive right to do so. Further, they contend that an action for damages will not lie against them. The defendants are not liable for anything in the nature of nonfeasance, but for misfeasance only. Here no misfeasance has been proved. The present corporation did not construct any of the outfalls: they inherited them from their predecessors. In the case of any outfall or sewer constructed more than twenty years ago the defendants have acquired a prescriptive right to discharge sewage through it into the river. The increase of pollution is due either to the increase of population or to fresh connections made by the inhabitants with the defendants' sewers. In neither case are the defendants responsible, as the sewers were vested in them by Act of Parliament. They are not the property of the defendants in the ordinary sense—*Tunbridge Wells Corporation v. Baird* [1896].¹

Originally the drainage of Derby was under the control of commissioners acting under a private Act of 1825. By the Public Health Act, 1850 (13 & 14 Vict. c. 90), the commissioners were abolished and a local board of health was created.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 43, all sewers were vested in the local boards of health; and by section 45 they were empowered to repair and discontinue sewers vested in them,

(1) 66 L. J. Q.B. 451; [1896] A.C. 444.

and to make additional sewers. The latter section only enabled a local board of health to act within their own district. The Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 4, empowered local boards to exercise the powers given them by section 45 of the Act of 1848 outside their districts. That section does not apply, because here all the outfalls are within the borough.

Under the Public Health Act, 1872 (35 & 36 Vict. c. 79), the local board became the sanitary authority of the borough. By the Public Health Act, 1875, s. 13, sewers were vested in the local authorities, who were given powers to purchase, repair, and make sewers (see sections 14, 15, and 16). By section 17 it was provided that nothing in the Act should authorise them to turn sewage into a stream before it was purified. That section does not prevent the defendants from polluting the river if they can shew that they have power outside the Act to do so—*Durrant v. Branksome Urban Council* [1897].² By section 21, owners and occupiers of premises within the district are empowered to drain into the sewers of the local authority. By section 22 similar powers are given to owners and occupiers of premises outside the district on terms to be agreed on. By section 32 notice must be given by the local authority before commencing sewage works outside the district. By section 299 any complaint of default by a local authority in respect of sewers must be made to the Local Government Board. The plaintiffs' proper remedy, therefore, is under section 299, and not by action—*Pasmore v. Oswaldtwistle Urban Council* [1898]³ and *Robinson v. Workington Corporation* [1897].⁴

By the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3, the drainage of sewers into streams is prohibited, except in the case of individuals. The defendants cannot, therefore, prevent persons who have acquired a prescriptive right to use the sewers from so using them—*Reg. v. Staines Local Board*

(2) 66 L. J. Ch. 653; [1897] 2 Ch. 291.

(3) 66 L. J. Q.B. 392; 67 L. J. Q.B. 635; [1897] 1 Q.B. 625; [1898] A.C. 387.

(4) 66 L. J. Q.B. 388; [1897] 1 Q.B. 619.

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[1888].⁵ By the Rivers Pollution-Prevention Act, 1893 (56 & 57 Vict. c. 31), the provisions of section 3 are extended to include any channel vested in the local authority through which the sewage flows. As persons aggrieved within section 8 of the Act of 1876, it was competent to the plaintiffs to bring an action themselves under the Act in the local County Court against the defendants (see sections 10, 11, 13, and 16), instead of moving the county council to take action in the matter. The obligation imposed on the defendants was to use the best practical means of preventing pollution, and if they have done so they will be under no liability.

Although prescriptive rights cannot be acquired as against public authorities they can as against individuals. The defendants contend that they have acquired as against the plaintiffs a prescriptive right to pollute the Derwent from outfalls more than twenty years old. Such a right extends to the whole capacity of the sewer, and the question as to whether there has been any increase in the amount of the pollution is immaterial. As regards sewers constructed less than twenty years ago the plaintiffs are in this difficulty: they have to prove that damage is done by the additional pollution, and that but for that additional pollution no damage would have been caused. Owing to the existence of the prescriptive rights the present case is not one in which the Court will grant an injunction—*Att.-Gen. v. Dorking Union* [1882]⁶ and *Brown v. Dunstable Corporation* [1899].⁷ *Att.-Gen. v. Acton Local Board* [1882],⁸ in which an injunction was granted, is distinguishable from the present case on the ground that there were no prescriptive rights. The only way in which the defendants could prevent the sewage from going into the river would be by constructing a new system of sewerage to convey the sewage elsewhere. Inasmuch as the defendants have done nothing to create or increase the pollution, the plaintiffs cannot compel them to do this—*Att.-Gen. v. Clerkenwell*

Vestry [1891]⁹ and *Glossop v. Heston and Isleworth Local Board* [1879].¹⁰ The defendants are liable only for misfeasance and not for nonfeasance—*Cowley v. Newmarket Local Board* [1892]¹¹ and *Russell v. Men of Devon* [1788].¹² And this principle applies not only where the action is for an injunction, but also where it is for damages.

Then as to damages, the plaintiffs and their predecessors in title have known for over forty years that sewage was being discharged into the river, and have taken no action until the present time. If, therefore, they chose to take water into their lake from the river they cannot complain that it was polluted—*Adams v. Lancashire and Yorkshire Railway* [1869]¹³ and *Gee v. Metropolitan Railway* [1873].¹⁴ The plaintiffs' remedy was not to take the water on to their land, and to bring an action against the defendants for damages for not being able to use it. The damage caused to the lake by the silting up was not due to sewage, but to vegetable and other matter brought down by the stream above Derby, and to dead leaves from trees and dead weeds in the lake.

Assuming, however, that the plaintiffs are entitled to some damages, they must be limited to such damages as have accrued within six months before action brought—Public Authorities Protection Act, 1893, s. 1, sub-s. (a).¹⁵ The fact that the cause of action was a continu-

(9) 60 L. J. Ch. 788; [1891] 3 Ch. 527.

(10) 49 L. J. Ch. 89; 12 Ch. D. 102.

(11) 62 L. J. Q.B. 65; [1892] A.C. 345.

(12) 2 Term Rep. 667.

(13) 38 L. J. C.P. 277; L. R. 4 C.P. 739.

(14) 42 L. J. Q.B. 105; L. R. 8 Q.B. 161, 173.

(15) Public Authorities Protection Act, 1893, s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect: (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . ."

(5) 60 L. T. 261.

(6) 51 L. J. Ch. 585; 20 Ch. D. 595.

(7) 68 L. J. Ch. 498; [1899] 2 Ch. 378.

(8) 52 L. J. Ch. 108; 22 Ch. D. 221.

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ing one does not prevent the Act from applying—*Markey v. Tolworth Joint Hospital District Board* [1900],¹⁶ *Darley Main Colliery Co. v. Mitchell* [1886],¹⁷ *Carey v. Bermondsey Corporation* [1903],¹⁸ and *Lloyd v. Wigney* [1830].¹⁹

The Act of 1893 applies to actions for nuisance—*Chapman, Morsons & Co. v. Auckland Union* [1889].²⁰ This is not a case for an injunction, because the defendants are not threatening or intending to do an unlawful act. At the date of the issue of the writ in the action they were doing all in their power to abate the nuisance. If an injunction is granted at all, it ought to be limited to restraining the defendants from doing what they could otherwise do.

Macmorran, K.C., in reply.—By the Private Act of 1825 commissioners were appointed, and were empowered to make sewers for Derby. The Act did not expressly prohibit them from turning the sewage into the river. Outfalls were made by them under the Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 41, 43, and 45. By section 46 of that Act the local authority were empowered to turn their sewage into the river, "but so as not to commit a nuisance." These sections are repeated in the Act of 1875. A breach of section 19, which repeats section 46 of the Act of 1848, gives rise to a cause of action, and section 299 does not apply. Section 15 imposes on the local authority the duty of maintaining and making sewers, and section 299 gives the remedy for its breach, and the Court will not therefore interfere—*Pasmore v. Oswaldtwistle Urban Council*.³ But that case does not apply to section 19, under which the local authority are bound to prevent their sewers from causing a nuisance. They must provide such a discharge for their sewers that no nuisance results—section 27. Here the defendants ought to have constructed proper works for dealing with the sewage. No prescriptive right can be claimed by the defendants to discharge their

sewage into the river—*Goldsmid v. Tunbridge Wells Improvement Commissioners* [1865].²¹ Even assuming that the defendants could acquire such a right, it would not extend to an increase in the pollution. No doubt where the local authority have not themselves constructed the sewers, but have only permitted them to be used as formerly by the inhabitants, they cannot be sued—*Att.-Gen. v. Dorking Union*,⁵ *Glossop v. Heston and Isleworth Local Board*.¹⁰ Here the defendants have added to the nuisance, and by so doing have rendered themselves liable for the whole nuisance. The plaintiffs' claim is for misfeasance as well as nonfeasance.

In 1872 the defendants succeeded the old local board, and having regard to section 9 of the Public Health Act, 1872, must be considered as being in the same position as the old local board. It is admitted that some of the outfalls were constructed by that board. The defendants have, by exercising their powers under section 36 of the Act of 1875 of requiring the substitution of water-closets for earth-closets—*Nicholl v. Epping Urban Council* [1899]²²—enormously added to the volume of sewage going into the river. It is the gradual increase of sewage since 1872 which has caused the nuisance of which the plaintiffs complain. That distinguishes this case from *Glossop v. Heston and Isleworth Local Board*¹⁰ and *Att.-Gen. v. Dorking Union*.⁵ As to what constitutes a sewer as distinguished from a drain, see *Beckenham Urban Council v. Wood* [1896].²³

Section 299 of the Act of 1875 does not apply to a case like the present—*Baron v. Portslade-by-Sea Urban Council* [1900].²⁴ It is concerned only with breaches of section 15—*Dent v. Bournemouth Corporation* [1897]²⁵ and *Gibbings v. Hungerford* [1904].²⁶

As to damages, in 1867, when the lake was cleaned out, the owner of Elvaston Castle was using the water in

(21) 35 L. J. Ch. 88; L. R. 1 Eq. 161. Affirmed on appeal, 35 L. J. Ch. 382; L. R. 1 Ch. 349.

(22) 68 L. J. Ch. 393; [1899] 1 Ch. 844.

(23) 60 J. P. 490.

(24) 69 L. J. Q.B. 899; [1900] 2 Q.B. 583.

(25) 66 L. J. Q.B. 395.

(26) [1904] 1 Ir. R. 211.

(16) 69 L. J. Q.B. 738; [1900] 2 Q.B. 454.

(17) 55 L. J. Q.B. 529; 11 App. Cas. 127.

(18) 67 J. P. 111.

(19) 6 Bing. 489.

(20) 58 L. J. Q.B. 504; 23 Q.B. D. 291.

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a way which, as a riparian owner, he was entitled to do. The water was not then polluted to any appreciable extent. In 1872 the river became worse. It has been argued that the lake has silted up from natural causes. The plaintiffs do not complain of that, but they contend that the necessity for cleaning it out has been occasioned by the sewage pollution, and that the cost of so doing ought to be borne by the defendants.

The meaning of section 1 (a)¹⁵ of the Public Authorities Protection Act, 1893, is that where the injury is continuous the six months is to be computed from the date at which the injury ceases. It does not mean that an action must be brought within six months of the date on which each act is done—*Carey v. Bermondsey Corporation*.¹⁶

If the plaintiffs are entitled to bring an action at all, they are only limited by the Statute of Limitations to six years before action brought.

Cur. adv. vult.

Dec. 3.—BUCKLEY, J., read the following judgment: For many years past, and for aught I know since sewers were first laid, the sewage of the borough of Derby, as that borough existed before 1877, and as extended in that year, and as again extended in 1901, has been discharged in a crude state, without purification or treatment of any kind, into the river Derwent. The discharge is by certain outfalls, of which I may dismiss two with but few words. The one is the Midland Railway outfall, which is not vested in the corporation and is the outlet of drains which come only from the premises of the Midland Railway Co. This outfall to some extent no doubt, but to exactly what extent I am unable to say, contributes to the pollution of the river. The other—the Markeaton Brook—is of little importance. It seems to be a brook rather than a sewer, and brings down no sewage at all, or at most the drainage of a very few houses. By the remaining outfalls the whole sewage of the borough is discharged, as I have said, into the river. These outfalls were all made more than twenty years ago. The sewage thus discharged has for many years polluted

the river. The pollution has been from at least the year 1872 onwards—a constantly increasing pollution. As the population of Derby has increased, as new connections have been made to previously existing sewers, as new sewers have from time to time been laid, and as privies have from time to time been converted into water-closets, the volume of the sewage and the pollution of the river have continually increased.

The plaintiffs are the legal owners, and the plaintiff Lord Harrington is the equitable tenant for life, of the Elvaston Castle and estate lying by the course of the river some five and a-half miles below Derby. The estate extends in places along both banks, and in other places along one bank only of the river. There has existed for many years an intake from the river, a short distance above the castle, which, after a short course, brought water from the river into an ornamental lake lying at a short distance from the castle. The outflow from the lake passed along another channel again into the river some distance below. At the outlet from the lake Lord Harrington and his predecessors in title have for many years had a water-wheel, for which the power was obtained from the water which came in at the intake and flowed out at the lower end of the lake. It was used to pump water from an adjacent well into a tower at the castle and, I believe, another receptacle. This water was used for all purposes of water-supply to the castle, stables, gardens, and appurtenances. The plaintiffs say that the defendants, the corporation, have polluted the river, and ask first—an injunction to restrain them from polluting the river, so as to cause a nuisance to the castle and estate; secondly, a mandatory injunction to compel them to do certain works of cleansing and removal of foul matter from the plaintiffs' lands; and thirdly, damages for injuries done by the pollution of which they complain.

As regards the pollution, the evidence is that it exists in a very gross degree. The defendants say that the river when it reaches Derby is already in a polluted condition. I need say no more about this, for the evidence of their own witnesses is that this pollution, so far as it exists, will

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have become innocuous and have disappeared altogether before the stream reaches the plaintiffs' lands. The pollution of which the plaintiffs complain is not attributable to anything done above the borough of Derby. The results of the pollution, quite shortly stated, have been that in the latter half of the decennial period ending in 1890 the pollution in the river and in the lake became so great that the fish in the river below Derby and in the lake died and were found floating in the water covered with slime, and in or about 1893 to 1897 Lord Harrington was removing cartloads of fish killed by the pollution; that somewhere about the same time (say 1895) the water-weeds in Lord Harrington's intake from the river died and the weeds in the lake died, and that, while water-weeds may flourish upon a small amount, they are killed by a large amount of sewage pollution; and that about the same time the water in the lake became so fetid and foul that residence at the castle became not only unpleasant, but to a large extent dangerous. Dr. Barwise, medical officer for the county, who had been subpoenaed in this action by both sides, and had given no proof to either, has proved what he found to be the state of facts in October, 1903, and I can best give it in his own words. He says: "In consequence of a complaint from Lord Harrington I paid a visit to Elvaston Castle and obtained samples of the water used for dietetic purposes. The water is obtained from the lake in front of the castle, which, in its turn, is supplied by a feeder from the river Derwent. At the time of my visit, the water being pumped up to the castle positively stank. There were hundreds of dead fish (chiefly tench) floating on the lake, in fact, there were so many close to the pumping-station that there was a most offensive smell for twenty yards around. The sides of the lake and its feeder were covered with black stinking mud, and the water was bubbling with putrefaction. I followed the feeder up to the Derwent and saw pieces of excreta floating by. There is no other water available for drinking-purposes, and owing to the presence of a case of cholera in Derby, and the castle being only 100

yards from the lake, in reply to the question put to me, I could only give the opinion that it was not under the circumstances, safe to live there." That report is dated October 20, 1893.

The state of pollution at the present day, taking the evidence of Mr. Hehner (who gave his evidence most fairly) and of Dr. Howarth, who were both called for the defendants, is that the water at the intake is seriously polluted with sewage, with the result that the lake had become in a filthy and almost dangerous state, to which the sewage contributed, and, according to Dr. Howarth, that at times of low river and of the first flood water the pollution at the intake is so gross—meaning by that not merely that it is not fit to drink, but that it is so foul, as not to be fit for impounding in a lake. Mr. Hehner, as regards the condition of impurity of the water at the intake, says that it is seriously polluted with sewage. At normal times he puts it as being with few exceptions of such purity, or rather impurity, as the Thames Conservators will treat as being sufficiently good for the admission of a sewage effluent into the Thames. In other words, it does not approach at all to a proper condition of purity for a flowing river, but at most to such a condition as may be accepted for an effluent sewage discharge into a flowing river for the purpose of being mixed with a much larger volume of water, and thus rendered innocuous. The lake, he says, was in a filthy, almost putrid, state.

In 1898 the county council obtained from the County Court under the Rivers Pollution Prevention Acts of 1876 and 1893 an order, which I need not read at length, but which ordered the corporation to abstain from polluting the river. As regards obtaining that order, Lord Harrington says he thinks he most likely instigated the county council in the matter, and that he would have taken action if they had not. That order gave the corporation until December 31, 1902, to do what was required. That time has since been twice extended, and the second extension will expire on January 1, 1906.

As long ago as the year 1872 the then Earl of Harrington, father of the present earl, commenced, and the present earl

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upon succeeding in 1881 continued, to make repeated complaints and protests to the defendants against the grievous state of things which existed in the river. From the long correspondence which has been read in the case I extract the following by way of summary sufficient for my purpose, and taken roughly at successive intervals of ten years: On June 10, 1872, the mayor stated that the subject of the sewage of Derby would receive attentive consideration, and asked that the matter might be permitted to remain in abeyance for the present. The local authority continued that request upon several occasions. On December 18, 1873, they stated that they were awaiting reports and the results of proposed legislation with a view to taking advantage of them. On June 1, 1883, they stated that attention was being given to a comprehensive scheme of drainage for the borough, and on December 17, 1883, that no time would be lost in bringing before the corporation a scheme for adoption. On April 9, 1892, the town clerk wrote that Sir Frederick Bramwell was engaged upon a report upon the matter, and again on July 12, 1892 (in a letter in which he had the courage to say that Lord Harrington was "taking up a very peremptory position"), that the corporation were making experiments and had retained Sir Frederick Bramwell and Mr. Harris, and were acting under their advice. On August 11, 1892, the town clerk refused to give Lord Harrington any definite assurance in the matter, but stated that no definite time could be fixed until the Lockwood process had been tested, and so on. On October 4, 1894, he wrote that the committee had received the report of Sir Frederick Bramwell and Mr. Harris and had it under consideration. Shortly stated, the effect of the correspondence is that the repeated complaints made and great forbearance shewn by Lord Harrington and his father were met with repeated promises or assurances that something would be done, but that nothing, in fact, was done by the defendants to remedy the state of things which existed. Ultimately, in 1898, the order of the County Court was obtained. In 1901 the corporation

obtained an Act giving them certain statutory powers to deal with the sewage. The intended works under the order of 1898 had not been, and I daresay could not be, constructed and finished by 1902, and in July of that year Lord Harrington found it necessary to close, and did close, the source by which the water of the river flowed into the intake of his lake. The result was that the water-power which was employed to pump water for his house was destroyed. He had therefore to supply power for that purpose, and built an engine-house and put in an engine and a new pump, which, upon the evidence, was the most reasonable and cheapest way of meeting the difficulty of the destruction of the water-power which he had previously enjoyed. On July 29, 1902, in view of the closing of the sluice and the cutting off of the water, Lord Harrington's solicitors wrote that he would hold the corporation responsible for the expense to which he was put in connection with the new pumping apparatus and making new watering-places for his tenants' cattle. To this, on August 16, 1902, the town clerk replied that the corporation "cannot accept any liability in the matter." In the result the writ in this action was issued on December 18, 1902.

I will first deal with the question whether the plaintiffs can obtain the injunction which they ask to restrain the defendants from polluting the river so as to cause it to be a nuisance to them. For this purpose it is necessary to bear in mind that the sewage which is now polluting the river may come from any one of four sources of origin—namely, first, from sewers constructed many years ago, into which householders have for more than twenty years discharged their sewage; secondly, from sewers not laid by the corporation, but which became vested in the corporation when they became the sanitary authority into which householders have, by virtue of their statutory rights, made connections; thirdly, from sewers laid by the corporation; and fourthly, from additional sewage arising from the conversion of privies into water-closets under directions given by the corporation for that purpose. As

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regards the first class, it is, I think, settled by authority that persons who have discharged their sewage for more than twenty years have obtained a prescriptive right—*Glossop v. Heston and Isleworth Local Board*,¹⁰ *Att.-Gen. v. Dorking Union*,⁶ *Reg. v. Staines Local Board*,⁵ and *Brown v. Dunstable Corporation*.⁷ It is true that this prescriptive right is not that of the defendants, but of persons who use the sewers of the defendants; but it would be impossible, I think, to grant an injunction which would interfere with those prescriptive rights. The corporation have, in fact, as was decided in *Att.-Gen. v. Dorking Union*,⁶ only a limited ownership in the sewers, and are not in the same position as a private individual would be, because they have in many cases no power to prevent householders from using them; and when they have power a landowner cannot obtain an injunction against them by reason of the fact that they in turn could obtain an injunction against the householder. It would therefore be impossible to grant an injunction which should extend to sewers of the first class, for the Court will never enjoin a defendant unless it is satisfied that the party enjoined can obey the order. Similar considerations apply to sewers of the second class. The sewers of the first and second classes are a constituent contributing to the total volume of sewage which is discharged through the outfalls, and if an injunction cannot be granted as regards the first and second classes it is, I think, physically impossible, or practically impossible, for the defendants to comply with an injunction if an injunction were granted as to the sewers of the other two classes. This seems to be a first ground why an injunction cannot be granted. But, further, as regards the last two classes, so soon as the corporation have made new sewers or have permitted or directed connections into them or conversions of privies into water-closets, with consequent discharge of further sewage, there have arisen, as it seems to me, rights in individuals under the statutes to continue to discharge through the sewers which in fact have been constructed. An injunction could no doubt be granted to restrain the cor-

poration from constructing further sewers so as to pollute or increase the pollution, but it is not shewn that they are doing so. Neither the rights of the parties nor the circumstances of the case seem to me to allow of an injunction which shall restrain the defendants as regards any sewers which have been constructed. These reasons are sufficient, I think, to shew that the plaintiffs cannot obtain an injunction. But there are further grounds upon which I should be of opinion that an injunction ought not to be granted, supposing that it were possible to grant it. First, under the Rivers Pollution Prevention Acts the plaintiff Lord Harrington, as a person aggrieved, could obtain protection not only as regards sewage which the defendants cause to fall or flow or knowingly permit to fall or flow into the river, but also under the Act of 1893, as regards sewage which in fact falls or flows or is carried into the river after passing through the sewers of the corporation, so that a larger protection than otherwise might be possible is afforded under those Acts; and in point of fact, by the order of 1898, which was obtained with the knowledge and at the instigation of the plaintiff, he has obtained such protection, and that protection is on its way to be given by the construction of works as to whose efficiency I have not to enquire in this action. Under these circumstances I should be slow to grant an injunction which would or might give him protection a second time, but a protection less, it may be, than has already been obtained under the order of 1898. Further, as a third ground, I think that in the exercise of its discretion the Court would not grant an injunction upon the footing that the defendants are threatening and intending to continue the pollution when in fact they stand in a position in which, by the statutes which govern them, they are precluded from closing the sewers and are in fact taking steps to remove the cause of the pollution. For these reasons I think no injunction against pollution should be granted.

Secondly, as regards the mandatory injunction which is asked, it seems to me that, and I think the plaintiffs' counsel conceded that, such a mandatory order is impossible. It is an order upon the

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defendants to go on the plaintiffs' land and do certain things there by way of removing an injury. The proper remedy (if any) in respect of this matter is in damages.

It remains then to consider, as regards the subject-matter of this mandatory injunction and the other matters in respect of which damages are sought, whether the plaintiffs can obtain, and under which of the heads on which they rely, damages against these defendants. The plaintiffs argue that to throw sewage into the river so as to cause a nuisance is an illegal act, and that the defendants are consequently liable in damages for all the pollution which is caused by the total volume of sewage which is discharged into the river. They rely for the purpose of this argument upon sections 15, 17, and 19 of the Public Health Act, 1875. The defendants are liable, they say, generally for causing sewage to be discharged into the river and for not keeping their sewers so as not to be a nuisance—liable not for misfeasance only, but for nonfeasance also.

It was decided, however, in *Robinson v. Workington Corporation*⁴ and *Pasmore v. Oswaldtwistle Urban Council*³ that the remedy for neglect of the duty imposed by section 15 of the Act is that given by section 299—that the neglect of this duty does not give a right of action to an individual whose property has been injured. The plaintiffs contend, however, that sections 17 and 19 of the Act of 1875 create rights in respect of which they are entitled to a remedy against the corporation in respect of all the sewers belonging to the corporation or which the corporation use, and that section 299 does not apply to that case. But first, as regards section 17, it was decided in *Glossop v. Heston and Isleworth Local Board*¹⁰ and *Att.-Gen. v. Dorking Union*⁶ that section 17 is to be read simply as a proviso, and that its effect, in the words of Lord Justice Cotton, is only this—that if the local authority “want, for the purpose of doing anything, to rely upon authority given by the Act, they must do that thing so as not to commit a nuisance.” The section, says Lord Justice Cotton, “does not mean that they (the local authority) are to be considered as themselves

using, either by themselves conveying, or by granting permission for sewage to be conveyed, into the stream by means of this sewer,” which they did not construct. It has only the effect which I have stated. As regards section 19, it was decided in *Baron v. Portslade-by-Sea Union Council*²⁴ that section 299 does not apply to cases within section 19, but my observation upon that case and upon section 19 itself is this—that what was there dealt with was the physical construction or condition of the sewer as such. The plaintiff's complaint in this action is not that the sewers are foul (by which I mean that the sewer as a sewer is not clean or not properly ventilated, or the like), but is that from the user of the sewer, whether the sewer itself be clean or unclean, properly or improperly ventilated, there is discharged an effluent which so pollutes the river as that he suffers injury five miles below. In my opinion section 19 is not addressed to that case. Counsel for the plaintiffs relies upon the words “that the sewers shall be kept so as not to be a nuisance.” This does not, I think, mean or include the case where the matter complained of is that the sewer is so used as that a filthy discharge in excess of the purifying influences of the volume of the water in the river causes pollution at a point lower down the river.

It has further been decided that damages cannot in such a case be recovered upon the ground of nonfeasance as distinguished from misfeasance. Thus, in *Glossop v. Heston and Isleworth Local Board*¹⁰ Lord Justice James says, “The only case the plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district.” And in *Att.-Gen. v. Dorking Union*⁶ Lord Justice Cotton says: “Here they are doing nothing, they are not constructing a new system of sewers. It was said that they are in fact using this sewer by allowing it to be used as part of the existing system of drainage which is vested in them. That is, they are not substituting a new system of sewerage, and in my opinion

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the mere fact that they have not substituted a new system of sewerage cannot make this the using of the sewer by them when it is used without any leave granted by them under the rights which are granted by the Act to householders." And in *Cowley v. Newmarket Local Board*¹¹ Lord Herschell says that he doubts "whether the broad general proposition could be supported, that whenever a statutory duty is created any person who can shew he has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed."

In my judgment, the defendants are liable in damages only for such acts as they have done, and which have occasioned the pollution by which the plaintiffs are injured. They are liable in damages for that which they have done, but not for that which they ought to have done but have failed to do. This being so, I must confine my attention to cases in which either—first, the corporation have laid new sewers, or secondly, have invited or permitted householders to make new connections with the sewers of the corporation, or thirdly, have permitted or required the conversion of privies into water-closets so as to increase the volume of sewage. No exact evidence has been adduced to shew what proportion of the total discharge of sewage into the river is attributable to these causes, but both parties agree that they have put before the Court such evidence as there is, and that it would be practically impossible to ascertain what is the exact amount of new sewers, new connections, and so on, which would lead to the answer to the above question. Minutes have been referred to by which I am satisfied that the corporation have, to a very large extent within the last twenty years, laid new sewers and required conversion of privies into water-closets and procured new connections to be made. I have also the evidence of Mr. Ward, that in the period to which he can speak—namely, from 1898 to 1902—the corporation laid about a mile or a little more of new sewers, made up of many different lengths, although some of those were replacement of old sewers. I have further the fact that the population

of Derby in 1881 was 81,470, and is now roughly about 120,000, being an increase of say about 50 per cent. Upon these materials both parties concur in asking me to act as being the best available materials for assessing the damages so far as this point is concerned.

As regards the several heads of damage, they are as follows: First, the plaintiffs say the pollution of the water of the river flowing by the intake into the lake has so fouled the lake that it must be cleaned out, and they measure their damage by the cost of cleaning out the lake. I think this is wrong. In the first place, the silting up of the lake is due largely—very largely—to the deposit of suspended matter which is brought down by the Derwent, which comes from the higher parts of Derbyshire, and in times of flood rises rapidly and brings down a large quantity of suspended matter. The corporation are not responsible for this. It is due, further, in part to vegetable matter from the leaves of the trees and hedges which have fallen into the water, and to the decay of the water-weeds, and so on, in the lake. To a comparatively small extent the silting up is due to the deposit of sewage pollution. No doubt the sewage pollution has acted so as to render more acute a foetid condition which would have resulted in a less degree from the gradual accumulation of decaying vegetable matter mixed with the deposit brought down by the river in flood. The lake was last cleaned out in 1867. It is now very much silted up, and requires to be cleaned out again. To say that the whole of the expense of so doing is damage caused by the pollution of the river is, to my mind, extravagant. Further, the plaintiffs are entitled to the inflow at their intake of pure water, but if, as the fact was, they knew that the water was impure, their remedy was to exclude it, and to claim damages for the loss which they sustained by not enjoying the supply. They cannot have as legal damages the expense to which they have been put by taking water which they knew to be impure. They can have as legal damage the expense to which they have been put by procuring by other means a supply of pure water in the place of that of which this wrongful act

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of the defendants had deprived them. But secondly, when the plaintiffs were, by reason of the pollution, driven to close the intake in 1902, they lost the water-power which enabled them to pump the water for the supply of the house. Such loss as has resulted therefrom is, in my judgment, recoverable as good legal damages. The plaintiffs were entitled to the flow of pure water. Had they had it they would have enjoyed the water-power. The defendants' act rendered it necessary for them to cut off that intake. The loss which they have thus sustained is, in my judgment, attributable to the defendants' wrong. Thirdly, the water of the river was used for watering cattle and horses belonging to the earl or his tenants in the meadows adjoining the river. The pollution of the river has rendered it necessary to take other means for watering them. This is, I think, good ground for damages. Fourthly, the riverside house at Borrowash has depreciated. There is a contest of fact upon this as to whether the depreciation of rental value was due—in part, at least—to the defective water-supply (which was taken from the adjacent canal) or to the bad state of repair of the premises, or whether it was due to the foul state of the river, or to what extent it was due to any and which of these causes. I think the result of the evidence is that the condition of the river has played a large part in the depreciation of the value of that property. As regards the want of repair, the house was offered to a tenant upon the terms that the lessor would put it in repair. At any rate, some damages, I think, are recoverable in respect of this house. Fifthly, the plaintiffs claim damages in respect of injury to the amenities of the castle by the fouling of the lake. There is no legal damage under this head. The earl has never wished to let the place, and no pecuniary damage is attributable to the fact that the castle by loss of the lake became disagreeable as a residence. Sixthly, damages are recoverable, I think—to the proper figure, whatever it is—in respect of the injury to the fishing in the river and the lake. I think I have now travelled through the principal heads of damage.

The defendants contend that, having regard to section 1 of the Public Authori-

ties Protection Act, 1893, the plaintiffs can recover damages for no longer period than six months before the issue of the writ. To determine this point it is necessary to ascertain the meaning of the words in the section, "in case of a continuance of injury or damage." It cannot be disputed that for one cause of action all damages incident to it must be recovered once and once only; so that, for instance, if by the removal of the soil the defendant causes the walls of the plaintiff's house to crack, the plaintiff's cause of action is one and one only, and that none the less because the house does not at once shew all the damage done to it, but manifests subsequently by degrees that the damage had been done. Upon this *Lloyd v. Wigney*¹⁹ was cited, being a case upon the words of an Act which provided that an action must be brought within six calendar months "after the thing done." But if the result of the Act is that one damage is done to-day and another subsequently, there is nothing to prevent a fresh action *toties quoties* fresh damage is inflicted—*Darley Main Colliery Co. v. Mitchell*.¹⁷ If as the result of an act done to-day damage results a year later, the cause of action arises not at the date of the act, but a year later when damage results. No cause of action arises from the act if it at that date created no damage. The right of action arises not from the act, but from the resulting of damage from the act. *Backhouse v. Bonomi* [1861]²⁷ established that proposition. There is, however, a further case with which this action is particularly concerned—namely, a continuing act which produces subsequently from day to day a recurrent damage. There is thus created within the principle which I have stated a fresh cause of action every day, and this, I conceive, is what is referred to in the section by the words, "in case of a continuance of injury or damage." The words do not mean or refer to a damage inflicted once and for all which continues unrepaired, but a new damage recurring day by day in respect of an act done, it may be for once and for all at some prior time, or repeated, it may be, from day to day. In such case there is what Mr. Justice Channell, in *Carey v. Bermondsey Corpora-*

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tion,¹⁸ calls a continuing cause of action. Where this is the case I think that, within section 1 of the Public Authorities Protection Act, 1893, an action will lie when instituted six months next after the ceasing of the continuing injury or damage. That is, I think, the present case. These plaintiffs are, therefore, I think, entitled to recover for a greater period than six months, and up to the period of six years limited by the Statute of Limitations.

The damage which the plaintiffs have in fact sustained is, under the circumstances which I have stated, attributable partly to acts for which the defendants are not, and partly to acts for which the defendants are, responsible. It is also attributable partly to the Elvaston outfall, which is not complained of in this action, and partly to the Midland Railway outfall, for which the defendants are not responsible. In assessing the damages recoverable against them I have borne these points in mind. I am conscious that without a more exact knowledge of the extent to which the defendants have by acts of their own, as distinguished from acts of nonfeasance, contributed to the pollution, the question of the proper amount of damages is not capable of any exact solution. Both parties, however, have concurred in asking me to assess the damages upon the materials before me—being, as they say, the best which in fact can be obtained. After giving the best consideration I can to the evidence before me and all the circumstances of the case, I think the plaintiffs are entitled to substantial damages, and I assess them at 500*l*. I have considered whether the fact that the plaintiffs have not succeeded in obtaining the injunction which they have asked ought to affect the costs of the action. I think not. I give judgment against the defendants for 500*l*. and the costs of the action.

Solicitors—Walfords, for the plaintiffs; Sharpe, Parker, Pritchards, Barham & Lawford, for G. Trevelyan Lee, town clerk of Derby, for defendants.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
1905.
Jan. 19. }

HEMMINGS v. SCEPTRE
LIFE ASSOCIATION.

Insurance—Life Policy—Misstatement of Age—Receipt of Premiums after Knowledge of Misstatement—Affirmation of Policy.

*In a proposal for a life policy a lady, by mistake, declared her age to be forty-one next birthday, instead of forty-four, which it in fact was. The policy was effected in 1888, and by it the defendant company undertook to pay the sum of 2,000*l*. upon the death of the assured, or on her attaining the age of sixty years. The mistake was not discovered until 1897, and after being informed of it the defendant company accepted from an assignee of the policy two premiums on the old footing, but subsequently declined to receive any more, and claimed to avoid the policy under the terms of the proposal and contract. The lady attained the age of sixty on March 6, 1904, and was still living:—Held, that the defendants must be treated as having affirmed the policy as it stood, and were liable to pay the moneys secured thereby when the lady in fact attained sixty years.*

By a policy of assurance dated May 11, 1888, effected on her own life with the defendant company by Blanche Mary Innes Ker (commonly called Lady Charles Ker), it was witnessed that in case Lady Charles Ker should survive February 28, 1889, and should on or before, or within thirty days from March 1, 1889, in every subsequent year until she should have attained the age of sixty years, pay to the directors of the defendant company the sum of 112*l*. 16*s*. 8*d*., then the defendant company should be liable to pay to the executors of Lady Charles Ker, immediately after the production of satisfactory proof of her death, or to Lady Charles Ker, immediately after satisfactory proof should have been given to the directors that she had attained the age of sixty years, the sum of 2,000*l*., together with such sums as should be appropriated to the policy by way of bonus. And by the said policy it was provided that in case the assurance thereby made should be proved to have been obtained by wilful misrepresentation, concealment, or other

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fraud, either in regard to any matters contained in the declaration recited in the policy, or otherwise, then the policy should be void, and all payments thereunder should be forfeited to the defendant company.

In the proposal for assurance, which was signed by Lady Charles Ker on December 16, 1887, and which contained the declaration above referred to, she stated her age next birthday (which was on March 6, 1888) to be forty-one, and that she was born on March 6, 1847.

At the end of the proposal was the following declaration by Lady Charles Ker: "I do hereby declare that the preceding answers and statements are, to the best of my knowledge and belief, correct and true, and that I have not withheld or concealed any fact or circumstance which the Directors ought to know in accepting my proposal; And I do hereby agree that this proposal and declaration shall be the basis of the contract between myself and the Association, and if it shall hereafter appear that I have made any untrue statement therein, then the policy to be issued shall be void, and the premiums paid shall be forfeited."

By an indenture dated June 9, 1888, the policy of assurance and the sum thereby assured, and the full benefit thereof, were assigned to the plaintiff Mary Jane Hemmings, who advanced 2,000*l.* to Lady Charles Ker upon the security of the policy and a guarantee signed by certain relatives of the assured. Notice of this assignment was given to the defendants.

In the year 1897 it was discovered, as the fact was, that Lady Charles Ker was born on March 6, 1844, and that her age on her birthday next after the date of the declaration was forty-four, and not forty-one; but it was admitted that this error in the declaration was made by mistake, and was not wilful or fraudulent. The defendant company were immediately informed of the true facts, but two annual premiums of 112*l.* 16*s.* 8*d.* each were paid to and accepted by the defendant company on March 1, 1898, and March 1, 1899, respectively. Some correspondence followed in the year 1899,

in the course of which the defendants required a premium of 135*l.* 6*s.* 8*d.* to be paid instead of 112*l.* 16*s.* 8*d.*, and that the difference—namely, 22*l.* 10*s.* in each year for twelve years—should also be paid. The defendants subsequently decided to avoid the policy altogether, and declined to receive any further premiums, although they were duly tendered by the plaintiff.

Lady Charles Ker attained the age of sixty years in fact on March 6, 1904, and was still living. The plaintiff claimed a declaration that the policy was valid and subsisting, and that the moneys assured thereby became payable on March 6, 1904; alternatively, repayment of all moneys paid by way of premiums in respect of the policy and interest thereon.

The defendants pleaded that the plaintiff was estopped by the statements made in her declaration from setting up that she was other than the age she would be if the declaration were true; and they denied that the 2,000*l.* was now due. They claimed by their pleadings to be entitled to declare the policy null and void, on the ground of the misrepresentation as to age; but this plea was given up at the Bar.

P. O. Lawrence, K.C., and *Cann*, for the plaintiff.—The policy and the declaration must be construed together, and, if so, the policy can only be avoided by a statement which is designedly and wilfully untrue—*Fowkes v. Manchester and London Life Assurance and Loan Association* [1863].¹ By the receipt of the two premiums in 1898 and 1899 on the old footing, the association must be deemed to have affirmed the contract, and elected not to avoid it—*Armstrong v. Turquand* [1858]² and *Wing v. Harvey* [1854].³

The proposal must be taken as the basis of the contract which culminated in the policy, and it can only be avoided by returning all the premiums from the beginning. Nor can there be any estoppel against the defendants from proving the true age of the assured.

(1) 32 L. J. Q.B. 153; 3 B. & S. 917.

(2) 9 Ir. R. O.L. 32.

(3) 23 L. J. Ch. 511; 5 De G. M. & G. 265.

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Stewart-Smith, K.C., and *Blaklock*, for the defendants.—Lady Charles Ker must be held bound by the contract which states her age at the time of the proposal to be forty-one, and the premiums were fixed on that basis. Her assign cannot be heard now to say that the age is incorrectly stated. The company might have avoided the policy when the mistake in the age became known, but they thought it worth their while to keep the policy, and to accept premiums on the footing that Lady Charles Ker was forty-one years old at the time of the proposal. That was the basis of the contract, and the agreement to pay when the lady reached sixty must be read as an agreement to pay on March 6, 1907, when she would attain that age according to the terms of the contract. The sum assured is not payable, therefore, until that date. If payable now, the association will lose three premiums; and it would be a variation of the original contract.

KEKEWICH, J., after making some observations as to the course which the case had taken, proceeded as follows: I was troubled throughout the greater part of the argument with the thought of a common-law right to avoid the policy on the ground of a false statement—not wilfully false—made the basis of the policy, notwithstanding that there is in the policy a proviso which contemplates an avoidance if the policy has been obtained by wilful misrepresentation. I therefore let counsel cite the cases to get rid of that difficulty. I need only refer to *Fowkes v. Manchester and London Life Assurance and Loan Association*,¹ which does get rid of it altogether. The key of that case is that this proviso must be read with reference to the statements in the policy itself, and to the declaration, which, in one form or another, is always added to proposals, and which declaration is read into the policy. That being so, the society cannot avoid the policy on the ground of misrepresentation which is admitted not to have been wilful. What they could have done was to say that the policy was granted on the basis of the lady being at the date of the proposal forty-one next birthday; and that fact not having been admitted, now

it is proved that she was not forty-one but forty-four next birthday, that the assured, or the assignee of the assured, could not recover on the footing of her being forty-four. That they had to consider in 1897; the question had been raised then. On December 17, 1897, Mr. Phillips, the secretary of the insurance office, writes to say, "The directors accept the extracts from the family Bible sent by you as satisfactory evidence that the assured was born on the 6th of March, 1844, and not on the 6th of March, 1847, as stated in the proposal." Now it seems to me that they might, if they thought fit, with propriety have said, "Therefore we return you the premiums, or will undertake to return the premiums hitherto received to the proper person to receive them, and we will receive no more unless you wish to make a new contract." It was for the directors of the insurance office to consider whether then, when the policy was something like nine years old, they would regard it as a valuable policy, and say: "It is true we accepted this policy on the footing of the lady being forty-one next birthday, and we have, therefore, fixed a premium according to that age. It turns out that her proper age was forty-four, and we ought to have had a larger premium. Is it worth while to avoid the policy, and return the premiums, or is it better for us to treat the policy as on foot, and to accept the premiums for the future on the old footing?" They elected to do the latter. It was a pure matter of business for them. I have great confidence in the directors of insurance companies, and I have not the slightest doubt that they do their best for their proprietors. In the present case the directors accepted two premiums after that knowledge, and they admit, as against the present plaintiff, that it is impossible for them to say that they did not affirm the policy as it stood. Now, that being so, the question of construction being decided against them, they say, "We are perfectly willing to pay, but we will pay when the lady attains sixty years according to the policy"; and they suggest that if they are made to pay when the lady actually attains sixty years, it is making a new

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contract. It seems to me that it is the insurance office that is seeking to make a new contract. They say in their policy that they will pay immediately after satisfactory proof has been given to the said directors of her having attained the age of sixty years, and it is impossible, as it seems to me, for any one to say now that that means sixty years from a given date, which happens to be the date mentioned in the proposal: it means the time that she attains sixty years. That is one of the very things which they must have considered, and cannot have failed to consider, as a matter of business, when they discussed the question and came to a conclusion whether they should allow the policy to remain on foot or not. As I pointed out to counsel for the defendants, it matters not in the least to them whether they had a larger premium on the footing of the lady being the age she was, or the same premium to endure till she was sixty years of age according to the date of birth fixed in the proposal; but, one way or another, no doubt, they were entitled very fairly to a larger premium, but at the risk of avoiding the policy and returning the premiums. That would have been a new contract. Of course, there was a doubt whether the representative of the assured, the assignee, would continue the policy. It was a business matter, and they must be taken to have said, "On the whole, this policy is not so valuable as we hoped, but still a policy of some value, and we must continue it, and we must pay"; that means, pay when the lady attains the age of sixty years. Upon that part of the case I do not think there is really any room for doubt. Therefore, in my view, they are bound to pay the whole sum assured, with bonuses, and those bonuses will be calculated on the footing of the premiums being paid which were not paid, but were tendered, and which, of course, must be set off.

Solicitors—G. A. Martin, for plaintiff;
May, Sykes & Co., for defendants.

[Reported by G. Macan, Esq.,
Barrister-at-Law.

KEKEWICH, J. } OXENDEN'S SETTLED
1904. } ESTATES, *In re*;
Dec. 21. } OXENDEN v. CHAPMAN.

Settled Land—Mortgage by Tenant in Tail—Proviso for Re-conveyance on Redemption to Uses of Original Settlement—Absolute Bar of Estate Tail—Fines and Recoveries Act, 1833 (3 & 4 Will. 4. c. 74), s. 21.

Under a settlement of real estates made in 1831, A, in 1884, was tenant for life in possession, B first tenant in tail, and C second tenant in tail in reversion. B being a lunatic, C, with the consent of A, disentailed his interest and re-settled the estates, with a power to charge the same, which was exercised. In 1893 B, who was then tenant in tail in possession, acting by C as his committee, mortgaged the estates with a proviso that on redemption they should be "reconveyed by the mortgagees to the uses, upon the trusts and with and subject to the powers and provisions in and by the settlement (of 1831) declared and contained":—Held, that, notwithstanding that the estate tail was barred by virtue of section 21 of the Fines and Recoveries Act, 1833, the proviso for redemption in the mortgage of 1893 was valid and operative, so that the uses created by the settlement of 1831 were revived subject to the re-settlement of 1884.

Adjourned summons.

The question in this case was whether, having regard to a proviso contained in a mortgage in fee by a tenant in tail of settled estates to the effect that on redemption the mortgaged property should be re-conveyed to the original uses, such mortgage became, by operation of section 21 of the Fines and Recoveries Act, 1833,¹ an absolute bar for all purposes in

(1) Fines and Recoveries Act, 1833, s. 21: "... if a tenant in tail of lands shall make a disposition of the same, under this Act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this Act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: Provided always, that if the estate created by such disposition

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equity as well as at law against the estate tail.

The mortgage in question was made with the sanction of the Court in lunacy by Sir Percy Oxenden as committee of the estate of his brother Sir Henry Montague Oxenden, who in 1893 was tenant in tail in possession under a settlement of the family estates executed in 1831, and made with the usual limitations.

In 1884 Sir H. C. Oxenden was tenant for life in possession, and Sir Percy Oxenden was tenant in tail in remainder expectant on Sir H. M. Oxenden's death without issue and without having barred his estate tail; and on July 14, 1884, Sir H. M. Oxenden being then a bachelor and of unsound mind, Sir Percy Oxenden executed a disentailing deed (to which Sir H. C. Oxenden was a party), by which the estates were (subject to Sir H. M. Oxenden's estate) re-settled upon himself for life, with remainder to his son, the plaintiff Basil Oxenden, for life, with remainders over to the latter's sons in tail male. This settlement of 1884 contained a power to charge the hereditaments thereby assured (notwithstanding and in priority to the limitations therein contained) with any sums not exceeding in the whole 40,000*l.* and interest.

By an indenture of consolidated mortgage dated May 20, 1893, the property was, in pursuance of Orders in Lunacy, conveyed by Sir H. M. Oxenden, acting by Sir Percy Oxenden, his committee, to Lord Poltimore and K. E. Digby in fee simple freed and discharged from the estate in tail male or other the estate of Sir H. M. Oxenden and all remainders, estates, and powers to take effect after the determination or in defeasance of such shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this Act by a tenant in tail of lands, an interest, charge, lien, or incumbrance shall be created without a term of years for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected."

estate in tail male or estate tail, and freed and discharged from all rights or equity of redemption subsisting in the premises or any part thereof by virtue of certain prior mortgages, but subject to the incumbrances mentioned in a schedule thereto and subject to the following proviso—namely: "Provided always that if the said Sir Henry Montague Oxenden or other the person or persons for the time being entitled under the limitations of the said Indenture of Settlement of the 17th day of December 1831 or otherwise to the hereditaments hereby conveyed or any part thereof (all of whom are hereinafter included in the expression 'the mortgagor') shall on the 20th day of November next pay to the said Lord Poltimore and Kenelm Edward Digby their executors administrators or assigns (hereinafter called 'the mortgagees') the sum of 26,772*l.* 4*s.* 9*d.* with interest thereon after the rate of 4*l.* 10*s.* per cent. per annum computed from the date of these presents then and in such case the said hereditaments shall at the request and the cost of the mortgagor be reconveyed by the mortgagees to the uses upon the trusts and with and subject to the powers and provisions in and by the said Indenture of Settlement declared and contained of and concerning the hereditaments thereby settled or such of them as shall be then subsisting and capable of taking effect."

The said indenture of May 20, 1893, was duly enrolled in the Court of Chancery as a disentailing assurance on January 31, 1894, and the charge created thereby was still subsisting.

The power to charge contained in the deed of 1884 had been exercised by Sir Percy Oxenden, who by a deed dated December 10, 1884, had created a term of six hundred years in the property as security for 40,000*l.*

Sir H. M. Oxenden died intestate in September, 1895.

On October 28, 1896, Sir Percy Oxenden was adjudicated a bankrupt, and had not obtained his discharge. The defendant G. W. Chapman, the official receiver, was his trustee in bankruptcy.

In June, 1896, the plaintiff purchased from a mortgagee, who had sold under his

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power of sale, the life estate of his father, Sir Percy Oxenden, under the settlement of 1884, and all the estate and interest in the settled hereditaments which the vendor was competent to convey, but subject to prior incumbrances, of some of which the plaintiff also took transfers.

Claiming to be the absolute owner of the equity of redemption, subject to the then existing prior incumbrances, in his father's life estate, and having taken a transfer of a mortgage of the said term of six hundred years, the plaintiff had since dealt with the property by way of mortgage.

In consequence of an objection to the title to the term of six hundred years raised by proposed new mortgagees of the property, this summons was taken out by the plaintiff to have it determined by the Court whether upon the true construction of the deed of May 20, 1893, and in particular of the proviso for redemption therein contained, the equity of redemption in the property was thereby limited to the same uses to which the property stood limited before the execution of the deed, and in particular whether such equity of redemption became subject, as to the interest of Sir Percy Oxenden therein, to the disentailing deed of July 14, 1884, and the re-settlement of the estates. If this question was answered in the affirmative, the Court was asked to declare that the equity of redemption in the events that had happened now stood limited to the uses and upon the trusts declared by the re-settlement subject to the incumbrances created under any powers for that purpose therein contained.

P. O. Lawrence, K.C., and *J. I. Stirling*, for the plaintiff.—In the present case the mortgage by the tenant in tail was settled by the Court in lunacy. The Court will in such circumstances be careful so to exercise its jurisdiction as not to affect the rights of the remaindermen—*Pares, In re*; *Lillingston v. Pares* [1879].² But if effect is to be given to this proviso it can only be done by holding that the estate re-settled by it is subject to Sir

Percy Oxenden's dealing with his estate tail. *Wortham v. Mackinnon* [1831]³ is a direct authority for this proposition and against the view that Sir Percy Oxenden took a new estate tail discharged from his previous dealings under the proviso for redemption.

Gatey, for a mortgagee in the same interest as the plaintiff.

F. L. Wright, for the official receiver.—By section 21 of the Fines and Recoveries Act¹ this mortgage is an absolute bar at equity as well as at law, notwithstanding any declaration of intention to the contrary in the deed creating the mortgage. *Wortham v. Mackinnon*³ is only an authority that Sir Percy Oxenden's estate tail was not revived by virtue of the proviso for redemption; but my case is based on the words of the Act. The uses of the original settlement being completely barred by reason of the statutory provision, there was nothing on which the proviso for redemption could take effect, and the result of the mortgage deed was to leave the fee-simple in the equity of redemption in the lunatic, whose heir-at-law Sir Percy Oxenden is. *Wortham v. Mackinnon*³ is really in favour of this contention, as it shews that where there is a conveyance to "subsisting uses" of a settlement, and those uses have been barred by a disentailing deed, they will not be revived. A proviso for redemption is not a re-settlement of the equity of redemption to the former uses so as to defeat the effect of section 21 of the Fines and Recoveries Act.¹ Without going so far as to say that this can only be done by a separate deed, at any rate a separate witnessing part is required—see *Coote on Mortgages*, p. 381.

P. O. Lawrence, K.C., in reply.—It is laid down in *Sugden's Real Property Statutes* (2nd ed.), pp. 199, 200, that the object of section 21 was to defeat declarations of intention inserted in the mortgage deed, but that it does not prevent a re-settlement of the equity of redemption to the former uses, and such re-settlement may be created by the mortgage deed itself. So long as the mortgage deed does create an actual re-settlement as opposed

(2) 12 Ch. D. 333.

(3) 4 Sim. 484.

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to a mere expression of intention so to do, this can be effected by the proviso for redemption.

KERWICH, J.—There can be no question but that this must be treated under the statute as an absolute bar of the estate tail, and no words in the deed can prevail to the contrary.

I think the fallacy of the argument for the official receiver is this—that counsel says the construction attempted to be put by his opponent on the limitation contained at the end of the proviso for redemption is really nothing but a declaration of intention to the contrary within the meaning of the Act. I do not think that is so. I think that what the Act contemplates, and what the Act forbids, is a declaration that the estate tail shall not be absolutely barred for all purposes. There is nothing in this direction or proviso which precludes that effect, either in form or in substance. All that is provided is that in the event of redemption the property shall be re-conveyed to certain uses. One always reads these provisos, quite apart from the statute, as meaning that there is not to be any new settlement of the equity of redemption—that is to say, any settlement differing from the settlement of the original ownership, unless it is clearly expressed; but, if it is clearly expressed, there is no difficulty in doing it, and no reason why it should not be done. It might be done by a separate witnessing part, or it might be done if clearly expressed in the proviso for redemption itself.

One is bound to consider all the circumstances. Here it was known to the parties, of course, that there were limitations arising out of the original settlement—that is to say, created by the ownership conferred by the original settlement and by the disentailing deed thereunder; and to say that this was simply to go back to the uses of the original settlement so as to render Sir Henry Montague Oxenden's tenancy in tail converted into a tenancy in fee would really be to defeat what must be, on the face of it, the intention of the parties. I do not see that there is any reason to do

that, and, for the reason which I have mentioned, I do not think there is anything in the statute which prevents my giving effect to what is really declared.

I therefore answer the first question in the summons affirmatively, and make the declaration as asked.

Solicitors—Harries, Wilkinson & Raikes, for plaintiff; C. W. M. Price, for mortgagee; Adams & Adams, for official receiver.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.]

WARRINGTON, J. }
1905.
Jan. 11.

HILL v. FEARIS.

Goodwill—Partnership—Deceased Partner—Brokers on London Stock Exchange.

There is no objection in law to the existence of a goodwill in a partnership business of brokers on the London Stock Exchange, and, unless provision is made to the contrary in partnership articles, the value of the goodwill must be included among the assets of the partnership.

Wilson v. Williams (29 L. R. Ir. 176) explained.

The deceased partner, Mr. Thomas Bourne Hill, had for some years carried on business on the London Stock Exchange as a stock and share broker, under the style of Hill, Fawcett & Hill. On May 18, 1895, he took into partnership the defendant and Charles Henry Bourne Hill, a son of the deceased. The articles provided that the partnership should continue for seven years. In or about the year 1898 the deceased, in exercise of a power reserved to him for this purpose in the articles, dissolved the partnership so far as his son Charles Bourne Hill was concerned. The partnership continued as between the deceased and the defendant until the expiration of the seven years, and thereafter, by virtue of certain memoranda and letters signed by the parties, until the death of Thomas Bourne Hill on May 17, 1904.

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After the death of Thomas Bourne Hill the defendant continued to carry on business as a broker upon the London Stock Exchange, under the old partnership style. This he did with the permission of the committee of the London Stock Exchange.

The plaintiff was the widow and executrix of Thomas Bourne Hill. The defendant accounted for and paid over to her the capital of the deceased. The plaintiff, through her son, who was also a member of the London Stock Exchange, and with a view to benefit him, offered 1,000*l.* for the goodwill of the partnership business. This was refused by the defendant, who also declined to account for anything in respect of the goodwill of the business.

The present action was brought for the winding up of the partnership and the realisation of the partnership assets. The defendant alleged in his defence that since the death of the testator he had carried on business on his own account, and denied that a goodwill of a business carried on in co-partnership on the London Stock Exchange could be sold, or that if it existed it was saleable.

H. Terrell, K.C., and *R. J. Parker*, for the plaintiff.—It is for the defendant to shew that the goodwill of the business should be excluded in taking the partnership accounts—*David and Matthews, In re* [1899].¹

Gore-Browne, K.C., and *Willoughby Williams*, for the defendant.—There is no goodwill of the business of a stockbroker—*Wilson v. Williams* [1892].² The character of a business may determine whether there is or is not a goodwill—*Stewart v. Gladstone* [1879],³ *Austen v. Boys* [1858],⁴ and *Arundell v. Bell* [1883]⁵; as may also the nature of the property—*Banks v. Gibson* [1865].⁶

H. Terrell, K.C., in reply.—The idea of a goodwill has varied from time to time, and its history may be traced. It was at first said that where a partner died the

surviving partner was entitled to the goodwill—*Hammond v. Douglas* [1800].⁷ Then it was regarded as attached to the premises where the partnership business is carried on—*Crutwell v. Lye* [1810].⁸ Finally, we get the definition of goodwill in *Trego v. Hunt* [1895].⁹ All the earlier cases must be read as modified by that decision.

[He was stopped.]

WARRINGTON, J.—The dispute in this case is between the executrix of a deceased partner and the surviving partner, and for the purposes of my judgment it resolves itself into a question whether, among the assets of the partnership, for the purposes of winding-up, is to be included the goodwill. Now for the purpose of answering that question one must necessarily consider, first, what is meant by the expression "goodwill," and fortunately one is able to turn to a recent decision of the Court of the highest authority in this country for the solution of that question. In *Trego v. Hunt*⁹ the learned Lords before whom that case came all expressed their opinions as to what is meant by goodwill. I think the best—at any rate, the speech to which I prefer to turn for the purpose of quotation—is that of Lord Macnaghten, who says: "Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Crutwell v. Lye*,⁸ where he says: 'the goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money." I have quoted that passage in Lord Macnaghten's judgment, and I think Lord Herschell expresses the same thing in rather different words. He says this: "It"—that is,

(1) 68 L. J. Ch. 185; [1899] 1 Ch. 378.

(2) 29 L. R. Ir. 176.

(3) 10 Ch. D. 626.

(4) 27 L. J. Ch. 714; 2 De G. & J. 626.

(5) 52 L. J. Ch. 537.

(6) 34 L. J. Ch. 591; 34 Beav. 566.

(7) 5 Ves. 539.

(8) 17 Ves. 335.

(9) 65 L. J. Ch. 1; [1896] A.C. 7.

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goodwill—"is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business." Paraphrasing that, the goodwill of a business is the advantage, whatever it may be, which a person gets by continuing to carry on, and being entitled to represent to the outside world that he is carrying on, the business which has been carried on for some time previously. That seems to me to be the meaning of the word "goodwill."

Now to apply that to the present case. The facts are simple enough. [His Lordship then stated the facts to the effect above set out, and continued:] Omitting for the present purpose what is immaterial for my decision, I will only say this—that questions arose between Fearis, the defendant, as surviving partner, and the plaintiff, who is executrix of Thomas Bourne Hill, in reference to the goodwill of the business. Ultimately an offer was made, nominally on behalf of Charles Henry Bourne Hill, to purchase the goodwill for the sum of 1,000*l.*, but the money, it was intended, should be found by Mrs. Hill. The defendant has continued the business since the death of Thomas Bourne Hill in the old firm name, and he insists that he is entitled to carry on the business under that name, and that there is no goodwill which can be sold, and therefore nothing which could go to a purchaser, or be credited to the estate of Thomas Bourne Hill. Is that contention right?

It is put in two ways. It is said, first of all, that in a stockbroker's business there is no such thing as goodwill, and that contention again divides itself into two parts. It is said that there is no such thing as goodwill in a stockbroker's business—first, because of the nature of the connection between a stockbroker and those with whom he does business. That I do not quite follow. I agree that in many cases it may be that the relation between the client and the broker is of such a nature that the client would not go with his business to the successor in business of the broker; but, on the other hand, there are many cases which one can conceive in which the client, not knowing to whom to go, if he knew that his

old broker had a successor, might well give that man a trial, and see whether he would continue to go on or not. I can quite imagine that the successor in business of the old broker might, using the expression in *Trego v. Hunt*,⁹ get an advantage in that way, by being able to represent that he was carrying on the original business. It seems to me, therefore, that that branch of the argument fails—that it is impossible to say that the advantage derived from the connection cannot be of some pecuniary value.

Then it is said that in the case of stockbrokers, in London or elsewhere, members of the London Stock Exchange, the goodwill of a business can have no saleable value, and this can be, and I think is, the only reason alleged—namely, that if the purchaser of a business wishes to carry on under the original name he can only do so by the assent or by the permission of the committee of the London Stock Exchange. That may be; but again it may not be essential to the advantage which I have just pointed out may accrue to the successor, or person entitled to represent himself as the successor, to be able to say that he is using the old name, or trading under the old name. He may be able to represent to clients that he is the successor in the business, and get such advantage as there may be, arising out of the connection, without saying that he is entitled to carry on the business in the old name. But it is said, further, not only would the successor not be entitled, according to the rules of the London Stock Exchange, to use the old name for the purposes of the business, but that the old partner would be entitled to use that name; and it is said, therefore, that the ordinary rule of law which now would exclude a surviving partner from using the name of the firm as against the purchaser of the goodwill would be excluded from this particular partnership by reason of that rule of the London Stock Exchange. There again I do not follow. The Stock Exchange committee makes a practice, as a general rule, of giving to the surviving partner, and of giving to him alone, the right of using the name of the firm, but, as Mr. Satterthwaite told me, if a case arises in

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which a surviving partner was by agreement between himself and his co-partners precluded from using that name, it does not at all follow that the committee of the Stock Exchange, which has an absolute discretion in the matter, would allow him to use it. Therefore, I cannot go so far on the evidence which I have as to hold that the fact that there are rules, or that there is a practice on the committee of the London Stock Exchange, in reference to the use by a successor of the name of the original firm, is sufficient to enable the Court to say that in the case of a broker, a member of the London Stock Exchange, there is no such thing as a saleable goodwill.

But now I am pressed with authority, and I am referred to an Irish case of *Wilson v. Williams*,² in which it was decided that in the case of stockbrokers there was no such thing as goodwill. In the first place, I do not think the Vice-Chancellor, who decided that case, intended to lay down a rule of law. On the contrary, at the conclusion of his judgment he said: "The question is one of mixed law and fact. Without going so far as to lay down any hard and fast rule as to stockbrokers' business being, in every case, incapable of goodwill, I hold that in this case there is no saleable goodwill." He therefore carefully abstained from laying down any rule which would bind a Judge in another case on consideration of different facts. But I think I may go further, and say that I am not at all satisfied that the Vice-Chancellor would have decided as he did if he had had before him the speeches of the learned Lords in *Trego v. Hunt*.⁹ I think he decided this case, if one looks at it carefully, on notions of goodwill which were not quite so wide as those which have now been laid down in the case I have just mentioned; and that that was the notion I think is shewn by the passage where the Vice-Chancellor says, "On a dissolution any of the partners may, unless expressly prohibited by contract from doing so, carry on the same business as before, and use the old name of the firm, and solicit the customers to deal with them." I do not think he would have said that if he had had before him the

case of *Trego v. Hunt*,⁹ which referred not only to the using of the name, but the soliciting of customers to deal with the purchaser, and renders that on a sale of the goodwill an unlawful thing for any one of the partners to do. I think, therefore, that although, while the case of *Wilson v. Williams*² is not binding on me, I should, if it were applicable, treat it with the utmost respect; yet even if it had been a report of a case in England (I think that is the way I may put it), and therefore binding on me if applicable, I should not have considered it applicable to the present case, or a case which I should be bound to follow.

The result is therefore, I think, that, dealing with the matter without reference to the partnership articles, I cannot come to the conclusion that there is no advantage arising from the connection and the business of the old firm, and therefore that there is nothing that could be treated as a saleable goodwill. I do not for this purpose attribute much importance to the offer made of 1,000*l*. I cannot regard that as an offer made by an outsider. It was really made by the plaintiff, the executrix. She said in one of her earlier letters that she desired to purchase the goodwill for her son, and it is common ground that she was going to provide, or at all events advance, the money with which the purchase was to be made; but, quite independently of that offer, I cannot hold that there is nothing to which a saleable value could be attributed.

Now it is said, secondly, that by the contract in this particular case the sale of the goodwill, which I must now assume does exist in the events which have happened, is precluded by the articles of partnership. That is a question of construction. [His Lordship then examined the partnership articles, and expressed his approval of the following passage in *Lindley on Partnership* (6th ed.), at p. 447: "If then the goodwill of a partnership has any saleable value at all, it seems impossible to hold that on a dissolution of a partnership, whether by death or otherwise, any partner can continue the old business in the old name for his own benefit, unless there is some agreement to that effect, or at least to the effect

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that the assets are not to be sold. Such a right on his part is inconsistent with the right of the other partners to have the goodwill sold for the common benefit of all." In reference to this part of the case his Lordship said:] It seems to me there is nothing in these articles which prevents the goodwill being sold and the proceeds properly divided between the partners.

That really decides the whole point which I have to decide. I may say that, with regard to some of the authorities which have been cited, I do not think that *Stewart v. Gladstone*³ applies to the present case. In *Stewart v. Gladstone*³ the question that arose was whether, having regard to the practice of the partners in that case, and having regard to the ordinary practice of mercantile men, the value of the goodwill was to be taken into account in the periodical accounts. I am not at all satisfied, looking at the judgment of Sir George Jessel in that case, that if he had had to deal with the question of goodwill at the expiration of a partnership he would have dealt with it in the way in which he dealt with it in the case before him, because he does in that case point out that there may be some value in the name of Gillanders, Arbuthnot & Co., which was a well-known name in India, the name of the firm there concerned. With regard to *David and Matthews, In re*,¹ that, so far as it goes, supports the opinion which I have expressed as to the construction of the partnership articles, and I think therefore I need not say anything more about it.

I hold, therefore, that in winding up the affairs of this partnership the goodwill must be treated as one of the assets of the firm, and must be realised with the other assets of the firm.

Solicitors — James Robinson, for plaintiff;
Morley, Shirreff & Co., for defendant.

[Reported by A. E. Randall, Esq.,
Barrister-at Law.

BUCKLEY, J.

1904.

Dec. 16, 21.

1905.

Jan. 18.

GREAT WESTERN RAILWAY
v. FISHER.

Vendor and Purchaser—Implied Covenants for Title—"Beneficial owner"—Breach of Covenant—Easement—Knowledge of Purchaser—Claim for Interference with Easement—Arbitration—Action to Enforce Award—Costs—Repayment by Vendor—Solicitor and Client Costs—Interest—Indemnity—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7.

The defendant conveyed "as beneficial owner" to the plaintiffs certain plots of land forming part of a building estate, including part of the site of a road. The conveyance did not contain any express covenants for title or any qualifications of the implied covenants. The plaintiffs had notice at the date of the deed that the purchasers of other plots had rights of way over the road. As between the plaintiffs and the defendant the agreement was that the plaintiffs should take the land discharged from such rights. The plaintiffs constructed works upon the land purchased by them, and blocked up the road. In 1902 a previous purchaser of other plots claimed damages against the plaintiffs as compensation for the loss of his right of way over the road, and was awarded by an arbitrator 510*l.* and interest. The plaintiffs did not pay this sum, and the previous purchaser brought an action to enforce the award. The Court ordered the plaintiffs to pay the 510*l.* and interest, and the costs of the arbitration proceedings and the action. The plaintiffs, having paid these sums, sued the defendant on his implied covenants for title for repayment of the sums so paid and of their own costs of the arbitration proceedings and the action:—Held, that the plaintiffs were entitled to maintain the action, and that their right to do so was not affected by their knowledge of the rights of the previous purchaser. Held, therefore, that the defendant being under his implied covenants bound to indemnify the plaintiffs, he must repay them the 510*l.* and interest

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and the costs paid to the previous purchaser, and must also pay subsequent interest on the 510l. and the plaintiffs' costs of the arbitration proceedings as between solicitor and client, but that he was under no liability to repay them their costs of the action to enforce the award.

Turner v. Moon (70 L. J. Ch. 822; [1901] 2 Ch. 825) followed.

Action with witnesses.

By a deed dated August 13, 1900, in consideration of 11,000l. the defendant conveyed "as beneficial owner" to the plaintiffs the fee-simple of certain plots of land on the Drayton Park estate, Hanwell, abutting on both sides of Tennyson Road towards its eastern end and the site of the eastern end of Tennyson Road itself. The deed provided that the plaintiffs should erect and for ever maintain a certain fence five feet high in certain places, which included its erection so as to stop and close Tennyson Road at its eastern end. The deed did not contain any express covenants for title or any qualification of the implied covenants. In constructing their works the plaintiffs stopped up Tennyson Road.

In 1902, J. O. Johnstone, in whom other plots purchased in 1899, and forming part of the same building estate, were vested, claimed payment by the plaintiffs of 5,000l. as compensation for stopping up his right of way over Tennyson Road, and that the amount should be settled by arbitration in the case of dispute. The plaintiffs, under protest, appointed an arbitrator and gave notice to the defendant that they should require repayment by him of any sum awarded against them and their costs of contesting the claim. The defendant disclaimed all liability, but assisted the plaintiffs in the arbitration. By the award the amount of the compensation was fixed at 510l. The plaintiffs did not pay the sum awarded, but allowed an action to be brought against them by Johnstone to enforce the award, in order to raise the question whether he was entitled to any compensation at all. The action was tried as a Special Case before Bigham, J., who decided in favour of Johnstone, and ordered payment by the plaintiffs of the

510l. with interest at 4 per cent., the costs of the arbitration proceedings, and the costs of the action. Under this judgment the plaintiffs had paid 510l. and 21l. 1s. 10d. interest, and 293l. 15s. for Johnstone's costs of the arbitration, the award, and the action.

This was an action brought by the plaintiffs against the defendant on his implied covenants for title in the deed of August 13, 1900, claiming repayment by him of—first, the 510l. with interest at 4 per cent; secondly, the 293l. 15s.; thirdly, the plaintiffs' costs of the arbitration proceedings, the award, and the action, to be taxed as between solicitor and client.

The plaintiffs based their claim on the indemnity arising from the defendant's implied covenant for title.

The defendant, by his defence, alleged that the plaintiffs had full notice of Johnstone's rights, or could have ascertained what they were by enquiry.

Cripps, K.C., and *Howard Wright*, for the plaintiffs.—The conveyance by the defendant to the plaintiffs was made by him as beneficial owner, and therefore, under section 7, sub-section 1 (A) of the Conveyancing and Law of Property Act, 1881, a covenant for freedom from incumbrances was to be implied. He is consequently bound to indemnify the plaintiffs against the expenses to which they have been put in their proceedings with Johnstone—*Turner v. Moon* [1901].¹ The property was sold by the defendant without any reservation, and with the intention that the plaintiffs should block up Tennyson Road. He is liable, therefore, upon the implied covenants, notwithstanding that the defects of his title appeared on the conveyance—*Page v. Midland Railway* [1893].² The measure of the damages which the plaintiffs are entitled to recover is the amount which they have had to pay for costs, damages, and expenses—*Rolph v. Crouch* [1867].³ The plaintiffs are entitled to be repaid their costs of the arbitration and the King's Bench action as between solicitor and client.

(1) 70 L. J. Ch. 822; [1901] 2 Ch. 825.

(2) 63 L. J. Ch. 126; [1894] 1 Ch. 11.

(3) 37 L. J. Ex. 8; L. R. 3 Ex. 44.

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[BUCKLEY, J., referred to *Barnett v. Eccles Corporation* [1900].⁴]

Buckmaster, K.C., and *W. Mackenzie*, for the defendant.—The plaintiffs bought with notice that there were other persons besides themselves who had rights over Tennyson Road. It was therefore incumbent on them to enquire what those rights were. Where a purchaser purchases land in fee-simple with notice of an easement over it, the implied covenant of the vendor, who conveys as beneficial owner, does not give him a right as against the vendor in respect of undisclosed easements which the purchaser could by enquiry have found out, and of which he had sufficient notice to put him on enquiry—*Boyles v. Round* [1800].⁵ The plaintiffs cannot, therefore, recover anything under the implied covenant for title.

[BUCKLEY, J., referred to *Shackleton v. Sutcliffe* [1847].⁶]

It is admitted that the plaintiffs can recover the 510*l.*, the amount of the award. They cannot, however, recover the costs of the King's Bench action—*Baxendale v. London, Chatham, and Dover Railway* [1874].⁷ They ought to have paid the amount of the award, and not to have left it to Johnstone to bring an action against them to enforce the award.

Cripps, K.C., in reply.—The costs incurred by the plaintiffs in respect of the breach of the covenant were reasonably incurred. All that was done by them was done with the knowledge of the defendant, and they are therefore entitled to recover them from him—*Sutton v. Baillie* [1891].⁸

Cur. adv. vult.

Dec. 21, 1904.—BUCKLEY, J., read a written judgment, in which, after reviewing the evidence at length, he stated that at the date of the conveyance the plaintiffs knew that such a state of things existed as that possibly or probably previous purchasers of land upon the estate had so taken

their conveyances as that they would be entitled to rights over Tennyson Road, including so much of that road as was included in the estate plan within the land coloured red on the plaintiffs' conveyance; and that he was satisfied that as between the plaintiffs and defendant the bargain was made upon the footing that such rights of way, if any, over the land sold to the plaintiffs as previous purchasers possessed should be abrogated, and that the plaintiffs should take the land discharged from those rights if they existed. He continued: Having regard to those facts, it is in my opinion plain that as between the defendant as vendor, and the plaintiffs as purchasers, the bargain was that so much of Tennyson Road as lay upon the plaintiffs' land should be abandoned, and if any rights of third parties were thus interfered with it would result that it was for the defendant to make good to the plaintiffs any diminution in value of the property which as between them was the subject of the agreement and conveyance.

What afterwards happened was that on July 28, 1902, Johnstone claimed compensation for loss of that part of Tennyson Road which the plaintiffs had blocked up and destroyed by the construction of sidings upon the land, and named 5,000*l.* as the amount of his claim. The railway company appointed an arbitrator under protest, and the matter was fought out, with the result that on June 25, 1903, Mr. Watney made his award of 510*l.* Upon the arbitration the defendant appeared, I understand, by counsel, but took no actual part in the arbitration. There are, however, letters of May 15, 1903, onwards, and in particular one of May 22, 1903, which shew that the defendant was working with the plaintiffs in the conduct of the arbitration. After the award was made the plaintiffs did not—as it seems to me they ought to have done—pay the amount awarded and seek to recover against the defendant their damages up to that time; but they allowed an action to be brought upon the award, and defended the action with a view to raising the question whether Johnstone was entitled to any compensation or not—whether, in short, he was

(4) 69 L. J. Q.B. 556, 834; [1900] 2 Q.B. 104, 423.

(5) 5 Ves. 508.

(6) 1 De G. & Sm. 609.

(7) 44 L. J. Ex. 20; L. R. 10 Ex. 35.

(8) 65 L. T. 528.

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entitled to a right of way over so much of Tennyson Road as the Great Western Railway Co. had blocked and destroyed. In the result a Special Case was stated, upon which Mr. Justice Bigham found against the Great Western Railway Co., determining, in fact, that Johnstone had a right of way over the whole of Tennyson Road. That decision is not one for me to review; but counsel for the defendant Fisher, who was not a party to the Special Case, and is not bound by that decision, has intimated that he reserves his right to contest it in the Court of Appeal should the present case go there.

The plaintiffs say that they are entitled to damages against the defendant, and that the damages are—first, 510*l.*; secondly, the costs they have had to pay in the arbitration and in the action; and thirdly, their own costs as between solicitor and client in the arbitration and action. I have to decide whether in this they are right.

It was decided by Mr. Justice Joyce in *Turner v. Moon*¹ that in an action for damages for breach of the covenant for title implied by section 7 of the Conveyancing Act, 1881, which is this case, damages may be recovered for defect of title by reason of the existence of an undisclosed right of way. Upon the point there decided I simply follow, without expressing any opinion of my own, the decision of my brother Joyce. The defendant argues, however, that the plaintiffs here are not entitled to damages because they knew of the rights subsisting between Johnstone and Fisher. I think they did know, but I also think that for the reasons which I have stated the conveyance by Fisher was as between himself and the plaintiffs intended to be a conveyance of the land discharged from those rights. It was decided in *Levett v. Withrington* [1887]² that mere notice to a purchaser of a defect of title does not bar his right to recover; and in *Page v. Midland Railway*³ it was further decided that no difference is to be made by reason of the fact that the defect of title appears upon the face of the conveyance. "There is no warrant," said Lord Justice Lindley, "for qualifying the

(9) 1 Lutw. 317.

acts covenanted against by inserting 'save as herein appears,' or 'save as shewn by the abstract,' or 'save as explained before the execution of this deed,' or any words to any such effect. If a vendor does not intend that his covenant for title shall extend to defects disclosed to the purchaser, whether on the face of the deed, or *aliunde*, the vendor must take care not to word his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenant." The knowledge which the purchasers here obtained by seeing the estate plan, and knowing of the previous sales of plots upon the footing of that plan, was notice outside the conveyance. The statement that the plan had been deposited with the Hanwell District Council, and that other persons were entitled to use some portion at least of Tennyson Road, was notice on the face of the conveyance; but neither the one nor the other justifies the insertion into the conveyance of words qualifying the covenant in respect of the acts covenanted against. There was in this conveyance no express covenant which required qualification, but there was an implied covenant introduced by virtue of section 7 of the Conveyancing Act, 1881; and, having regard to the decision in *Turner v. Moon*,¹ this implied covenant, unless qualified, gives rise to a right to damages. I have no doubt myself but that the defendant knew that the company contemplated using, and intended that the company should use the purchased land in such a manner as that Tennyson Road, so far as it lay on that land, should never be constructed. I think that the defendant is liable in damages.

Then what is the measure of damages? It is in the 510*l.* which the plaintiffs have been compelled to pay in order to enjoy the land in the actual state in which by the contract they were to enjoy it. To this is to be added, I think, the costs to which they were necessarily put in determining in the arbitration that 510*l.* was the proper figure. Johnstone had claimed 5,000*l.* Under section 68 of the Lands Clauses Consolidation Act, 1845, the company were bound either to admit

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that to be the figure or to proceed to arbitration. They did the latter, with the result that 510*l.* was the amount awarded; and there was necessarily incurred in ascertaining that sum taxed costs as between party and party, which they had to pay to Johnstone, and the company's costs of the arbitration proceedings. They are, I think, entitled to recover all those as damages—*Rolph v. Crouch*.³ Then subsequently the Great Western Railway defended the action on the award. They cannot, in my opinion, claim as damages any of the costs which they either had to pay or which they incurred in that proceeding. They knew the facts, from which they ought to have been aware that the rights were such as Mr. Justice Bigham subsequently decided them to be, and they ought not to have put Johnstone to bring the action. Those costs are not legal damages as between them and Fisher. I think, however, that the plaintiffs are entitled to recover the 510*l.* and the taxed costs which they had to pay in the arbitration proceedings, and their own costs in the arbitration, and I give judgment for the damages thus ascertained and the costs of the action.

[Some discussion followed as to whether the plaintiffs' own costs in the arbitration should be taxed as between solicitor and client or between party and party. At its close his Lordship said:]

The plaintiffs' costs of the arbitration proceedings must be paid as between solicitor and client. As between Fisher and the Great Western Railway, the Great Western Railway are entitled to say, "We were put to certain costs in respect of which we can claim damages against you." Those costs are such costs—proper costs, of course—as they incurred. The proper costs under these circumstances are those which they incurred as between themselves and their own solicitor—that is to say, they are solicitor and client costs. The matter must be treated as if Fisher, and not the Great Western Railway, had been the person opposing Johnstone, in which case, of course, he would have had to pay his own solicitor. I think, therefore, that those costs—that

is to say, the Great Western Railway's costs of the arbitration—are to be taxed as between solicitor and client.

*Barnett v. Eccles Corporation*⁴ was a case in which the person claiming solicitor and client costs was in the proceeding a litigant adverse to the person from whom he was claiming them. He had recovered party and party costs, and the Court said: "You can have no more. Party and party costs are those which the Court allows, and you can only have them." The present case is distinguishable, because here the Great Western Railway and Fisher were not the adverse litigants in the proceedings in which the costs were incurred; the adverse litigants were the Great Western Railway and Johnstone. It is upon this ground, and not upon any application of *Smith v. Compton* [1832]¹⁰ that I decide the point. I agree in thinking that a distinction is to be drawn between cases in which a person is entitled by contract to an indemnity and cases in which a person is simply recovering damages. If a person is entitled to an indemnity, there may be a right to solicitor and client costs; but where he is simply recovering damages he would not in general get solicitor and client costs. *Smith v. Compton*,¹⁰ which is an authority to the contrary effect, would not, I think, now be followed, having regard to *Barnett v. Eccles Corporation*.⁴ The reasoning, however, in *Barnett v. Eccles Corporation*⁴ does not apply to this case. Fisher was not an adverse litigant in the proceedings in which the costs were incurred. There is no question of party and party costs as between the Great Western Railway and Fisher. The question is what costs Fisher ought to bear by reason of the fact that his act involved the Great Western Railway in a litigation with Johnstone. I think he ought to bear that which the Great Western Railway necessarily bore—that is to say, their proper costs as between solicitor and client.

Jan. 18, 1905.—*Howard Wright*, for the plaintiffs, stated that on the occasion when judgment was given the questions as to whether the interest on the 510*l.*

(10) 1 L. J. K.B. 146; 3 B. & Ad. 407.

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paid by the plaintiffs to Johnstone ought to be repaid them by the defendant, and as to whether the defendant ought also to pay them interest thereon at 5 per cent. from the date of such payment, had been overlooked. He now asked for a direction that the defendant should make such payments.

W. Mackenzie, for the defendant.—No interest is payable on damages. The plaintiffs ought to have paid the 510*l.* to Johnstone when the award was made, in which case no interest would have accrued. A statement in the statement of claim that interest on the amount claimed till payment would be asked for is not a good demand for the purpose of the Civil Procedure Act, 1833 (3 & 4 Will. 4. c. 42), s. 28—*Rhymney Railway v. Rhymney Iron Co.* [1890].¹¹

BUCKLEY, J.—I think the plaintiffs are entitled to be repaid the interest which they have paid, and to be paid subsequent interest at 4 per cent. Under the implied covenant on which in substance the plaintiffs were suing they were entitled to recover such damages as they had sustained. In my judgment I spoke of the 510*l.*, but I did not mean by that to exclude interest. Both parties are in the wrong on this application: the plaintiffs because they ought to have made the application at the hearing, and the defendant because he has unsuccessfully resisted it; so there will be no costs of to-day.

Solicitors—R. R. Nelson, for plaintiffs; Mills, Curry & Gaskell, for defendant.

[Reported by *W. Ivimey Cook, Esq., Barrister-at-Law.*

BUCKLEY, J. }
1905.
Jan. 13, 14, 18. }

HULSE, *In re*;
BEATTIE v. HULSE.

Settled Land—Fixtures—Lease of Mill by Tenant for Life—Machinery Erected by Lessee—Purchase under Covenant by Lessor at End of Term—Right of Executrix to Remove as against Remainderman—“Quicquid plantatur solo, solo cedit.”

The principle which, as between tenant and landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life and remainderman, and allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment.

This is an exception to the maxim “Quicquid plantatur solo, solo cedit,” and not a concession allowing what has become part of the soil to be removed.

The question is one not of the nature of the attachment, but of its purpose and of the intention with which it was made.

Leigh v. Taylor (71 L. J. Ch. 272; [1902] A.C. 157) followed.

Summons in a creditors' action for the administration of the estate of Sir Edward Hulse, deceased, tenant for life of the Hulse family estates, issued by his widow and executrix to establish her right to certain machinery as against the infant tenant in tail. The respondent was the trustee of the settlement.

Sir Edward had demised a steam flour-mill to a tenant. The lease, which bore the date June 6, 1877, contained the following covenants:

“n. That the lessee will, at the expiration of the tenancy, sell to the lessor all steam engines wheels stones going-gear tackle and machinery then on the demised premises other than the demised machinery specified in the schedule hereto at a sum to be fixed by arbitration.

“o. That except for renewing or replacing the demised machinery where necessary the lessee will not without the lessor's licence in writing erect or bring on the demised premises in any one year any new or additional machinery or going-gear exceeding in aggregate value 300*l.*”

(11) 59 L. J. Q.B. 414; 25 Q.B. D. 146.

HULSE, IN RE.

"s. That the lessor will at the end of the tenancy take and pay for all the steam engines wheels stones going-gear tackle and machinery then on the demised premises other than the demised machinery specified in the schedule hereto and other than any machinery or going-gear erected by the lessee in breach of the covenant hereinbefore contained and distinguished by the letter o the amount to be so paid to be fixed by the arbitration of . . ."

In accordance with the arrangement thus made, the tenant erected at the mill certain machinery within the prescribed limit, and connected it with the demised machinery. The lease came to an end; the additional machinery so erected was valued at 2,035*l.*, and Sir Edward paid for it out of his own moneys. He endeavoured, but without success, to re-let the mill, and died in 1899.

After his death further efforts were made to find a tenant, but the arrangement of the mill was old-fashioned, as was also much of its machinery, and it was therefore determined to pull down the structure and utilise the land for building purposes, for which its position rendered it suitable.

Sir Edward's executrix claimed the additional machinery as part of his personal estate, and by her summons asked that she might be at liberty to take down and remove it.

Birrell, K.C., and *Ashton Cross*, for the applicant.—We claim these fixtures as against the remainderman. It is a question of intention whether they became part of the freehold when Sir Edward bought them from the tenant—*Wake v. Hall* [1883],¹ per Lord Blackburn. They were tenant's fixtures by agreement, and removable by the tenant, but subject to their liability to be bought by the landlord. They were, by an agreement which the tenant for life was entitled to enter into, made tenant's fixtures whether affixed to the freehold or not, and subsequently the landlord, pursuant to the agreement, bought them. The onus is on the other side to shew that he intended to give them to the estate. If the inten-

tion can be ascertained, the question of detail, whether they were actually affixed or not, becomes immaterial.

If Sir Edward had himself occupied the mill he could have put in this machinery, and would have been entitled to remove it—*Lawton v. Lawton* [1748],² *Dudley (Lord) v. Warde (Lord)* [1751],³ and see the notes to *Elwes v. Maw* [1802].⁴ The case of *Leigh v. Taylor* [1902]⁵ shews how much depends upon intention. Is it likely that Sir Edward intended to spend 2,035*l.* for the benefit of the inheritance? The chattels belong to the estate of the tenant for life.

Buckmaster, K.C., and *H. B. Howard*, for the trustee for the purposes of the Settled Land Acts, representing the infant tenant in tail.—This machinery was bought and erected by the tenant, and afterwards bought from him by Sir Edward Hulse. So far as the present question is concerned, it is the same thing as if Sir Edward had bought and erected it in the first instance, as he might have done, with the view of getting a good tenant.

Intention is a factor, but not a sole or determining factor, in the question whether a chattel is a fixture or not; it may become a fixture in law, however much the person who fixed it may have intended it should not.

Bain v. Brand [1876]⁶ was a case of personal representative and heir, and is in our favour. The quotation on page 777 of that case, from the judgment of Lord Hatherley in *Meux v. Jacob* [1875],⁷ shews that even the right conceded to a tenant is limited to the currency of his term. The *Cider-mill Case* [undated]⁸ was considered in *Fisher v. Dixon* [1845],⁹ and can no longer be regarded as law, and *Lawton v. Lawton*² is tainted by association with it.

The question is whether there is anything here to except the case from the

(2) 3 Atk. 12.

(3) 1 Amb. 113.

(4) 2 Sm. L.C. (11th ed.), 189, 222 (2).

(5) 71 L. J. Ch. 272; [1902] A.C. 157.

(6) 1 App. Cas. 762.

(7) 44 L. J. Ch. 481, 485; L. R. 7 H.L. 481, 490.

(8) Mentioned in 3 Atk. 13 and 1 H. Bl. 260*n.*

(9) 12 Cl. & F. 312, 329.

(1) 52 L. J. Q.B. 494, 499; 8 App. Cas. 195,

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general rule that, as between real and personal representatives, the heir takes those fixtures which have become part of the freehold. There is a special exception in the interests of trade in the case of tenant and landlord; for though the fixture has become part of the soil, the tenant is allowed to remove it. Here the fixtures would be of no value for any other purpose; they were machinery for this mill. They may have become part of the soil, even though not physically attached to it—*Monti v. Barnes* [1900].¹⁰

BUCKLEY, J.—Where the owner of the freehold affixes chattels to the freehold and dies, there exists no reason in the nature of things why, as between his executor and his heir, the former should take rather than the latter. The chattel affixed has become as matter of attachment part of the freehold, and there is no reason as between the personal and the real representatives of the dead man why the derivative owner of the freehold should not take it. In *Lawton v. Salmon* [1782]¹¹ and *Fisher v. Dixon*² the heir was accordingly held entitled. *Bain v. Brand*⁶ is to the same effect. Why the executor succeeded in the *Cider-mill Case*,⁸ it is impossible to say. There are no facts ascertainable to guide to any conclusion.

But the case is different where the two claimants are not persons who each derive title under the person who affixed the chattels, but are the one the person who did and the other an owner who did not affix the chattels, as, for instance, where the question is between tenant and landlord, or between tenant for life and remainderman. The old maxim, *Quicquid plantatur solo, solo cedit*, was, as between tenant and landlord, long since relaxed for the benefit of trade. It was advantageous that the tenant should be at liberty, for the purposes of his trade, to affix chattels to the soil, and in his case there was established an exception by which he was entitled to remove the fixtures during the term. As between tenant for life and remainderman the same principle is applicable. It is advantageous that the tenant for life

should be in such a position as to be able to improve the estate for his own enjoyment without being thereby compelled to make a present to the remainderman. The remainderman is not injured if the person deriving title under the tenant for life removes the fixtures, leaving the remainderman with the freehold in the same state as it would have been if the chattels had never been affixed. Lord Hardwicke in 1751 in *Dudley (Lord) v. Warde (Lord)*³ said, "The case being between executor of tenant for life or in tail, and a remainderman, is not quite so strong as between landlord and tenant, yet the same reason governs it." Speaking of the two cases of tenant and landlord and tenant for life and remainderman, Lord Justice Rigby in *De Falbe, In re; Ward v. Taylor* [1901],¹² goes a little beyond this sentence in saying that. "The exception extends equally, as is shown by *Dudley (Lord) v. Warde (Lord)*,³ to the case of a tenant for life, and the person who comes into possession of the estate upon his death." In *Fisher v. Dixon*² Lord Cottenham puts the case of tenant and landlord and that of tenant for life and remainderman together in a separate class, distinguishing them from that of executor and heir. Accordingly, in *Lawton v. Lawton*,² *Dudley (Lord) v. Warde (Lord)*,³ and *Leigh v. Taylor*⁵ the executor of the tenant for life, and not the remainderman, was held entitled. In *Leigh v. Taylor*⁵ (being the title of *De Falbe, In re; Ward v. Taylor*,¹² on appeal to the House of Lords)—the question being, as I have said, between tenant for life and remainderman—the learned Lords treated the question as one to be determined not so much by an investigation of the physical means used for the attachment, as of the purpose for which and of the intention of the person by whom the chattels were attached. The question is not what is the nature of the attachment of the chattel to the soil, but what, having regard to all the facts of the case, must have been the intention of the tenant for life. It is upon these principles, I think, that this case has to be decided.

(10) 70 L. J. K.B. 225; [1901] 1 K.B. 205.

(11) 1 H. Bl. 260n.

(12) 70 L. J. Ch. 286, 288; [1901] 1 Ch. 528, 530.

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The question has been argued as to whether the true principle is that where the tenant affixes chattels to the freehold, with the right to remove them during his term, that right is based upon an exception which enables him to remove part of the freehold, or an exception by which the chattels do not become part of the freehold. It appears to me that the exception is an exception to the maxim *Quicquid plantatur solo, solo cedit*. It is not that the law allows him to remove part of the freehold, but that it is not the fact that the chattels have become part of the freehold, for the exception prevents their becoming so.

The facts are these: Sir Edward Hulse was tenant for life of settled estates. In 1877 he executed a lease of a mill with certain machinery in it. As to that machinery no question arises. By the bargain between him and the lessee the latter might, under clauses (n) and (o) of the lessee's covenants in the lease, erect additional machinery up to a certain annual

If he did so, then he was bound under clause (n) to sell that machinery to the lessor at the end of the term; and under clause (o) of the lessor's covenants Sir Edward Hulse covenanted to buy it. Certain additional machinery was brought upon the premises by the tenant. The result was, therefore, that, as between landlord and tenant, the tenant brought upon the freehold machinery which he would have been entitled to remove during the term, but that by the special bargain he had agreed to sell it to the lessor. The lease came to an end, and the lessor did buy this machinery, and paid 2,035*l.* for it. He subsequently died in 1899. The question is whether his executrix is entitled to the machinery which he thus paid for. In my opinion she is. It is plain that when the machinery was brought on the land it did not become part of the land, so that the tenant could not for that reason remove it. If the lessor had died before the end of the lease, and the remainderman had not wished to buy the machinery, the tenant could have taken it away. The term came to an end and the lessor did buy it. It had not become part of the soil up to that time. What was the lessor's intention? Did he wish

to make a present to the inheritance? Certainly not. He looked out for another tenant. Had he found one, he would have sold him this machinery. Such tenant would have been entitled to remove it during his term. And if Sir Edward had thought it better to work the mill himself he would have been in the same position as any tenant who brought machinery on to the land. I cannot find any evidence to shew that he intended to make a present of this machinery to the remainderman, and I think it never became part of the soil. I think, therefore, that the summons succeeds.

Solicitors—Payne & Son, for applicant; Payne, Shaw-Mackenzie & Lake, for trustees.

[Reported by R. HILL, Esq.,
Barrister-at-Law.]

JOYCE, J. }
1904. }
Nov. 18, 22. } BEERWICK & Co. v. PRICE.
Dec. 20. }

Mortgage — Priority — Constructive Notice—Non-disclosure by Solicitor to all Parties—Statute of Limitations.

A mortgagee, who was also a solicitor, deposited the mortgage deeds with his bankers to secure an overdraft on his current account. No notice of such deposit was given to the mortgagor. Subsequently the mortgagor and mortgagee joined in a further mortgage of the property to S. The mortgagee acted throughout the transactions as solicitor for all parties, but he did not disclose the existence of the bankers' mortgage either to the mortgagor or to S.:—Held, that S. was affected with constructive notice of the bank's mortgage, and that therefore the bank was entitled to priority over S.; but that the mortgagor had not through his solicitor notice of the bank's mortgage.

Dixon v. Winch (69 L. J. Ch. 465; [1900] 1 Ch. 736) distinguished.

Action for foreclosure or sale, and for a declaration as to priorities.

BERWICK & Co. v. PRICE.

By a conveyance of January 26, 1886, certain property was conveyed to the use of the defendant Bennett in fee-simple.

By a mortgage of January 27, 1886, the property comprised in the said conveyance, together with two houses erected thereon, and known as "Holmden" and "Ravendale," were conveyed to the use of one Corbett by way of mortgage for securing the sum of 2,100*l.* and interest.

On August 3, 1886, Corbett deposited the said conveyance and mortgage with the plaintiffs to secure the balance of his banking account with the plaintiffs.

By a mortgage of December 31, 1887, in consideration of 650*l.* paid to Corbett by Mrs. Holbrook at the request of Bennett, and in part discharge of the 2,100*l.* secured as above mentioned, the premises known as "Holmden" were conveyed by Bennett and Corbett to Mrs. Holbrook by way of mortgage to secure the sum of 650*l.* and interest. This mortgage subsequently became vested in the defendants W. H. Price and E. Price, against whom all proceedings had been discontinued.

By a mortgage of January 31, 1891, in consideration of 550*l.* paid to Corbett by Miss Wilson at the request of Bennett, and in reduction of the 2,100*l.* secured by the original mortgage, the premises known as "Ravendale" were conveyed by Bennett and Corbett to Miss Wilson in fee to secure the repayment of the 550*l.* and interest.

This mortgage subsequently became vested in the defendant Spicer, who consequently claimed to be first mortgagee of "Ravendale."

By another mortgage of January 31, 1891, "Holmden" and "Ravendale" were conveyed by Bennett to Corbett (subject to the mortgages above mentioned) to secure the repayment of 900*l.* and interest.

The sums of 650*l.* and 550*l.*, when received by Corbett, were paid by him into his current account at the plaintiffs' bank.

In 1902 Corbett was adjudicated bankrupt, and at that date, as the plaintiffs alleged, Corbett was indebted to the plaintiffs, on his current account, in a sum considerably exceeding 2,100*l.*

On the mortgage to Miss Wilson and on the transfer to Spicer, Corbett acted as their solicitor.

The plaintiffs never gave any notice of their mortgage by deposit to Bennett, and the defendants denied all notice, constructive or otherwise, and pleaded the Statute of Limitations.

The plaintiffs now claimed priority for their mortgage on the ground that the defendants had constructive notice of the same through Corbett, who acted as solicitor for all parties.

Levett, K.C., and *Martelli*, for the plaintiffs.—The plaintiffs hold the title-deeds and have an equitable mortgage which is superior to the defendant's legal mortgage. The defendant, who also employed Corbett as his solicitor, must be deemed to have had notice of a mortgage which it was to Corbett's interest to conceal, and which he did conceal—*Worthington v. Morgan* [1849]¹ and *Atterbury v. Wallis* [1856],² in which latter case Turner, L.J., discusses *Hewitt v. Loosemore* [1851].³ The doctrine laid down in *Kennedy v. Green* [1834],⁴ that the knowledge of an agent is not imputed to the principal where the agent commits a fraud requiring the suppression of a prior interest with notice of which it is sought to affect the principal, does not apply where the only ground for charging the agent with fraud is the concealment of the fact upon which the question of notice depends. But, even if the defendant was not affected with notice, he advanced his money without enquiry, and was therefore guilty of such negligence as would prevent him from availing himself of the legal estate to gain priority over the plaintiffs' mortgage—*Lloyd's Banking Co. v. Jones* [1885]⁵ and *Oliver v. Hinton* [1899].⁶

Hughes, K.C., and *Gatey*, for the defendant Spicer.—First, a legal mortgage is never postponed to an equitable mortgage except by such negligence as gives rise to an inference of fraud—*Northern Counties*

(1) 18 L. J. Ch. 233; 16 Sim. 547.

(2) 25 L. J. Ch. 792, 794; 8 De G. M. & G. 454, 464.

(3) 21 L. J. Ch. 69; 9 Hare, 449.

(4) 3 Myl. & K. 699.

(5) 54 L. J. Ch. 981; 29 Ch. D. 221.

(6) 68 L. J. Ch. 583; [1899] 2 Ch. 264.

BREWICK & Co. v. PRICE.

of England Fire Insurance Co. v. Whipp [1884].⁷ Negligence is nothing unless it leads to the inference that the person guilty of it intended to avoid the consequences of notice. Nor is constructive notice to be imputed to a person unless notice is to be inferred from the facts. Recent cases tend to restrict the doctrine of constructive notice—*Waldy v. Gray* [1875]⁸ and *Cave v. Cave* [1880].⁹ Secondly, Bennett having no notice of the deposit was in a position to settle with Corbett, which he did by substituting the three mortgages for 650*l.*, 550*l.*, and 900*l.* for the original mortgage for 2,100*l.* This he was entitled to do, having no notice of any assignment—*Matthews v. Wallwyn* [1798],¹⁰ *Williams v. Sorrell* [1799],¹¹ *Norris v. Marshall* [1821],¹² and *Stocks v. Dobson* [1853].¹³ There was therefore accord and satisfaction of the original mortgage and the sub-mortgage became valueless; the debt being gone the charge went too—*Roxburghe v. Cox* [1881].¹⁴ Thirdly, this action is barred by statute, for there has been no payment of interest by Bennett to Corbett within the Real Property Limitation Act, 1874, s. 8. Payment of rent is not payment of interest—*Harlock v. Ashberry* [1882].¹⁵ *Bovill*, for the defendant Bennett.—There is nothing in the present case to take it out of the rule that payment without notice is good. There was no negligence on Bennett's part. *Levett, K.C.*, in reply, referred to *Dixon v. Winch* [1900].¹⁶

Cur. adv. vult.

Dec. 20.—JOYCE, J.—This case is one of considerable complication, and by no means free from difficulty. It is well settled that a purchaser or mortgagee will be deemed to have notice of all facts which he would have learned upon a

proper investigation of the title under a contract containing no restrictions of his rights in this respect. So also a purchaser who does not ask to have the title-deeds delivered to him—*Worthington v. Morgan*,¹ *Maxfield v. Burton* [1873],¹⁷ and *Lloyd's Banking Co. v. Jones*⁵—or, if such deeds relate to other property, to have them produced—*Oliver v. Hinton*⁶—is deemed to have notice, if they turn out to be in the possession of a stranger, of that stranger's rights, whatever they may be. Therefore, a purchaser who, without requiring delivery or production of the title-deeds, takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage is affected with constructive notice of such sub-mortgage, and the legal estate in the purchaser is in his hands subject to the equitable incumbrance, and such notice will raise in the mortgagee a trust to the amount of the sub-mortgage—*Story, Eq. Jur. par. 395*. It is quite immaterial whether the purchaser employs a solicitor or not—see *Atterbury v. Wallis*³ and *Oliver v. Hinton*⁶; and it is also immaterial whether the solicitor does or does not in fact inform his client of the existence of the incumbrance—see *per Lord Hatherley in Rolland v. Hart* [1871]¹⁸; nor is evidence admissible to prove that a solicitor did not in fact communicate his knowledge to the client—*Bradley v. Riches* [1878],¹⁹ *Kettlewell v. Watson* [1882],²⁰ and *per Vice-Chancellor Kindersley in Boursot v. Savage* [1866].²¹ A person who ought, according to the rule in equity, either personally or by his agent to have known a fact, is treated in equity as if he actually knew it, and he cannot escape the consequences of such constructive notice by employing the dishonest solicitor of the other party with whom he is dealing, if the true facts would have come, or ought to have come, to the knowledge of an independent solicitor, if such a solicitor had been employed. No one, by delegating to an agent that which he might do himself,

⁷ 53 L. J. Ch. 629; 26 Ch. D. 482.⁸ 44 L. J. Ch. 394; L. R. 20 Eq. 238.⁹ 49 L. J. Ch. 505; 15 Ch. D. 639.¹⁰ 4 Ves. 118.¹¹ 4 Ves. 389.¹² 5 Madd. 475.¹³ 22 L. J. Ch. 884, 885; 4 De G. M. & G.¹⁴ 17 Ch. D. 520, 527.¹⁵ 51 L. J. Ch. 394; 19 Ch. D. 539.¹⁶ 69 L. J. Ch. 465; [1900] 1 Ch. 736.¹⁷ 43 L. J. Ch. 46; L. R. 17 Eq. 15.¹⁸ 40 L. J. Ch. 701; L. R. 6 Ch. 678.¹⁹ 47 L. J. Ch. 811; 9 Ch. D. 189.²⁰ 51 L. J. Ch. 281; 21 Ch. D. 685.²¹ 35 L. J. Ch. 627; L. R. 2 Eq. 134.

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can place himself in a better position than if he had done the thing himself. If notice to an agent were not notice to his principal, notice would be avoided in every case by employing agents—*per* Lord Northington in *Sheldon v. Cox* [1764].²² Section 3 of the Conveyancing Act, 1882, imposes certain restrictions on the old rule as to constructive or imputed notice, but it in no way alters the law with respect to any instrument, fact, or thing that would have come to the knowledge of a purchaser if such enquiries and inspections had been made as ought reasonably to have been made by him. If I honestly buy or advance money upon mortgage of an estate without notice of an incumbrance, but the solicitor whom I employ in the transaction knew, or ought to have known, of it, I am held to have notice of such incumbrance, although notice will not be imputed to me of a fraud previously perpetrated by the solicitor, and therefore within his knowledge, unless the fraud be such as ought to have been discovered by any honest and competent solicitor who duly investigated the title on my behalf; but if it be such a fraud then I have constructive notice of it—*Kennedy v. Green*.⁴ The omission by a purchaser to investigate the title or to require delivery or production of the title-deeds is not to my mind either fraudulent or culpable, nor does it, since the judgment of Sir N. Lindley, M.R., in *Oliver v. Hinton*,⁶ seem necessary to characterise it by any such epithet; but the consequence of such omission or wilful ignorance is that it is unjust to prefer the purchaser to the previous mortgagee who has the deeds, although such mortgage be equitable and the purchaser has the legal estate. In the present case, however, the deposit by Corbett with the bankers of the conveyance of January 26, 1886, and the mortgage to Corbett of January 27, 1886, was not a fraud. Any ordinary solicitor who, on behalf of Mrs. Holbrook as intending mortgagee of "Holmden," or on behalf of Miss Wilson as intending mortgagee of "Ravendale," investigated the title to the property proposed to be mortgaged must, or ought to, have discovered the existence of the sub-mortgage.

(22) 2 Eden, 224, 228

At all events, if he did not, or if no solicitor were employed, Mrs. Holbrook and Miss Wilson respectively would have constructive notice of the sub-mortgage. There is nothing in *Kennedy v. Green*,⁴ nor, so far as I am aware, in any other case, to support the contention that Mrs. Holbrook or Miss Wilson can be relieved from the effect of the rule with respect to constructive notice by the fact that she employed Corbett as her solicitor, even if it were granted that he had an interest in concealing the sub-mortgage. Indeed, the contrary is shewn by the actual decision of the Lord Chancellor in *Kennedy v. Green*,⁴ and by *Atterbury v. Wallis*,² *Hopgood v. Ernest* [1865],²³ and *Rolland v. Hart*,¹⁸ which are directly in point. In other words, the mere fact that a prior equitable title which ought to have been discovered by an ordinary independent solicitor was concealed from the principal by the solicitor employed does not prevent the principal from being affected with constructive notice of it, and I must hold that Mrs. Holbrook and Miss Wilson were each affected by constructive notice of the sub-mortgage.

It is not necessary to impute to them the knowledge that their solicitor Corbett undoubtedly possessed of the existence of the sub-mortgage, and the result would be the same if they had not employed Corbett or any solicitor at all. By the same rule each of the transferees from Mrs. Holbrook and Miss Wilson, and therefore the defendant Spicer, had similar constructive notice, not because they employed Corbett as their solicitor, but notwithstanding such employment. As between the plaintiffs, then, and the defendant Spicer, the plaintiffs have priority. This defendant, to the extent of what he acquired by the transfer to him of Miss Wilson's mortgage, is bound in the same manner as was Miss Wilson and as was Corbett, and *prima facie* he is constructively a trustee for the plaintiffs, who hold the sub-mortgage to the amount required to satisfy their security.

It was contended on behalf of the defendant Spicer, and also I think of the defendant Bennett, that the mortgages to Mrs. Holbrook and Miss Wilson were

(23) 3 De G. J. & S. 116.

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given in substitution for, and effected a partial discharge of, the original mortgage to Corbett, and that consequently the security of that mortgage was thereby diminished, if not altogether extinguished. Of course, if Bennett prior to or at the time of these mortgages had notice, actual or constructive, of the sub-mortgage, then these mortgages to Mrs. Holbrook and Miss Wilson, who, as I have already held, had constructive notice of the sub-mortgage, are as against the plaintiffs wholly ineffectual and no better than waste paper; and the claim of the plaintiffs is precisely the same as if the original mortgage of January 27, 1886, were still subsisting in every respect. It was said, however, that if Bennett had no such notice, then the original mortgage was discharged, and the sub-mortgage, having nothing left to operate upon, expired with it. I am unable to assent to that proposition. Mrs. Holbrook and Miss Wilson having notice of the sub-mortgage, there could be no discharge, partial or otherwise, of the original mortgage for their benefit, to the prejudice of the plaintiffs, without the plaintiffs' concurrence. If, however, Bennett had no notice, he is, or may be, entitled to say that as against him the original mortgage is discharged to the extent of the 650% raised from Mrs. Holbrook and the 550% raised from Miss Wilson; and that they, or the persons entitled through them, have respectively first mortgages for those amounts upon "Holmden" and "Ravendale" respectively, that subject thereto Corbett has a charge for the balance of 900% upon the equity of redemption in "Holmden" and "Ravendale," and that these are the only charges upon the property as against him. He could not successfully contend for more than this, and, as I have already said, whatever Mrs. Holbrook or Miss Wilson obtained under their mortgages is, in my opinion, as between them and the plaintiffs, subject in equity to a trust for the plaintiffs to the extent required to satisfy the full amount of their security.

Further, in my opinion, no Statute of Limitation affords to the defendant Spicer any defence against the claim of the plaintiffs. Interest on the sub-mortgage has

been regularly paid or acknowledged by Corbett, and the rents received by Bennett's agents have, by his direction, been applied in paying the interest on the subsisting incumbrances, the legal effect being the same as if he had personally paid such interest from time to time.

Having regard, then, to the values of "Holmden" and "Ravendale," it is in all probability practically immaterial whether Bennett had or had not notice of the sub-mortgage. I may say, however, that, as at present advised, I do not see my way to hold that he had, or is to be deemed to have had, such notice, although it has been admitted that Corbett acted as his solicitor in the several transactions "relating to or in which he was or purported to be interested as mentioned in the pleadings." The plaintiffs, as they admit, abstained, and no doubt advisedly, from giving notice to Bennett of their sub-mortgage, choosing to run all the risk of not doing so until June, 1902, so that Bennett would be entitled to set off against any claim of the plaintiffs upon him or his property all moneys paid by him to Corbett towards the discharge of the original mortgage before he had notice of the sub-mortgage, and the plaintiffs would be bound by all *bona fide* transactions having reference to the mortgage which may have taken place between Bennett and Corbett prior to such notice—*Stocks v. Dobson*¹³ and *per* Lord Justice Fry in *Bickerton v. Walker* [1885].¹⁴

Now Bennett had not express notice by reason of the deliberate omission of the plaintiffs, who elected not to give it. There is no evidence before me to shew, nor do I think it was contended, that Bennett constituted Corbett his general agent to obtain the advances from Mrs. Holbrook and Miss Wilson—*Northern Counties Insurance Co. v. Whipp*¹⁵—or that Bennett had placed himself in the hands of Corbett, signing whatever he was asked to sign, so as, according to *Dixon v. Winch*,¹⁶ to render himself responsible to Mrs. Holbrook and Miss Wilson for whatever Corbett did or failed to do in dealing with them. I infer that Corbett for his own purposes obtained the advances, and requested Bennett to concur, acting as

(24) 55 L. J. Ch. 227, 229; 31 Ch. D. 151, 158.

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his solicitor to the extent of settling the deeds on his behalf. It does not appear to me that Bennett, being without notice of the sub-mortgage, was bound, before paying off his mortgage debt or executing at Corbett's request the mortgages to Mrs. Holbrook and Miss Wilson, to require production of the original mortgage deed of January 27, 1886, of the existence of which he was of course well aware—*per* Lord Justice Turner, in *Stocks v. Dobson*.¹³ In other words, I do not think he had constructive notice of the sub-mortgage, and if that is so I do not think that knowledge ought to be imputed to him through Corbett, who for his own ends was committing a fraud upon the plaintiffs, although the money raised was paid to his banking account with the plaintiffs, but without any information as to the source from which it came. At all events, I think that, under all the circumstances, as between Bennett and the plaintiffs such notice ought not to be imputed, seeing that the plaintiffs refrained from giving notice—an omission which has caused all the trouble so far as Bennett is concerned. It would be unjust to say that, as between the plaintiffs and Bennett, the latter must be deemed to have notice, when he had no such notice in fact by reason of the plaintiffs advisedly omitting to give it.

What, then, is the practical result on the hypothesis that Mrs. Holbrook and Miss Wilson and their transferees must be taken to have had notice, and that Bennett had no notice. The question has scarcely been argued before me, but, having regard to the probable insufficiency of the original mortgage, I am not sure that it is of any practical importance whether Bennett had notice or not. Even if he had no notice, I take it that the plaintiffs come first on the property comprised in Mrs. Holbrook's mortgage to the extent of the principal 650*l.* and interest, and (omitting for the moment from consideration the fact that they have bought up the equity of redemption in "Ravendale") in like manner they come first on the property in Miss Wilson's mortgage for the principal 550*l.* and interest, and that for the 900*l.*, the balance of the original mortgage money and interest, they have

a charge upon the equities of redemption of the properties comprised in the mortgages to Mrs. Holbrook and Miss Wilson respectively. I do not suppose that there will be anything left for any one else.

Solicitors—Maples, Teesdale & Co., agents for Lord & Parker, Worcester, for plaintiffs; Ford & Ford, agents for W. W. A. Tree, Worcester, for defendant Spicer; H. A. Farman, agent for C. W. F. Clinton, Worcester, for other defendants.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.

WARRINGTON, J. } SITWELL, *In re*;
1905. } SITWELL v. LONDES-
Jan. 11. } BOROUGH (EARL).

Settled Land — Leasing Power — Easement — Right to Let Down Surface of Settled Land — Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-s. 10 (iv.), ss. 6 and 7.

A tenant for life under a settlement of the surface of lands, being also entitled in fee-simple to the mines and minerals under the settled lands, may grant to the lessee of the mines and minerals a right to let down the surface, although the tenant for life could not, under the terms of the settlement, himself so work the mines as to let down the surface.

The rent to be reserved is not incapable of ascertainment if experts can say what rent should be reserved.

Section 6 and section 7, sub-section 3 of the Settled Land Act must be read together, and a lease may be granted of an incorporeal hereditament to which a condition of re-entry is inapplicable.

Upon his marriage, the applicant, by deed dated July 7, 1888, exercised a general power of appointment by limiting the surface of the settled lands to himself for life with remainders over in strict settlement, and by the same deed he reserved the mines and minerals under the settled lands to himself in fee-simple. Upon the construction of this settlement his Lordship held that the tenant for life was not entitled to work the mines and

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minerals under the settled land so as to let down the surface.

The tenant for life had agreed to lease mines, of which he was owner in fee, proposed to grant to the intending the right to let down the surface of the settled lands.

The tenant for life took out a summons (amongst other things) that it be declared that he had power to grant to the lessee (in any lease made by him as absolute owner of the mines under the settled lands) the right to work these mines so as to let down the surface. The respondents were the trustees of the settlement and the infant tenant in tail in remainder.

Rowden, K.C., and *Bryan Farrer*, for the tenant for life.—This is a right in relation to the settled land, and may be leased under section 6 of the Settled Land Act, 1882.¹ It is a lease for mining purposes within the definition clause. The Court in a case under the Settled Estates Act, 1856, held that lands for the convenient and effective working of the minerals could be included in the lease—*Reveley's Settled Estates, In re* [1863].² The right

(1) The material provisions of the Settled Land Act, 1882, which were referred to were section 2, sub-section 10 (iv.): "mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes."

Section 6: "A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding . . . (ii) in case of a mining lease, sixty years."

Section 7, sub-section 2: "Every lease shall reserve the best rent that can reasonably be obtained, regard being had . . . generally to the circumstances of the case." Sub-section 3: "Every lease shall contain . . . a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days."

(2) 32 L. J. Ch. 812.

purposed to be leased is an easement—*Rowbotham v. Wilson* [1860].³

H. Terrell, K.C., and *Hemmerde*, for the respondents.—The right of support is an easement. That is common ground on both sides. What is proposed to be done is to release that right. That is not a lease at all. In the next place it is impossible to comply with the terms of section 7 as to the reservation of rent or a condition of re-entry.

[They referred to *Dalton v. Angus & Co.* [1881].⁴]

No reply was called for.

WARRINGTON, J.—The question which I have now to decide arises upon the Settled Land Act, 1882. The question is whether the plaintiff, as tenant for life under the provisions of the Settled Land Act, 1882, is entitled to grant to the lessees of his minerals the right to let down the surface of the land. Now the material provisions of the Settled Land Act, 1882, are section 6 and the definition clause—section 2, sub-section 10 (iv.). What is proposed to be done is to grant to the lessees of the mine a right, during the continuance of their lease, so to work their mines as to let down or damage the surface of the land. Now it seems to me that, assuming the right so to do is within section 6, then the purposes for which it is proposed to grant that right are mining purposes within the definition clause, and it only remains, therefore, to consider whether such a right as that which it is proposed to grant is an "easement, right, or privilege" in relation to the settled land within the meaning of section 6.

Now what really is the right which it is proposed to grant? It is a right to damage the surface. It is true it is a right to damage the surface by underground workings, but it seems to me that, for the purpose of construing section 6, the source of damage is immaterial. If the section allows, as I think it is plain it does allow, the lease of a right to damage the surface, say, by opening a pit, or by removing a part of the surface altogether, or by constructing a railroad or a tram-

(3) 30 L. J. Q.B. 49; 8 H.L. C. 348, 362.

(4) 50 L. J. Q.B. 689; 6 App. Cas. 740.

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road over the surface, which cannot be done without damaging a part of the surface, I think it must also authorise the granting of a lease of the right to damage the surface in any other way. Now I think that that is the true way of looking at the matter is shewn by the case of *Rowbotham v. Wilson*,² especially by the passage which has been cited. The passage is this: "I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary. It is undoubted law, that no particular words are necessary to a grant; and any words which clearly show the intention to give an easement which is by law grantable, are sufficient to effect that purpose." It seems to me that this is sufficient authority for saying that the grant of a right to damage the surface, however that damage may be caused, is a right grantable at law. If that be so, I can see no reason why, under the Settled Land Acts, a tenant for life should not be authorised to lease that right, and to lease it, in a proper case, for mining purposes.

Then it is said that it would be impossible to ascertain the best rent. I do not agree with that. All that the Act provides is that "every lease shall reserve the best rent that can reasonably be obtained." It may be a difficult thing to ascertain. It may be a question for experts to say what rent should be reserved to be paid for such a right, but that such a rent can be ascertained one ought not to have any doubt. Then it is said that the lease does not comply with subsection 3 of section 7—namely, that it does not contain "a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days." That I do not think can be maintained. A condition of re-entry is only applicable to corporeal hereditaments. It is clear, from the express words of section 6, that a tenant for life has the right to lease incorporeal here-

ditaments. The two sections, therefore, must be read together, and must be understood to apply to a lease where a condition of re-entry is not applicable. I therefore hold that the tenant for life has a right of leasing the right proposed to be granted.

Solicitors—A. & H. White, for all parties.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.]

JOYCE, J. }
1905. } AINSWORTH v. WILDING.
Jan. 12, 13. }

Mortgage—Redemption—Mortgages in Possession—Accounts—Sale-moneys—Rents and Profits—Rests—Practice.

In taking the accounts in a mortgagee's redemption action against a mortgagee in possession, and in the absence from the order, according to the practice, of any direction for making any rests in such accounts, the account of rents and profits, unlike that of purchase-moneys, should be taken as a whole without rests.

Wrigley v. Gill (*ante*, p. 160; [1905] 1 Ch. 241) approved.

Thompson v. Hudson (40 L. J. Ch. 28; L. R. 10 Eq. 497) explained.

This was an adjourned summons in respect of certain items in the accounts after judgment in a redemption action brought by a second mortgagee against the first mortgagee in possession.

The question in taking the accounts was whether, in the absence from the order of any direction for making any rests in such accounts, a rest was to be made in the account of rents and profits at the date of a sum being brought in by the mortgagee as received from a sale of part of the mortgaged property, so as to bring in any balance of rents and profits in the hands of the mortgagee.

In 1890 the plaintiff Ainsworth (since dead, and now represented by the executors of his will) commenced this action for a declaration that a deed of charge,

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dated October 7, 1877, and made between one Smith and his solicitors and financial agents, Richard and John Wilding, ought to stand only as a security for the amount which, upon taking an account of all dealings between them on the principle of a current account, should be found due to the said John Wilding, the surviving partner.

The Wildings had for some time prior to 1877 acted as financial and business agents for Smith, for whom they obtained advances on the security of various legal mortgages, equitable charges, and promissory notes. In keeping and stating the accounts as between themselves and Smith, they had treated the relationship between them as that of principal and agent, and credited and debited themselves with interest on all sums advanced to or received from him by themselves, treating the account as a running account.

By the above-mentioned indenture of October 7, 1877, Smith charged certain hereditaments, situate in Blackburn and Little Harwood, in the county of Lancaster, and certain ground-rents, with the payment to the Wildings of the sum of 12,500*l.* therein alleged to have been advanced by them to him, with interest thereon at 5 per cent. per annum, but subject to the several mortgages mentioned in a schedule thereto.

In January, 1878, the Wildings gave Smith notice of their intention to sell the property comprised in the said deed, and Smith promptly commenced an action against them for an account, redemption, and other relief. By an order dated March 28, 1878, it was ordered that the deed of October 7, 1877, ought to stand as security for what was due at that date to the Wildings on the balance of account of dealings and transactions between them, with interest.

The account which they brought in was disputed on behalf of Smith by his solicitor, the plaintiff Ainsworth, who on February 8, 1879, himself took a charge by an indenture of that date whereby Smith charged the hereditaments comprised in the deed of October 7, 1877, but subject thereto and to the other mortgages therein mentioned, with the payment to Ainsworth on demand of the balance

which should for the time being be owing on the account current of Smith with Ainsworth for money lent or advanced, and for interest at 5 per cent. per annum. It was thereby agreed that the total amount recoverable should not exceed 10,000*l.*, and Smith agreed to execute a legal mortgage in favour of Ainsworth.

John Wilding having, after the death of Richard Wilding, contended that Ainsworth was bound by the statement of account delivered in the action of *Smith v. Wilding*, the plaintiffs disputed it and commenced this action for the relief above mentioned.

By an order dated August 3, 1901, the Court declared that the deed of October 7, 1877, ought to stand as security for what was due at that date from Smith to Richard and John Wilding on the balance of account of dealings and transactions between them, together with interest from the date thereof, and made the usual order directing accounts and enquiries, including an order that the account to be taken, having regard to the Court's declaration, should be "taken as an ordinary mortgagee's account," and an order "that the following accounts and enquiry be taken and made:

"An account of the rents and profits of the hereditaments comprised in the said mortgage dated 7th October 1877 received by the defendant John Wilding or by any other person or persons by his order or for his use or without his wilful default might have been so received.

"An enquiry whether any and what parts of the hereditaments comprised in the said mortgage of the 7th October 1877 have been sold and if so by whom and for what sums of money and by whom the purchase moneys have been received and how the same have been applied.

"An account of the proceeds of any such sale received by the defendant John Wilding or by any other person or persons by his order or for his use or which without his wilful default might have been so received."

In pursuance of directions given by the Master, the defendant Wilding on December 10, 1901, lodged in chambers his account as mortgagee in possession. This account shewed certain sums received by

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him as moneys arising on the sales of parts of the mortgaged property effected by him as mortgagee, the balance of such sums, after payment-off of interest, to be applied in payment-off of the principal moneys. This balance was ascertained at half-yearly or yearly intervals by way of "rests."

The account also shewed certain sums received as rents and profits, and the plaintiffs, in the course of several objections to the account in other respects, submitted with regard to these items of rents and profits that a balance of the same should be made out half-yearly or yearly, and that the balances from time to time should be set off as against the interest then due to the defendant in the same manner as the purchase-moneys were set off as against capital and interest.

The defendant disputed this contention that the right to take "rests" with regard to sale-moneys carried with it a right to take "rests" with regard to rents and profits, and submitted that the usual practice should be followed (as stated in Form 1,534 of *Daniell's Chancery Forms* (5th ed.), p. 773)—namely, to deduct the balance certified to be due from the mortgagee on the rents and profits account from the balance found due from the mortgagor on the principal and interest account, and to certify the ultimate balance without taking any "rests."

There being several matters in dispute between the parties, the Master made no certificate, but referred the matter to the Court.

Younger, K.C. (Leigh Clare with him), for the plaintiffs.—In such accounts rents and profits can properly be applied in reduction of principal and interest just like proceeds of sale and surplus rents. The origin of the moneys cannot in any way affect their applicability when a sale gives the occasion for a rest. At such a rest, whenever there is a sale, however small, what should be brought in is the difference between total receipts and the amount then due for interest and costs. If there is an arrear of interest, then the principle laid down in *Thompson v. Hudson* [1870]¹ applies, and the defen-

dant has purported to apply it here, as one of the cases to which Warrington, J., in *Wrigley v. Gill* [1904]² has said that the principle of *Thompson v. Hudson*¹ applies—see also *Parr's Banking Co. v. Yates* [1898].³ In justice as between mortgagor and mortgagee the rents and profits ought to be brought in every half-year as in Ireland—*Fisher on Mortgages* (5th ed.), p. 850, citing *Graham v. Walker* [1847].⁴

Hughes, K.C., and Austen-Cartmell, for the defendant.—The account of rents and profits must always be kept separate. In *Fisher on Mortgages* (5th ed.), p. 849; *Coote on Mortgages* (7th ed. by Robbins), pp. 1,200, 1,207–8, and 1,219; *Seton on Decrees* (6th ed.), p. 1,975; and *Daniell's Chancery Forms* (5th ed. 1901), p. 773, *Thompson v. Hudson*¹ is cited as the authority for bringing in proceeds of sale and not rents and profits on the occasion of a rest. The whole of the reasoning in that case goes to the sale-moneys, and nothing else. Lord Romilly, M.R., had not in his mind that any of the money was rents and profits, as appears from a collation of all the reports of the case.¹ There is no logical foundation for the proposition that the mere receipt of purchase-moneys on a sale warrants a rest being made for all purposes; there is no authority for it, and the practice is as stated by the Master, as reported in *Wrigley v. Gill*.²

Younger, K.C., in reply.—As to principle and logical result, nothing more has been said than that a mortgagee is not obliged to take his money by dribble—*Nelson v. Booth* [1858].⁵ A mortgagee by his own act of selling thereby acknowledges his willingness to receive the proceeds of sale, and whatever the source from which any net surplus of money comes into the hands of the mortgagee so selling, so soon as he arrives at an occasion for a rest he should bring in the net balance of all moneys in his hands after payment of principal and interest. It would be absurd that if, on a mortgage of 100,000*l.*, a mortgagee sells a cottage

(2) *Ante*, p. 160; [1903] 1 Ch. 241.

(3) 67 L. J. Q.B. 851; [189] 2 Q.B. 450.

(4) 11 Ir. Eq. R. 415.

(5) 27 L. J. Ch. 782; 3 De G. & J. 119.

(1) 40 L. J. Ch. 28; L. R. 10 Eq. 497; 18 W. R. 1081.

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for 50%, he should be entitled to make a rest on the 50%. only. There is no reason on principle why the decision in *Thompson v. Hudson*¹ should not be accepted.

JOYCE, J.—This action, as I understand it, is practically an action for redemption by a second mortgagee against the first mortgagee, and a decree was made by me on August 3, 1901, directing (with some directions immaterial for the present purpose) common accounts. That decree contains no direction for making rests, and I see no reason for adding such a direction now, even if it would be allowable for me to do so.

The accounts have been brought in, and what has been done as to sales of property has been this: the receipts from the sales have been brought in as debits against the mortgagee and credits to the mortgagor in the first account—namely, the account which is practically an account of what is due on the security, and brought in at the date of receipt.

Now, what has been contended by the plaintiffs has been this. They have started what, to my mind, is a new and ingenious theory that whenever a mortgagee brings into account what he has received from a sale, a rest is to be made at that date in the account of rents and profits, so as to bring in any balance which would be in the hands of the mortgagee from the rents and profits. No authority for this has been, or, I believe, could be cited, but this was said to have been done in the well-known case of *Thompson v. Hudson*,¹ and to be really involved in the decision in that case. The law or practice, whichever you may call it, on this subject has recently been stated, and I think correctly stated, by Mr. Justice Warrington in the case of *Wrigley v. Gill*,² where he says that the practice is this: "The first account"—that is, the account of what is due—"is treated as separate from the account of rents and profits. If money is received from an exercise of the power of sale, that money is credited to the mortgagor under the first account"—that is, the account of what is due—"at the date at which it is received, but unless rests have been directed in the judgment the account

of rents and profits, following the usual rule, goes on without rests"; and later on he says, "The ordinary rule is admitted that in the absence of special circumstances the account against a mortgagee in possession is not directed with rests—that is to say, the account of the rents and profits runs on from beginning to end without reference to the question whether he has at any particular time had in his hands more than sufficient to pay the interest or not, the reason being that a mortgagee is not bound to accept payment by dribblets, but is entitled to have the account taken as a whole, and not to be treated as repaid until that account has been so taken." But on further investigation it turns out that *Thompson v. Hudson*¹ is no authority against what Mr. Justice Warrington has stated. Certainly the question as to making a rest in the account of rents and profits does not appear by any of the reports to have been argued or even referred to in that case. No doubt the Master of the Rolls does mention a very large sum as having been received, a sum so large that, I suppose, it was thought by some of the counsel, and by myself too at first, that it must have consisted in great part of receipts in respect of rents and profits. But, on looking into the contemporaneous reports of the case, it appears by the report in the *Law Journal Reports*, there having been two mortgages in this case of *Thompson v. Hudson*¹ (which is quite an immaterial circumstance), that, the interest on both mortgages being in arrear, the plaintiffs entered into possession of all the mortgaged property. The date of the entry into possession is given as 1861 in the report in the *Weekly Reporter*. The report in the *Law Journal Reports* adds that the plaintiffs "from time to time, previous to May, 1861, sold portions of the Whitby estate, and applied the proceeds in reduction of interest on both mortgages, so as to leave in that month only about 1,000*l.* due in respect of such interest." It appears that the plaintiffs had been in possession but a very short time. I collect from these reports that the sum received consisted of receipts in respect of purchase-money of various lots of the

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Whitby estate, the aggregate of which sums so received as purchase-money, until the 21,600*l.* was received from the Albert Gate house, was less than the amount of the interest due by 1,000*l.* If possibly it could be ascertained that any part of the amount received in that case was received in respect of rents, there was no order that it was to be applied in reduction of interest, but the mortgagee himself gave credit for the amount. On the whole I see no reason whatever to suspect that there could have been anything of the kind, or that there had been any receipt of rents at all. Taking that report alone, there is certainly no decision, express or implied, that what, if anything, had been received in respect of rents must be given credit for against interest at that date; and when we look at the order itself it is perfectly plain that no such order was made, because it appears from the record that the only order made was as follows: "His Lordship being of opinion that the sale moneys received by the plaintiffs from the sale of the mortgage properties are to be applied first in payment of interest, costs and expenses due to them at the dates when such sale moneys were respectively received, and then in reduction of principal due at these dates respectively, refers the certificate back to chambers to vary."

It appears to me an entirely new theory that a rest is to be made in the account of rents and profits whenever (because it must go to that length) a sale has taken place of any part of the mortgaged property. In my opinion the objection raised to the account on this ground fails, and the account must be taken in the way I have stated without making rests, so that no rest is to be made in the account of rents and profits.

Solicitors—Bower, Cotton & Bower, for plaintiffs;
Robbins, Billing & Co., for defendants.

[Reported by *Warwick H. Draper, Esq.,*
Barrister-at-Law.

SWINFEN EADY, J. }
1905.
Jan. 11, 12. Feb. 3. }

BARBARA DOD'S
CHARITY, *In re.*

Charity—Administration—Petition—Consent of Charity Commissioners—Exemption—"Any cathedral or collegiate church"—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 17 and 62.

The phrase "any cathedral or collegiate church" in section 62 of the *Charitable Trusts Act, 1853*, does not extend so as to include an endowment, indirectly connected with the cathedral church, but over which the dean and chapter have not any control; which does not form a portion of the capitular estates; and which is not held by them upon any trusts.

The minor canons of *Chester Cathedral* were entitled, independently of the dean and chapter, to the income of certain lands, the legal estate of which was not vested in the dean and chapter. The dean and chapter, however, were indirectly interested in this trust, in so far as every increase in the income of the trust relieved them, *pro tanto*, in their statutory duty of maintaining the income of the minor canons at a certain level:—

Held, that this trust was not covered by the exemption in section 62 of the *Charitable Trusts Act, 1853*, and that it was necessary, accordingly, for the dean and chapter, under section 17, to obtain the certificate of the *Charity Commissioners* before they would be entitled to present a petition for the administration of the trust.

By her will dated May 2, 1703, *Barbara Dod* bequeathed to the six petty canons (now represented by four minor canons) of *Chester Cathedral* the equitable interest in certain lands in *Boughton* and *Childer Thornton*, in the county of *Chester*. At the present time the lands in question produced an income of about 300*l.* per annum.

By an Order in Council dated January 15, 1842, the Dean and Chapter of *Chester* were required to provide that the stipends of the four minor canons should not be less than 150*l.* each.

It was believed that by developing the lands in question for building purposes

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the income now derived from them could be greatly increased; and the present petition was presented by the dean and chapter, asking for the administration of the charity with a view to such development.

A question was raised at the hearing of this petition as to whether the consent of the Charity Commissioners was necessary to the petition under section 17 of the Charitable Trusts Act, 1853.

A question was also raised as to whether, on the true construction of the will of Barbara Dod, the legal estate in the lands in question were vested in the dean and chapter, as trustees for the minor canons; or whether the legal estate were now vested in the heir-at-law of Barbara Dod. His Lordship decided that the legal estate was not vested in the dean and chapter.

Evans, K.C., and *Francy*, for the petitioners.—The consent of the Charity Commissioners is not necessary, inasmuch as the Charitable Trusts Act, 1853, does not extend to "any cathedral or collegiate church," by virtue of section 62. This phrase covers any charity in which the cathedral body may be "interested"—*per Kindersley, V.C.*, in *Meyrick's Charity, In re* [1855],¹ as reported in the *Law Times Reports*. The petitioners are especially "interested" in this endowment of the minor canons in the present case, inasmuch as every increase in the income of this endowment results in relieving them in their statutory duty of making up the balance of 150*l.* for each canon. "Cathedral," moreover, in section 62 ought to be interpreted in a liberal sense, so as to include the whole cathedral body—that is, not merely the dean and chapter, but any person, or class of persons, who are more or less directly connected with the cathedral establishment.—*St. John Street Wesleyan Chapel, Chester, In re* [1893].² Thus in *Stockport Ragged, Industrial, and Reformatory Schools, In re* [1898],³ it is clear that

Chitty, L.J., was of opinion that the term "cathedral" in section 62 covered a cathedral school. He says: "The reason why 'cathedral' and 'collegiate' are put in, [in connection with schools] is plain from the opening part of the 62nd section, which relates to cathedral or collegiate churches, and takes them out of the general jurisdiction. Now, there are schools attached to cathedral or collegiate churches, and such of those schools as are charities are intended to be put back into the jurisdiction."

R. J. Parker, for the Attorney-General.—The consent of the Charity Commissioners is necessary, since the minor canons are not a "cathedral or collegiate church" within the meaning of section 62. As to the dictum of *Kindersley, V.C.*, in *Meyrick's Charity, In re*,¹ that dictum was differently reported in the *Jurist*. It is this latter report that was cited with approval by *Hall, V.C.*, in *Att.-Gen. v. Manchester (Dean and Canons)* [1881].⁴ In *Meyrick's Charity, In re*,¹ the land was given upon trusts, of which *Jesus College, Oxford*, was substantially the object. That could not be said of the Dean and Chapter of *Chester* with regard to the endowment of the minor canons in the present case: their interest is accidental and indirect only, and analogous to the interest that a college might have in the independent endowment of a university professor whom the college was bound to support by a fellowship. Where there is a doubt as to whether section 62 does, or does not, apply, the Court will lean in favour of its non-application—*per Turner, L.J.*, in *Duncan, In re; Taylor's Trusts, In re* [1867]:⁵ "In determining the question, it is right, in the first place, to observe that the statutes under which the Commissioners derive their powers, having been passed for the public good, it is the duty of Courts of justice to put such a construction upon them as may tend to the furtherance rather than to the restriction of those powers"; and *per the Court in Clergy Orphan Corporation, In re* [1894]:⁶ "We

(1) 24 L. J. Ch. 669; 25 L. T. (O.S.) 92, 93; 1 Jar. (N.S.) 438.

(2) 62 L. J. Ch. 927; [1893] 2 Ch. 618.

(3) 68 L. J. Ch. 41, 43, 45; [1898] 2 Ch. 687, 695, 699.

(4) 50 L. J. Ch. 562, 567; 18 Ch. D. 596, 611.

(5) 36 L. J. Ch. 513, 514; L. R. 2 Ch. 356, 359.

(6) 64 L. J. Ch. 66, 75; [1894] 3 Ch. 145, 154.

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will only observe that it is for those who claim an exemption to make it out."

Macnaghten, K.C., and *MacSwinney*, for the respondents, the minor canons.

Eve, K.C., replied.

Cur. adv. vult.

Feb. 3.—SWINFEN EADY, J., delivered a written judgment: The question raised before me is whether the dean and chapter are entitled to present this petition without first obtaining the certificate of the Charity Commissioners—that is to say, whether the charity constituted by the will of Barbara Dod is exempted from the operation of the Charitable Trusts Act, 1853, by the provision in section 62 of that Act—namely, "This Act shall not extend to . . . any cathedral or collegiate church." The petition has been served on the four minor canons, and they contend that they are the persons acting in the administration of the charity and the beneficiaries thereof, and that they are entitled to apply to the Charity Commissioners for a scheme, and that the dean and chapter, who are not trustees and are not entitled to interfere in the management of the charity, cannot present this petition to the Court without the certificate of the Charity Commissioners. The Attorney-General, who has been served with the petition, also contended that the certificate of the Charity Commissioners was necessary. Although the dean and chapter are not directly interested in the lands settled by the will of Barbara Dod, they are indirectly interested in the following way. Under and by virtue of an Order in Council dated January 15, 1842, they are required to provide that the stipends of the minor canons shall not be less than 150*l.* each per annum, so that a total annual sum of 600*l.* is required for this purpose. The minor canons have not any source of income other than the said charity, and any deficiency is made good out of the capitular revenues. If the income from the land in question can by judicious management, and by granting building leases, be raised to 600*l.* a year, or upwards—and the petitioners allege that a larger income than 600*l.* can eventually be obtained—the result may be

to relieve the dean and chapter altogether from any financial burden with regard to the stipends of the minor canons. In this manner, and to this extent, the dean and chapter are interested; but is an interest of this kind sufficient to bring the case within the exception contained in section 62? In my opinion it is not. It was contended on behalf of the petitioners that, wherever a charity exists for the benefit of any class of ministers, or officers, within a cathedral church, such a charity is within the exception; and for this proposition reliance was placed on a passage in Vice-Chancellor Kindersley's judgment in the report of *Meyrick's Charity, In re*,¹ as reported in the *Law Times Reports*. In that case the objection taken was that, as the funds which were the subject of the petition did not wholly belong to Jesus College, but another charity was, or might be, interested therein, the case was not within the exception. The Vice-Chancellor is reported to have said: "The purpose of that exemption (in section 62) is that, so far as relates to an application to the court in respect of any charity in which the universities or colleges are interested, it shall be unnecessary so far as regards such universities or colleges, to go before the commissioners. The object of the present petition, though it may affect funds in which another charity is interested, is in effect one in which Jesus College alone is concerned." This report differs from the report of the same case in the *Jurist*, which is as follows: "The purpose [of the exemption] was, that so far as related to the application to the Court with respect to any charitable purpose of which the colleges or universities were the object, it should not be necessary to go before the commissioners. Now, here, the object of the petition, though it may affect another charity, is in effect an end of which the college alone is the object. . . . If it is to affect matters of which the college is the object, then you need not go before the commissioners; but if it is to affect an end of which another charity is the object, then it would be necessary to go before the commissioners." It was this latter report which was cited with approval by Vice-Chancellor Hall in

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Att.-Gen. v. Manchester (Dean and Canons),⁴ and, if any cathedral or collegiate church is the object of a charity, an application to the Court may be made with reference thereto, without any application to the Charity Commissioners. The petitioners, however, are in effect seeking to extend this rule to all cases in which a minister, or officer, of a cathedral, or collegiate church, is interested in a charitable endowment. As was said by Lord Lindley in *Stockport Ragged, Industrial, and Reformatory Schools, In re*,³ section 62 is a very obscure section; and as the Court pointed out in *Clergy Orphan Corporation, In re*,⁶ it is for those claiming that they are exempt from its provisions to make out the exemption. In my judgment the petitioners have failed to do so. The exception of "any cathedral or collegiate church" cannot be interpreted so as to exclude from the operation of the Act every endowment in which any minister, or officer, of the cathedral is interested, nor so as to exclude from the operation of the Act this particular endowment of the minor canons. By section 18 of the Ecclesiastical Commissioners Act, 1866 (29 & 30 Vict. c. 111), the Ecclesiastical Commissioners are empowered under certain circumstances to make provision out of certain income "for securing adequate stipends and allowances to the minor canons, schoolmasters, organists, vicars choral, lay clerks, officers, choristers, bedesmen, servants, and other members of the cathedral or collegiate church." A large class of persons is here designated, and the argument of the petitioners is that, if a charity be established for any of these persons, such charity is outside the Charitable Trusts Act, 1853, although not within the jurisdiction of the Ecclesiastical Commissioners, unless the persons entitled constitute a corporation, when statutory powers are given of transferring the property to the Ecclesiastical Commissioners, on terms. I cannot construe the exception of "any cathedral or collegiate church" as extending to an endowment over which the dean and chapter have not any control, and which does not form portion of their capitular estates, and is not held by them upon any

trusts. I therefore direct the petition to stand over until further order, giving leave to the respondents to apply, in the event of the certificate of the Charity Commissioners not being obtained within a reasonable time.

Solicitors — Tatham & Procter, agents for Barker & Rogerson, Chester, for petitioners; Solicitor to Treasury; Woonnam & Smith, agents for Boydell & Taylor, Chester, for respondents.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.]

[IN THE HOUSE OF LORDS.]

1905. { COMISKEY AND OTHERS
Feb. 7. { v. BOWRING - HANBURY
AND ANOTHER.*

Will—Construction—“In full confidence”—Precatory Trust—Gift in Default of Disposition.

A testator gave to his wife the whole of his real and personal estate “absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces”:—Held (LORD LINDLEY dissenting), that there was a gift in favour of the surviving nieces on the widow's death, subject to a power of testamentary appointment by the widow to one or more of the nieces, who in default of appointment were to share equally; and that if the nieces predeceased the widow the latter would become absolutely entitled.

Decision of the COURT OF APPEAL (reported 73 L. J. Ch. 222; [1904] 1 Ch. 415) reversed.

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Lord Lindley.

COMISKEY v. BOWRING-HANBURY, H.L.

Appeal from an order of the Court of Appeal made on February 2, 1904 (Vaughan Williams, L.J., and Stirling, L.J., from whom Cozens-Hardy, L.J., dissented), and an order of Kekewich, J., made on July 10, 1903.

The questions for decision were solely questions as to the true construction and effect of the will of the Right Hon. Robert William Hanbury, late Minister of Agriculture, who died on April 28, 1903, and whose will was proved on June 20, 1903, by the respondents. The will, which was dated October 31, 1893, provided as follows: "I desire that the remainder of the 5,000*l.* promised to my sister, S. A. C. Milman, on her marriage, being 4,000*l.*, shall be paid to her, and that the 7,500*l.* which I hold as trustee under my mother's marriage settlement, having received that sum from my predecessors, shall be paid to the surviving trustee, the value of the shares in the Colonial Sugar Co. (standing in the names of myself and my co-trustee) being, however, reckoned as a portion of such total sum of 7,500*l.* I give, bequeath, and devise to my very dear wife Ellen Hanbury the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces. I make this will in full confidence that my dear wife will show the affection of a daughter to my dear mother and step-father. I appoint my said wife Ellen Hanbury and Charles Fisher, of Brown-hills, colliery manager, executrix and executor of this my will, and I give the said Charles Fisher such sum not exceeding 150*l.* as my dear wife may decide upon."

The testator never had a child, and he was at the time of his death entitled to real and personal property of large value. A considerable part of such property consisted of freehold and leasehold

collieries, which were at his death being worked by the testator for his own benefit. The testator left seven nieces, who were the appellants.

The originating summons was heard by Kekewich, J., and by his order it was declared that upon the true construction of the will the testator's real and personal estate was given to the respondent Ellen Bowring-Hanbury absolutely for her own use and benefit. This decision was affirmed, and the nieces appealed.

Warmington, K.C., and *Christopher James*, for the appellants.—The words "in full confidence" is an old-fashioned expression equivalent to "in trust"—*Co. Litt.* 272*d.* It is not contended that the widow takes nothing more than a life interest, because in case all the nieces died before her she would be entitled to the whole. But there is no repugnancy, and the Courts below acted on a wrong principle in interpreting the early words as finally giving the whole property to the widow. The will should be construed as a whole; and so construed an intelligent and consistent meaning will be found. The words are that on his death the widow is to leave "it"—the property—among such nieces as she may select, and the limitation of the gift to the executor to 150*l.* shews that Mrs. Hanbury was not to be at liberty to spend or dispose of the *corpus*. The cases are collected in *Williams, In re*; *Williams v. Williams* [1897].¹

[They also referred to *Knight v. Boughton* [1844]² and *Hamilton, In re*; *Trench v. Hamilton* [1895].³]

Haldane, K.C., and *Jenkins, K.C.* (*Austen-Cartmell* with them), for the respondent Mrs. Bowring-Hanbury.—There is an absolute gift to the widow which cannot be cut down by the subsequent words, otherwise there would be a repugnancy. This was decided nearly fifty years ago in *Holmes v. Godson* [1856].⁴ After words of absolute gift any attempt to create a devolution of interest other-

(1) 66 L. J. Ch. 485; [1897] 2 Ch. 12.

(2) 11 Cl. & F. 513.

(3) 64 L. J. Ch. 799; [1895] 2 Ch. 370.

(4) 25 L. J. Ch. 317; 8 De G. M. & G. 152.

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wise than as the law prescribes is void—*Wilcocks' Settlement, In re* [1875].⁵

L. W. Byrne, for the respondent Fisher, the executor.

Warmington, K.C., replied.

THE LORD CHANCELLOR (EARL OF HALSBURY). — In this case the discussion appears to me to be in a very narrow compass. The question which this House has to decide turns upon a very few words. For my own part I am not able to entertain the doubt which appears to have prevailed with the learned Judge in the Court from which the case originally came, and the majority of the Court of Appeal. The situation of the parties, of course, is to be considered, and the situation of the property in this sense, that whether or not it was property which the testator contemplated remaining intact and not subject to any diminution until the time of his wife's death is an important factor in the construction of the words that he has actually used. I confess that to my mind it appears manifest that he did contemplate, whatever was the position in which he meant his wife to be, that the property which he himself left to her, to use a simple word, was to remain so that she would have power of making some disposition of it at the period of her death, whatever that disposition might be, which is the question which the House has in fact to determine.

Now, I cannot help thinking that enough has not been made of the mode in which the estate is given to her; it is all in one sentence: "I give, bequeath, and devise to my very dear wife Ellen Hanbury, the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it." I pause there for a moment before reading what follows. Reading that, I come firmly to the conclusion that he did contemplate that the property which he left was to remain; and the first inference I draw is that he did not contemplate that during her lifetime she would have made away with it, and disposed of it in any way, or placed upon it such an irrevocable cha-

racter, either by way of settlement or anything else, that at the time when she died herself it would have passed away from her power of disposition.

The next thing that occurs to me as to the nature of it is, that he does contemplate that she might make a will herself, and that those words "in default of any disposition" ought not to be read by themselves, but with the other words, "any disposition by her thereof"; so that what he is contemplating is, first of all, that the property is to remain capable of being left by her; and what he is contemplating is not a general failure of any will made by her which did not dispose of this particular property. Of course the case of no will being made by her would come within the same proposition; but what is in his mind is that she may have made a will, but have made no disposition of that particular property which she has come into possession of by reason of his death and his will.

Then what strikes one about it is this (and it is an observation which I think was made by counsel for the appellant)—that he contemplates that, in the state of facts which is before his mind, he is giving directions. I cannot think that if it was in his mind that she was to be absolute owner, and to do what she pleased with it, he would, after he had given her a complete power of disposition use such a phrase as "I hereby direct." If he contemplates that she is an absolute owner, and that his property may be given away by her, and may be used for the purpose of settlement on a second marriage or what not, the only thing that keeps his property to him and to his nieces is the possibility of her not making a disposition such as he contemplates she might make. To my mind, therefore, it is as clear as any such thing can be, that he is contemplating that she shall have the full use of it during her lifetime, and that—when she has not, as by the hypothesis I have been arguing upon she has not, made any disposition of it inconsistent with its complete disposition to the nieces—what he contemplates is that one or more of his nieces is to be the object of his bounty, and if his widow does not select one or more, then they are

(5) 45 L. J. Ch. 163; 1 Ch. D. 229.

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all to share alike. That, to my mind, is the meaning of the language. I do not stop to bring in any rules of law or any canons of construction. I look at the words merely as they stand in the will, and I think the natural and ordinary meaning of those words is what I have suggested.

The language which is relied upon of the gift to Charles Fisher is, I think, not absolutely immaterial. It is, in one sense, a small point, but I think, on the other hand, it does look as if the testator had in his mind that when she was in possession of whatever it was she was to be in possession of, she was not to be able to do what she would with it; but her power even to give such a sum as 150*l.* is limited, and that in language which I think is not subject to any ambiguity at all: "I give the said Charles Fisher such sum not exceeding 150*l.* as my dear wife may decide upon." It seems to me that that would be an extraordinary thing for him to do if he supposed that she was to be an absolute owner with power to determine in what way every part of the capital of the estate should go.

For these reasons I confess I am unable to entertain any doubt that what the testator did mean was that his wife should have the full use and enjoyment of the property during her life, and at her death she should either select among the nieces such as she pleased, or, if she did not make any selection, that they should share and share alike.

Under those circumstances I am unable to agree with the judgment of the Court of Appeal, and I move your Lordships that that judgment be reversed.

LORD MACNAGHTEN.—I am of the same opinion, and I accept and adopt the judgment of Lord Justice Cozens-Hardy.

LORD DAVEY.—I agree, and I will only, out of respect to Lord Justice Vaughan Williams and Lord Justice Stirling, add a very few words to what has been said.

The words which have been so much commented upon, "in full confidence," are, in my opinion, neutral. I think it would be impossible to regard them, and I do not for the purpose of my judgment

regard them, as technical words in any sense. They are words which may create a trust or may not create a trust, and whether they do so or not must be determined by the context of the particular will in which you find them.

Now, we have been enjoined a great many times by the learned counsel on both sides of the Bar that we must read the whole will in the first instance. I have obeyed that direction, and in fact I have read it more than once, and what strikes me upon reading it is this—first, I observe that the testator did obviously intend—whether his intention can be carried into effect or not is a different question—but he did obviously intend that his nieces should have an interest in and should be entitled to this estate in some event; and secondly, that, although he directed it in the last resort to go to his nieces, he hoped or believed—or, to use his own words, "had confidence"—that they would take the estate through the testamentary bounty of the widow.

I make this further observation—that if I read the will through without paying attention to legal rules, and for the purpose only of seeking the testator's intention—what he meant, and what the meaning of the words is that he used without for the moment regarding the question whether his intention could legally be carried into effect or not—it is, to my mind, obvious that he did not intend that his wife should have an absolute power of disposition. And for this reason, because, construing the words in the way in which the respondent would wish them to be construed—construing the words "In default of any disposition by her thereof by her will or testament" as meaning any testamentary disposition in favour either of the nieces or of anybody else, he intended in that event that it should go to the nieces. It is quite true that in that event the law would not give effect to the testator's intention; but if you are to seek what the testator's intention was, I think that was the purport of what he intended. That seems to me to throw considerable light upon the meaning we must attach to the word "absolutely." I do not myself attach any great importance to the use of the

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word "absolutely." Reading it as qualifying or expressing the estate which the wife had to take, it does not seem to me to do more than to give her a fee-simple. It is now admitted that she has a fee-simple, and the question is whether there is a good executory limitation, capable of taking effect upon her death. The use of the word "absolutely" as defining the amount of the estate which is given to the wife must, of course, be subject to any executory limitation, or any other valid limitation or exception which you find engrafted on that estate in fee-simple; therefore I attach no importance, or very little importance, to the use of the word "absolutely." In my opinion, the question really is this: Do those words "in default of any disposition by her" mean any disposition in favour either of the nieces or anybody else; or are they, as counsel for the appellant contended, to receive a referential construction, and to be construed as relating to such a disposition as that which he has expressed his confidence that his wife would make? That is a point which it is impossible to labour, and I do not know that I can add anything to what the Lord Chancellor has said upon it, or that I can do anything more than express my entire agreement with him. I think that is the most natural way of reading the will. I think any layman reading the will, and considering what the testator's intention was, would come to the conclusion—at any rate I come to the conclusion—that he is speaking only of a default of any such disposition as he had expressed his confidence that his wife would make; and, if so, I am of opinion that there is a good executory limitation.

I ought to say that it does not appear to me very important whether you treat the words "in confidence" as creating a trust or not. The question is whether the ultimate limitation is a good executory limitation; and even if you treat the words "in confidence" as only expressing a hope or belief, the will would run thus: "I hope and believe that she will give the estate to one or more of my nieces, but if she does not do so, then I direct that it shall be equally divided between them." I think that is a perfectly

good limitation. The case which the appellants' counsel last referred to shews that, although a gift over in default of alienation generally would be bad, yet a gift over in default of alienation to a particular individual, or alienation to any but a particular individual, would be good, and I see no reason whatever for thinking that this is not a good limitation. I will only add this: in none of the cases which have been cited in which questions of this kind have been discussed was there a gift over in default such as we find in the direction in this will, and I am not aware of any case of the kind. I observe, in some of the cases to which our attention was drawn, that absence of any such gift over, the absence of any direction such as we find in default of a bequest by the widow, is made a strong point for not holding that the words "in confidence," or similar words, created an obligatory trust.

There is one practical observation I will make for the consideration of the parties, and that is this: The question upon which the argument took place is stated in the appendix: "That it may be determined whether upon the true construction of the Testator's said Will the Testator's real and personal estate and property is given to the Plaintiff absolutely for her own use and benefit, or whether the same is given to the Plaintiff for her life only and after her death," and so forth. That seems to me to be framed on an erroneous hypothesis. Counsel for the appellants does not contend, and I do not think it would be possible to contend, that the wife has only a life estate. Her real interest is an estate in fee or an absolute estate in personalty, subject to an executory limitation. The parties will perhaps consider what is the best way to state it. I should think something of this kind would do: "That the plaintiff is entitled to an absolute estate subject to a conditional executory limitation to the testator's nieces living at her death, in case she shall not have made a will devising the estate to one or more of such nieces." Some words of that kind would do, but obviously we cannot answer the question which is asked of us, Yes or No.

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LORD JAMES OF HEREFORD.—I have very few words to add to the judgments that have already been delivered, and in which I concur. It is admitted on all hands that our only duty is to discover what was the intention of the testator, and that we must make that discovery from the words used in the will.

Now I do not enter, of course, into any consideration of the particular mental powers of the testator, but we must treat him who made the will as a person of ordinary common sense, meaning something by the words he wrote. It is contended on the one hand that this was a disposition of an unfettered freehold estate to the widow. If that had been so, it would have been very easy to have left out the words that appear subsequently to those first words in the will. There is in that contention no meaning whatever given to the words that follow—namely, the phrase, “and in default of any disposition by her thereof” the estate is to go to his nieces. I do not think we can shut out those words from the construction of this will, but I can quite conceive that, the word “absolutely” being used, we have to find some reason why in the first disposition he should have used the word “absolutely” and in the second there should have been this gift over to the nieces. I think the meaning of the testator from a common-sense point of view is clear enough. He wished his widow to have a life estate in this property, and he then wished after that life estate that it should be left to his nieces—to those of his own blood. If he had made the disposition at that time, in 1893, he must have selected the objects of his bounty without relation to what would be their condition at the time of his wife's death. There are seven nieces. We have no evidence about it, but I infer, from one of them being an infant now, that they were young ladies at the time of the will. At the time of the widow's death they would be in different conditions, deserving a different amount of beneficial gift. One might have married a rich man, and another might have married a poor man; and one might have a large family and another none; and one might not be married at all. Therefore it was

that he wished the power of selection to be given at a time more or less approaching that at which they would be recipients of the bounty. For that reason, while he gave his wife a life estate only, he asked her to take care that the nieces should have the estate subject to her selection of the individual nieces and a division of the property apportioned between them as she thought fit. That was apparently a most sensible, business-like, common-sense view of the position which Mrs. Hanbury was likely to take up in relation to these ladies; and I believe that was the whole intention of this will.

LORD ROBERTSON.—I entirely agree.

LORD LINDLEY.—I am sorry to say I am unable to come to the same conclusion, but I will not trouble your Lordships with many observations upon the question. It is impossible to say that a trust for the nieces, or at least for one of them selected by the wife, cannot be extracted from this will, but personally I think the construction adopted by Lord Justice Stirling is more in accordance with the language used than the construction contended for here by the appellants. The wife was in my opinion intended to be the absolute owner, free from any legal or equitable obligation in favour of anybody, and free from any executory gift over. I admit that the contrary construction can be put upon the will, but that does not appear to me to be the natural one.

Appeal allowed.

Solicitors—Walker, Martineau & Co., for appellants; Patersons, Snow, Bloxam & Kinder, for respondents.

[Reported by J. Eyre Thompson, Esq.,
Barrister-at-Law.]

FARWELL, J. }
 1905. } WILLATTS, *In re*;
 Jan. 13, 17. } WILLATTS v. ARTLEY.

Will—Construction—“What is left”—Real Estate—Gift to Some of Several Co-heiresses after Death of A—Life Estate—Necessary Implication—Intestacy during Life of A.

A gift of real estate after the death of A to persons who are some, but not all, of the co-heiresses of the testator does not confer upon A a life estate by necessary implication.

Hutton v. Simpson (2 Vern. 722) and *Willis v. Lucas* (1 P. Wms. 472) examined and explained. *The reasoning in Ralph v. Carrick* (48 L. J. Ch. 801; 11 Ch. D. 873) applied.

A testator gave his household effects to his wife absolutely, and directed that at his death his wife was to have power to sell all property and land belonging to him, and that at her death “what is left” was to be divided between two out of his five daughters:—Held, that the words “what is left” meant the net residue after payment of debts and costs of realisation, and that the testator died intestate during the life of his widow as to his personal estate (other than his household effects) and as to all his real estate.

Adjourned summons.

By his will dated May 17, 1903, the above-named testator, William Willatts, appointed his widow, the plaintiff Emma Willatts, and her daughter, the defendant Constance Artley, to be executors of his will, and after directing them to pay his just debts and funeral and testamentary expenses, he continued: “I give and bequeath to my wife Emma Willatts all my household effects absolutely and at my death the said Emma Willatts to have power to sell all property and land belonging to me and at her death what is left to be divided between Eliza and Emma Willatts my two daughters by second wife so that no husband they may marry shall have power or control over the same.”

The testator died on August 28, 1903. His real estate, consisting of two cottages and adjoining land, was of the value of

about 900*l.*, and his personal estate, exclusive of the furniture, was of a total value of about 112*l.*

The testator had been twice married, and he left surviving him two daughters (of whom the defendant Emma Bennett was one) and the son and other children of a deceased daughter, all issue of his first marriage, and the two infant defendants Eliza and Emma Willatts, daughters by his second wife, the plaintiff. The defendant Constance Artley was the plaintiff's daughter by a former husband.

This was a summons by the testator's widow asking for a declaration that she was entitled during her life to the residuary estate of the testator, with power during her life to expend such portion of the capital of such residuary estate as she might think fit, and that the infant defendants were entitled to such part of the said capital as might remain at the date of the death of the plaintiff; or that the beneficial interests of all parties of and in such residuary estate might be declared.

Chubb, for the plaintiff.—The plaintiff claims to be entitled to the residuary estate for her life, with power to expend so much of it as she may think fit. In *Hawkins on Wills*, p. 179, and *Jarman on Wills* (5th ed.), vol. i. p. 500, it is suggested that a gift to one of several co-heirs after the death of A does not confer a life estate on A; but in *Theobald on Wills* (6th ed.), p. 703, *Hutton v. Simpson* [1716]¹ is referred to as an authority for saying that a devise to one of several co-heiresses after the death of A gives A a life estate by implication, and in *Willis v. Lucas* [1718]² Lord Chancellor Parker expresses an opinion in favour of implying a life interest in such a case. *Ralph v. Carrick* [1879]³ will be cited against this contention; but in *Jarman on Wills* it is suggested that the statement in *Ralph v. Carrick*³ was an *obiter dictum*.

Shobbeare, for the infant defendants.—Either the plaintiff takes a life interest or there is an intestacy during her life. The

(1) 2 Vern. 722; *sub nom. Simpson v. Hornby*, Pr. Ch. 439, 452; and *Simpson v. Hornby*, Gilb. 115, 120.

(2) 1 P. Wms. 472; 10 Mod. 416.

(3) 48 L. J. Ch. 801; 11 Ch. D. 873.

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infant defendants adopt the argument of the plaintiff in support of the former contention. On the other hand, the view expressed in *Hawkins on Wills* is opposed to that put forward in *Theobald on Wills*, and the later cases seem to shew that there is no reason for the rule that a devise to one of several co-heiresses after the death of A gives A a life estate by implication; and in *Springfield, In re; Chamberlin v. Springfield* [1894],⁴ Kekewich, J., in the case of a bequest to some of the testator's next-of-kin after the death of his widow refused to give the widow a life estate by implication. *Constable v. Bull* [1849],⁵ followed in *Bibbens v. Potter* [1879],⁶ indicates that the words "what is left" are not enough to shew that the widow takes an absolute interest in the residuary estate.

J. F. W. Galbraith, for the defendant Emma Bennett.—With regard to personality, in *Woodhouse v. Spurgeon* [1883],⁷ and in *Springfield, In re*,⁴ where the reasoning of Cotton, L.J., in *Ralph v. Carrick*⁸ was applied, it was held that a bequest after the death of A to some of the persons who were the testator's next-of-kin did not give A a life estate by implication. The same reasoning applies to a case of realty, where some only of several co-heiresses are named. In *Jarman on Wills* (5th ed.), p. 500, the application of the doctrine to the case of a devise to one of several co-heiresses is criticised, and *Hutton v. Simpson*¹ and *Willis v. Lucas*,² as authorities for such application, are adversely commented on.

Chubb, in reply.—There is as much indication of intention in this will as there was in *Blackwell v. Bull* [1836],⁹ where the wife took a life estate by implication in both realty and personality.

The defendant Artley did not appear.

Cur. adv. vult.

Jan. 17.—FARWELL, J., after stating the facts and reading the will above set out, continued: I am unable to find any express words of gift to the widow of any

part of the real estate. The words "what is left" appear to me to mean the net residue after payment of debts and costs of realisation, and I cannot extract from them any gift of a life or other interest to the widow. If I were at liberty to guess, I might suppose that he meant to give the widow power to apply the *corpus* to such an extent as she required for her own benefit; but he has not said so, and I cannot supply the necessary words. The will therefore raises the neat point whether a gift of real estate after the death of A to persons who are some, but not all, of the co-heiresses of the testator amounts to a gift of a life estate to A by necessary implication.

It has been settled since the case in the *Year-Book* 13 Hen. 7. pl. 17 (I cite it from *Horton v. Horton* [1604]⁹), that "a devise to his heir of his land after the death of his wife, is a good devise by implication to the wife; for it appears he intended his heir should not have it until the death of his wife; and none other can have it besides the wife; and therefore it is a good devise to the wife by implication." It is equally well settled that a devise to a person other than the heir after the death of A gives no estate to A, because the land can descend to the heir in the meantime, and the testator has expressed no intention that it should not; and the heir is not to be disinherited without necessary implication. It is also well settled that a life estate will not be implied from a gift on the death of A to the testator's heir together with another or others—*Ralph v. Carrick*.³ The meaning of necessary implication is well stated in Chief Justice Vaughan's judgment in *Gardner v. Sheldon* [1672]¹⁰: "In a will estates are often given by implication. But I shall take this difference concerning estates that pass by implication, though it be by will. An estate given by implication of a will, if it be to the disinheriting of the heir-at-law, is not good, if such implication be only constructive and possible, but not a necessary implication. I mean by a possible implication, when it may be intended that the testator did purpose, and had an intention to devise his land

(4) 64 L. J. Ch. 201; [1894] 3 Ch. 603.

(5) 18 L. J. Ch. 302; 3 De G. & Sm. 411.

(6) 10 Ch. D. 733.

(7) 52 L. J. Ch. 825; 49 L. T. 97.

(8) 5 L. J. Ch. 251; 1 Keen, 176.

(9) Cro. Jac. 75.

(10) Vaugh. 259, 262.

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to A. But it may also be as reasonably intended, that he had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A., when A. must have the thing devised or none else can have it. And therefore if the implication be only possible, and not necessary, the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambiguously to the contrary."

It has been pointed out in *Jarman on Wills* (5th ed. vol. i. p. 500) that "there seems to be not the same absurdity in supposing a testator to give to *one* of his co-heiresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended." But it is said that there is authority to the contrary, and *Hutton v. Simpson*¹ is cited in *Theobald on Wills* as an authority for the proposition that a devise to one of several co-heiresses after the death of A gives A a life interest. The fourth resolution is as follows (at p. 723): "That a devise to Bridget after the death of his wife, although Bridget was but one of the two co-heirs, would give an estate for life to the wife by implication: but *that* would not concern this case; for the words in the will after the death of the wife, related only to her jointure-lands devised to Bridget." The case in *Vernon* is also reported in *Pr. Ch.* p. 439, and in *Gillb.* p. 115, and it is plain from these reports that no such point was in fact decided. The reports are identical, and are as follows: "As to the first point, the Court seemed pretty clear that the wife took no estate for life by implication, because the implication which shall disinherit an heir at law must be necessary; and here was no necessary implication, though the daughters were heirs, because it may be intended to extend only to those lands which were before expressly devised to the wife for life, that they should not have them till after her death; but for the others, they should go to them immediately, and there-

fore the will shall be taken distributively, according to the case of *Cook v. Gerrard* [1669]."¹¹ And subsequently it is said in *Pr. Ch.* p. 452, and in *Gillb.* p. 120: "As to the other points, he was of opinion, that the wife took no estate for life by implication, for he had, in the foregoing part of his will, devised several lands to her for life, for her jointure, and in full of all claims and demands whatsoever, both in law and equity; and when he after devises, after the death of his wife, all his lands, tenements, rents, reversions, profits, and hereditaments whatsoever (not before disposed of) to his daughter, &c. this shall be taken distributively, that is to say, all the lands which he had before given his wife, to go to his daughter after her death, and all other his lands, not before devised, to his daughter immediately; and to make any other construction on these general words would be absurd, when he had before, in such full and express words, provided for his wife besides; that in no case an heir-at-law is to be disinherited by implication, unless it be necessary, which in this case it is not." This has already been pointed out by Sir William Grant in *Dyer v. Dyer* [1816],¹² by Mr. Justice Bayly in *Rex v. Ringstead (Inhabitants)* [1829],¹³ and by Lord Esher in *Ralph v. Carrick*.³ It must be remembered that Mr. Vernon, who was a most learned lawyer, did not publish his own reports, and is believed to have made the notes which were published after his death as memoranda merely for his own use. The fourth resolution, regarded as a mere note, might well be read as meaning that, even if the devise would give an estate by implication, that would not concern the case. I am therefore of opinion that *Hutton v. Simpson*¹ is not a decision, and I do not think that it can fairly be said to be even a *dictum*, on the point. Then it is said that Lord Chancellor Parker expressed an opinion in favour of implying a life interest in *Willis v. Lucas*.³ I have compared Mr. Peere Williams's report of this case with that in 10 *Mod.* 416,

(11) 1 Saund. 181; 1 Lev. 212.

(12) 19 Ves. 612; 1 Mer. 414.

(13) 7 L. J. (o.s.) M.C. 103; 9 B. & C. 218, 228.

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and I think that it is plain that the statement at p. 475 of 1 *P. Wms.* is the argument of counsel, and not the opinion of the Lord Chancellor, and I read Mr. Peere Williams as stating that the Lord Chancellor said nothing as to this. I have considered the argument urged for the wife in that case. It was founded on the proposition of law stated by Littleton (*Co. Litt.* 163a) that daughters inheriting "be but one heir to their ancestor," in accordance with which it was held in *Reading v. Royston* [1702]¹⁴ that where a man devised his land to the son of one of his two daughters and co-heiresses the son took the entirety as devisee, and could not take one moiety by his superior title of co-heir. The decision is thus stated: "Where a devise to an heir gives the same estate which would descend, the devise is unnecessary, and *nihil operatur*; it has no effect, and therefore it is void: But here is not a devise to an heir; both co-parceners make the heir, and the one is not an heir without the other; and supposing the devise void as to one moiety, the other moiety must descend to both: But the grandson must take by the devise in this case, because nothing can descend to him *ut uni cohæredi*." But "Though parceners before partition have one entire freehold in respect of any stranger's *præcipe*, yet to many purposes among themselves they have in judgment of law several freeholds; for each parcener, where there are two of them, has really but a title to a moiety of the land, and is not, as in case of joint tenancy, seised *per my et per tout*: the same law holds where there are more parceners, for in such case each has but a title, in judgment of law, to her proportion; therefore parceners may enfeof each other of their share, as well as convey it to strangers"—*Bac. Abr.* "Co-parceners," B). (See *Year-Book* 2 Ed. 2. 103a, Anon. Selden Society, vol. xix. p. 5, and *Co. Litt.* 164a.) Although the legal estate may descend on the co-heiresses as one heir, their beneficial interests, both legal and equitable, are several, and there is no more inconsistency or absurdity in the devise to some of them after the death of A than

(14) 1 Salk. 242.

in a devise to the heir-at-law and another after such death. I cannot persuade myself that it is necessary, in order to answer the intention of the testator and to avoid an obvious absurdity in his will, to hold that he has given a life interest by implication. I should be disregarding the lucid and conclusive reasoning of Lord Justice Cotton in *Ralph v. Carrick*¹⁵ if I were so to hold. He says: "That being so, does this case come within the principle of the rule applicable to a gift to the heir-at-law after the death of A., or within the principle of the rule applicable to a gift to a stranger after the death of A.?" In my opinion it comes within the latter, because, although the heir-at-law is one of the persons to whom the gift is made, it is not necessary to give to anybody else in order to postpone the interest he is to take under the will, as he does not under the gift take that which, independently of gift, would come to him. Independently of gift he takes the whole real estate, but under that gift he takes only a share in it. So that, both as regards the interest given to the stranger and as regards the modification of the interest which the heir-at-law takes, it cannot be said that the gift after the death of A. is inoperative, unless you treat it as a postponement of the gift and give a life interest to A."

I have already pointed out that there is no express decision on the point. Nor can it be said that there is any consensus of professional opinion among text-writers in favour of implying a life estate. The statement in *Jarman*, which has been repeated by all his editors, is found at least as early as 1827 in the 3rd edition of *Powell on Devises*, vol. 2, p. 200. Mr. Vaughan Hawkins in 1863 expresses the opinion that in such a case a life estate cannot be implied, and refers to a *dictum* of Lord Romilly to that effect in *Barnet v. Barnet* [1861].¹⁶ I have come to this conclusion with some regret, but, as Sir William Grant said more than a century ago, in a somewhat similar case of *Upton v. Ferrers* (Lord) [1801],¹⁶ "a Judge in Equity is not more at liberty to raise inferences than a Court of Law. He must

(15) 29 Beav. 239.

(16) 5 Ves. 801, 805.

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not say what he supposes the testator meant, but what the testator has said . . .," notwithstanding that "A private man would say undoubtedly, that he must have intended, his wife should take for her life." As to the personality other than the furniture, the case is unarguable on the authorities. I must therefore declare that the testator died intestate during the life of his widow as to such personalty, and all his real estate.

Solicitors—W. W. Young, Son & Ward;
G. A. Double.

[Reported by R. J. A. Morrison, Esq.,
Barriater-at-Law.

BUCKLEY, J. }
1905. } MASON v. MOTOR
Jan. 27. Feb. 2. } TRACTION Co.

*Company—Power to Sell for Shares—
Reconstruction — Sale for Partly Paid
Shares—Unstamped Document.*

*Under a clause in a memorandum of association stating one of the objects of the company to be "to sell the undertaking of the company . . . for a consideration consisting in whole or in part of . . . shares . . . of any other company . . .,"—
Held, that the company could sell for partly paid shares.*

City and County Investment Co., In re (49 L. J. Ch. 195; 13 Ch. D. 475), applied.

A sale as above was part of a scheme of reconstruction under which it was proposed to distribute the partly paid shares among the (fully paid) shareholders of the selling company. Quære, whether the distribution would be ultra vires.

An agreement in writing for a sale as above was entered into between a company and a trustee for a new company, but was not stamped. On an application to restrain the agreement being carried out, the Court looked at a copy of the document, not as an agreement, but as a document evidencing the terms upon which the company proposed to sell if not restrained from so doing.

The above company was incorporated in 1898 under the name of the London Steam Omnibus Co., Lim., but in 1899 changed its name to the present one.

Its nominal capital was 420,000*l.*, divided into 42,000 shares of 10*l.* each, and at the date of this action the total number of shares held by shareholders was 12,743.

The objects for which the company was established were stated in the memorandum of association (clause 3) to be, *inter alia*, (xiv.) to accept payment for any property or rights sold by the company, either in cash or in shares or partly in one and partly in the other; (xv.) to promote companies to acquire any property in which the company should be interested, and to acquire and dispose of the shares of such companies; (xxii.) to subscribe for, take, acquire, and hold, sell, exchange, and deal in shares of any company; (xxiv.) "to sell the undertaking of the company or any part thereof, for such consideration as the company may think fit, and in particular for a consideration consisting in whole or in part of cash, or shares or debentures of any other company or companies having objects whether similar or not to those of this company"; (xxv.) to distribute any of the property of the company among the members in specie, but so that no distribution amounting to a reduction of capital should be made except with the sanction (if any) for the time being required by law.

The articles of association (clause 82) gave the directors in their absolute discretion, on behalf and in the name of the company or otherwise, power (*inter alia*) (xiv.) "to sell or dispose of the undertaking of the company, or any part thereof, for such consideration as the directors may think fit, and, in particular, for shares, debentures, or securities of any other company or companies." Article 132 empowered the liquidator on any winding-up, with the sanction of an extraordinary resolution, to "divide among the contributories in specie the whole or any part of the assets of the company." Article 133 provided as follows: "Any such liquidator may (irrespective of the power conferred upon

MASON v. MOTOR TRACTION CO.

him by the Companies Acts, and as an additional power), with the consent of a special resolution, sell the undertaking of the company, or the whole or any part of its assets, for shares, fully or partly paid up . . . in any other company . . . and may by the contract of sale agree for the allotment to the members direct of the proceeds of sale in proportion to their respective interests in the company . . . and may further by the contract limit a time at the expiration of which shares . . . not accepted or required to be sold, shall be deemed to have been refused, and be at the disposal of the liquidator or the purchasing company." Article 134 was, so far as material, as follows: "Upon any sale under the last preceding article . . . no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or resolution authorizing the same, or to purchase such member's interest in this company; but in case any member shall be unwilling to accept the shares . . . to which under such sale he would be entitled, he may within 14 days of the passing of the resolution authorizing the sale, by notice in writing to the liquidator, require him to sell such shares . . . and thereupon the same shall be sold in such manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale."

By an agreement of December 9, 1904, between the company and its secretary, Mr. Hackney, as trustee for an intended new company, after reciting that a new company was about to be incorporated with a capital of 65,000*l.* divided into 130,000 shares of 10*s.* each, and that one of the objects of the new company was to enter into an agreement "adopting these presents," it was agreed that the whole of the property and undertaking of the Motor Company should be sold to the new company, which should take over all debts and liabilities. It was provided: "(3) The consideration for the said sale shall be the allotment to the Motor Company or its nominees of 127,430 shares in the capital of the intended company with 7*s.* 6*d.* credited as paid thereon." "(6) Nothing in this agreement contained shall require the Motor Company or any liquidator thereof to be

registered in respect of any of the shares agreed to be allotted under clause 3 hereof."

"(10) If the Motor Company shall within 12 calendar months after the completion of the said sale pass a resolution for the voluntary winding-up of its affairs, the whole of the costs and expenses of and incidental to such liquidation shall be borne and paid by the intended company." "(11) This agreement is conditional on the same being ratified by resolution of a general meeting of the Motor Company, and if the same is not so ratified within 21 days from the date hereof either of the parties hereto may by notice in writing rescind the same."

On December 10, 1904, notices were sent to the shareholders of a meeting to be held on December 19 to consider the conditional agreement of December 9 "effecting the sale of the undertaking of the company and all its property and assets upon the terms therein mentioned," and, if thought fit, to pass a resolution approving the agreement, and authorising the directors "to carry the same into effect, with such, if any, modifications as they may think fit."

Each notice was accompanied by a circular, a form of proxy, and a document headed "Scheme of Reconstruction," in which the proposed scheme was set out as follows: "1. A new company to be formed with the same name as the existing company, or some other suitable name, with a capital of 65,000*l.* divided into 130,000 shares of 10*s.* each. 2. The existing company in exercise of the power contained in its memorandum of association to sell its undertaking and property to the new company for the consideration of 127,430 shares, each with 7*s.* 6*d.* credited as paid, in the capital of the new company, to be allotted to the company, or its nominees, and on the footing that the new company shall undertake all the debts and the liabilities of the existing company, and pay all the costs of liquidation and of carrying the scheme into effect. The liability of 2*s.* 6*d.* on the said shares to be payable 3*d.* on claim being made therefor, 3*d.* on allotment, and the balance as required by calls, not exceeding 6*d.*, and of which not less than two calendar months' notice must be given. 3. Every

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member of the existing company to be entitled to claim, within the time to be limited for that purpose, ten of the above-mentioned shares of the new company, each with 7s. 6d. credited as paid up thereon, in respect of every 10l. share held by him in the existing company. 4. The existing company to go into voluntary liquidation and the distribution of the said 127,430 shares in the new company to be made by the liquidator, who shall be at liberty to deal with and dispose of such of the said shares as may not be claimed or applied for by shareholders in the existing company in the manner and within the time fixed for making such claim or application."

The meeting called for December 19 was adjourned to January 4, 1905, when the resolution approving the agreement and authorising the directors to carry it into effect was duly passed.

On January 11, 1905, the plaintiff, who held 150 fully paid shares of 10l. each in the company, commenced this action, claiming—first, a declaration that the scheme of arrangement or reconstruction by means of a sale of the company's property to a trustee for a new company, and the consequential distribution among the shareholders of the proceeds of sale, was invalid and *ultra vires* the company; and secondly, an injunction to restrain the company from carrying out the scheme, and in particular from carrying into effect the agreement of December 9, 1904.

He now moved, on notice, for an interim injunction to restrain the company, its directors, servants, and agents, from carrying into effect the agreement of December 9, 1904, or from otherwise carrying into effect the scheme of arrangement or reconstruction intended to be carried out by means of it.

On the hearing of the motion the Court pointed out that the agreement of December 9, 1904, was not stamped. It was stated that the amount of the stamp duty was being adjudicated. The plaintiff declined to pay the duty, and the defendants declined to give any undertaking to pay except in the event of the agreement being held to be valid. Ultimately, upon the ground stated in the judgment,

the Court felt itself justified in looking at a copy of the agreement.

Buckmaster, K.C., and *Whinney*, for the plaintiff.—This is a scheme for reconstruction of the old company by a new company taking over its assets in consideration of shares which are not fully paid up. That is not within the memorandum of association. And it is proposed not only to sell the undertaking and property of the old company to the new for partly paid shares, but to do a good deal more—to go on and distribute the purchase consideration, the partly paid shares, among the shareholders of the selling company. A shareholder cannot be compelled to take in lieu of his share anything which has a liability upon it. If the company's view is right, a shareholder may be compelled to take a thing which is utterly worthless or incur a liability which he cannot afford. *Honig v. Blackett's Mines, Lim.* [1901],¹ is the only case where it has been held that a sale can be made under the memorandum for shares not fully paid.

[They cited *Cotton v. Imperial and Foreign Investment and Agency Corporation* [1892],² *Doughty v. Lomagunda Reefs, Lim.* [1902],³ and *Manners v. St. David's Gold and Copper Mines, Lim.* [1904].⁴]

[BUCKLEY, J.—The question divides itself into two—first, whether a sale can be made for shares not fully paid; and secondly, if it can, what can be done with the shares. It may be that an individual shareholder, as opposed to the corporation, cannot be put under a liability. But I do not see why under a memorandum like the present a sale cannot be made for shares not fully paid.]

Astbury, K.C., and *H. E. Wright*, for the company.—Clauses 3 and 4 of the "Scheme of Reconstruction," which deal with the disposition of the purchase consideration, are not yet part of the scheme; the agreement deals only with clauses 1 and 2—namely, the sale—and the company is willing to undertake not to carry them out without a further resolution

(1) 45 Sol. J. 770.

(2) 61 L. J. Ch. 684; [1892] 3 Ch. 454.

(3) 71 L. J. Ch. 888; [1902] 2 Ch. 837.

(4) 73 L. J. Ch. 764; [1904] 2 Ch. 593.

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being passed. The only question at present is whether a sale for partly paid shares is valid. It is quite clear that it is.

[They cited *City and County Investment Co., In re* [1879],⁵ and *Postlethwaite v. Port Philip and Colonial Gold-Mining Co.* [1889].⁶]

Disturnal, for Mr. Hackney.

Cur. adv. vult.

Feb. 2.—BUCKLEY, J.—The scheme of reconstruction dated December 10, 1904, contains four paragraphs. The first two deal with the formation of a new company and a sale by this company of its undertaking to that company for partly paid shares. The last two paragraphs deal with the manner in which the shares which form the purchase consideration are to be dealt with. The plaintiff has argued this motion as if the distribution of the purchase consideration under the last two paragraphs of the scheme had been resolved upon and was a matter for present consideration. In my opinion, that is not the case. The company have passed a resolution approving a certain conditional agreement dated December 9, 1904, and authorising the directors to carry it into effect. I am precluded from looking at that document as an agreement, for it is not stamped. It has, I am told, been carried in for adjudication. It would be unfortunate if I were compelled to require it to be stamped for the purposes of an argument which, if successful, would preclude it from ever being carried into effect. I am not, I think, driven to that course. I can look at a copy of the document, not as an agreement, but as a document evidencing the terms upon which the company by the resolution which has been passed propose to sell if they are not upon the present motion restrained from selling. Upon looking at it, I find that it contains nothing addressed to the last two paragraphs of the scheme. The company have simply resolved to sell for a certain number of partly paid shares. The whole question before me is whether a proposal so to sell is *ultra vires*. Looking at the

(5) 49 L. J. Ch. 195; 18 Ch. D. 475.

(6) 59 L. J. Ch. 201; 43 Ch. D. 452.

contemporaneous circular of December 10, I agree that the company no doubt intend, if they legally can do so, to deal with the 127,430 shares which will form the purchase consideration by distributing them amongst the holders of the 12,743 shares in their own company. But the question whether they can legally so distribute them as suggested in the last two paragraphs of the scheme will not arise until the necessary steps are taken for authorising such a distribution. The defendants are prepared to undertake not to carry out paragraphs 3 and 4 of the scheme without a further resolution of the company. Upon that undertaking being given, it is plain that the question does not arise at present. Counsel for the plaintiff had the courage to argue that I ought to restrain the company from holding a meeting to consider such a method of distribution. I cannot do that. The company may meet and discuss anything they like. When they have arrived at a conclusion there will arise for the first time for decision the question whether such a resolution as they pass can legally be carried into effect.

From the foregoing it results that the only question I have to determine upon this motion is whether under clause 3 (xxiv.) of the memorandum of association this company can sell for partly paid shares. There is nothing, in my judgment, in the context or in the memorandum and articles of association as a whole, so to qualify the meaning of the word "shares," as there used, as to confine it to a particular class of shares—namely, shares fully paid. Upon the same word in section 161 of the Companies Act, 1862, it was decided, in *City and County Investment Co., In re*,⁵ and subsequent cases, that a sale may be made for partly paid shares. I think the same is true of this memorandum of association. There is no reason in the nature of things why a company whose objects include subscribing for, taking, and holding shares should, under an authority to sell for shares, be precluded from taking shares partly paid. If the shareholders, as distinguished from the corporation, were to be compelled to become the holders of the shares, and thus come under liability, a

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totally different question would arise. The result of the present transaction is simply that the partly paid shares which form the purchase consideration become assets of the selling company, and as such must be dealt with as such assets can legally be dealt with by the corporation. In my judgment, this sale for partly paid shares is not, upon that ground, open to question.

The defendants, therefore, giving the undertaking above stated, there will be no order upon the motion except that the costs be costs in the action.

Solicitors—J. A. Bartrum, for plaintiff;
W. J. Hunter, for defendants.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

BUCKLEY, J. } ISAAC (deceased), *In re*;
1905. } HARRISON v. ISAAC.
Feb. 4. }

Will—Construction—Residue—Pecuniary Legacies—Gift of “remainder of my property”—Residuary Legatee Appointed—Destination of Lapsed Pecuniary Legacy.

Where, in a will, pecuniary legacies are followed by a gift of “the remainder of my property” to one or more, this is a good residuary bequest, and is not revoked by the subsequent appointment of a residuary legatee in the will.

A lapsed pecuniary legacy will fall into the first, and not the second of such residuary dispositions; but a lapse, in whole or in part, of the first residuary disposition will enure for the benefit of the person entitled under the second.

Originating summons.

The testator, Joseph Isaac, died in 1904, having by his holograph will dated September 21, 1899, appointed the plaintiff sole executor, and directed payment of his debts and funeral and testamentary expenses. He bequeathed pecuniary

legacies to a number of persons, and amongst them 100*l.* to George Critten and fifty guineas to Fanny Cowell, both of whom predeceased him, and directed that “The remainder of my property shall pass as follows, viz.: to be divided amongst my nephews and nieces or to their heirs in the following proportions, that is to say To my nephew Maurice James Isaac one fourth part of the said remainder To the orphan children of my late sister’s deceased daughter Louisa Goodall to be equally divided amongst them, one fourth part of the said remainder To my nephew-in-law Alfred D. Hoskins, the widowed husband of my late niece Jane Hoskins, or in case of his death to be equally divided amongst his children one fourth part of the aforesaid remainder To my sister’s other daughter Mary Ann Whittle or her heirs the remaining one fourth part of the said remainder and I appoint my executor my residuary legatee.”

The estate consisted of personalty only. The executor took out the summons for the determination of questions of which only two ultimately required decision—namely, first, whether the appointment of the plaintiff as residuary legatee operated to revoke or defeat the previous bequest of the remainder of the testator’s property to the defendants and others; secondly, whether the lapsed legacies went to increase the remainder of the testator’s property or passed to the plaintiff as residuary legatee, and, in the latter case, whether for his own benefit or otherwise.

The persons entitled to the four shares were all alive and of full age, and were either defendants or represented on the summons.

Sherrington, for the plaintiff.—It is difficult to argue that the first gift is revoked by the second. As to the other question, it is stated in *Theobald’s Law of Wills* (5th ed.), p. 659, that “if a testator gives the remainder of his property to A, and makes B his residuary legatee, B will take only lapsed legacies”; and the author supports his statement by citing *Jessop, In re* [1859],¹ *Davis v. Bennet*

(1) 11 Ir. Ch. R. 424.

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[1862].² *Kilvington v. Parker* [1872],³ and *Bristow v. Masefield* [1882].⁴ In the first of these cases the testatrix, after certain specific and pecuniary bequests, some of which latter lapsed, gave "the remainder of my property" to her sister Sally Fetherston, who lived with her and who took nothing under the earlier part of the will. She then gave further legacies, and appointed her two sisters, Sally Fetherston and Octavia Gregory, to be her executors and residuary legatees. It was held by the Lord Chancellor of Ireland that the gift to Sally Fetherston was not displaced by the subsequent residuary gift, but it was not questioned that the lapsed legacies fell into the latter. In the three other cases, though there were no lapsed legacies, the judgments all shew that it is the later gift of residue, and not the earlier gift of remainder, which is to benefit by a lapse.

[BUCKLEY, J., intimated that the answer to the first question would be in the negative.]

Buckmaster, K.C., and *Edward Ford*, for the defendants, on the second question.—The true construction of the will is this: First, the remainder of the testator's property is given to the legatees named; then, if there be a failure of any portion of that gift by the lapse of one or more of the shares, such portion will fall into residue as on an intestacy. In the absence of such lapse there is nothing on which the second gift can operate—*Spencer, In re*; *Hart v. Manston* [1886].⁵ The statement in *Theobald's Law of Wills* is based on mere *dicta*, not necessary to the decisions in three of the cases; while in the fourth—the Irish case—the point in question was not dealt with in the judgment. None of the cases really touch the question.

Sherrington, in reply.—The gift of the remainder is specific, but the testator has provided that his debts and funeral and testamentary expenses shall be paid out of it, so that no suggestion can be made that the lapsed legacies, if they fall into the second gift, will be swallowed up by

those payments. Lapsed legacies are the only property which the testator had to deal with by this residuary clause, and if there had been no such clause they would not have been caught by the gift of the remainder, because it was specific, and there would have been, as to them, an intestacy. A residuary gift effects nothing specifically, but is designed to sweep up everything not otherwise effectually disposed of—*Esrum v. Appleford* [1839],⁶ *per Lord Cottenham*.

BUCKLEY, J.—I have already held, in answer to the first question, that the appointment of the executor as residuary legatee does not defeat or revoke the previous gift of "the remainder" of the testator's property. It remains for me to determine what is the destination of the legacies which have lapsed by the deaths of the two legatees in the lifetime of the testator.

Now, if the will had not contained these last words appointing the executor as residuary legatee, it seems to me that the words "the remainder of my property shall pass," &c., would have constituted a perfectly good residuary bequest. But then the will does contain these words. Does that fact alter the construction I have placed on the first residuary gift? I do not think it does, unless the effect be to reduce the earlier words to silence. Is it possible, without doing this, to give a proper effect to the later words? In my judgment it is; because, supposing the prior gift of one or more of the shares of the first residue to fail, owing to a lapse by the death of the legatee in the lifetime of the testator, the subsequent disposition in favour of the residuary legatee would take effect. If some person entitled to a share of the first residue died in the lifetime of the testator, there would be a lapse of a part of the first residue, and under the second disposition the residuary legatee would take something. The testator makes certain gifts and provides that "the remainder of my property shall pass as follows." I think that means that, subject to providing for such of the previous gifts in the will as take effect,

(2) 31 L. J. Ch. 337; 30 Beav. 226.

(3) 21 W. R. 121.

(4) 52 L. J. Ch. 27.

(5) 54 L. T. 597.

(6) 5 Myl. & Cr. 56.

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the remainder of the property shall pass in the manner indicated. In other words, the first is a residuary bequest. Then there is a second residuary gift to which effect can be given by holding it to mean that if any of the property remains undisposed of, anything to be swept up is to belong to the executor, and that he is to take it beneficially.

It does not seem to me that there is any authority exactly in point. The nearest case is that of *Jessop, In re*,¹ where it appears to have been assumed that lapsed legacies would fall into the ultimate residue for the benefit of the second residuary legatee. There the two gifts of residue were—the first to A and the second to A and B. It was unreasonable to suppose that a legacy lapsing by the death of A could be intended to fall into residue for the benefit of A herself and another. This being so, there was nothing that the second residuary legatee could take other than legacies which were given in priority to both residuary gifts and which lapsed. That is not the case here.

I think that the lapsed legacies here fall into the first gift of residue.

Solicitors—Tarry, Sherlock & King, agents for Turner & Turner, Ipswich, for plaintiff; Mead & Co., agents for Wm. Smith & Sons, Weston-super-Mare, for defendants.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

JOYCE, J. }
1905. } MARSHALL v. JAMES.
Jan. 11. Feb. 4. }

*Attachment of Debts—Setting Aside—
Garnishee Order Absolute—Mistake.*

The Court will, in order to prevent a miscarriage of justice, set aside a garnishee order absolute on proof of a mistake of fact under which the order was obtained.

Where a judgment creditor, upon a mistaken allegation that debts were owed by third parties to his debtor personally, obtained a garnishee order absolute against those third parties, and it was subsequently proved that the debts were owing not to the debtor, but to the firm in which the debtor was a partner, the garnishee order was set aside on the application of the debtor's partner.

Moore v. Peachey (66 L. T. 198) followed.

Motion to discharge a garnishee order absolute under the following circumstances.

The plaintiff Marshall carried on business in partnership with the present applicant Witham as Marshall & Co. In an action instituted by Marshall personally the defendant James recovered judgment against Marshall himself.

Upon the application of James and on an allegation supported by affidavit, but afterwards found to be mistaken, that Cullen and Teetgen & Co. owed debts to Marshall, a garnishee order *nisi* was made in the usual form, and served on the debtors. In due course it was made absolute in the presence of Cullen's solicitors, Teetgen & Co. having been served with the order *nisi*, and not appearing. By the order it was ordered that Cullen should pay James the sum of 13*l.* 9*s.* owing by Cullen to the plaintiff, and that Teetgen & Co. should pay James the sum of 21*l.* 8*s.* 4*d.* owing by Teetgen & Co. to the plaintiff.

On discovering this Witham applied to set aside the garnishee order upon the ground that at its date no debt was due to Marshall, but moneys were due to the firm Marshall & Co., in which he was a partner. It then appeared, and was not

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disputed, that the debts were really contracted with the firm, and so were not payable to Marshall alone, Cullen believing that Marshall had no partner.

Cullen had not paid anything under the order, but Teetgen & Co. had paid 21*l.* 8*s.* 4*d.* to James, and had filed no evidence as to any mistake.

Witham moved for an order that the order be discharged, and that any moneys paid thereunder by the garnishees be repaid to them or to himself on behalf of Marshall & Co., on the ground that at the date of the garnishee order absolute no debt was due from any of the garnishees to Marshall, but that such debts were due and owing to the firm of Marshall & Co., in which the applicant still was and was at the date when such debts became due and payable a partner.

A. Lincoln Reed, for the applicant.—A garnishee order absolute can be set aside—*Moore v. Peachey* [1892]¹—the Court having an inherent jurisdiction to set aside an order which it has been induced to make by fraud or the suppression, however innocent, of material facts.

R. Nevill, for the respondent James.—*Moore v. Peachey*¹ was a case where the application was made by the garnishee on the ground of a mutual mistake, partially caused by the judgment creditor, and is therefore distinguishable. In *Burrell & Sons v. Read* [1894]² Wright, J., said that an order once made, with money paid under it, could not be set aside by a third party, although the Court of Appeal reversed his decision. Here there is no claim against James by the applicant.

A. Lincoln Reed, in reply.—The Court can correct a miscarriage of justice, and any person injured can come *ex debito justitiæ* for relief.

Cur. adv. vult.

Feb. 4.—JOYCE, J., stated the facts as above, and continued: No one has complained of the garnishee order as against Cullen except Marshall, the judgment debtor. Cullen had good reason, in my opinion, for believing that Marshall had no partner. Cullen has not paid anything,

but Teetgen & Co. have paid 21*l.* 8*s.* 4*d.* to James, the judgment creditor, who has thus obtained an amount which does not belong to him.

On the authority of *Moore v. Peachey*¹ and on general principles I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. In my opinion, there is no particular sanctity about a garnishee order, although it may have been made absolute and is so termed.

I think the order as to Cullen must be set aside, but with no order as to costs.

As to Teetgen & Co. the evidence is not quite complete. If they have made no mistake I cannot help them, but if it were proved that they have made a mistake, as the bank had done in *Moore v. Peachey*,¹ I should be disposed to help them.

I certainly think that the defendant James is innocent, and I will give no costs against him. [At his Lordship's suggestion, the applicant Witham here agreed with James to receive, in full satisfaction of the questions between them, half the sum of 21*l.* 8*s.* 4*d.* which James had received from Teetgen & Co.] I therefore discharge the order as regards Cullen, and by consent discharge it also as regards Teetgen & Co., James undertaking to pay 10*l.* 14*s.* 2*d.* to Witham. There will be no order as to costs.

I will only add that I entirely dissent from the notion that a garnishee order absolute cannot be set aside.

Solicitors—Hyman, Isaacs & Lewis, for applicant;
Malkin & Co., for respondent.

[Reported by Warrick H. Draper, Esq.,
Barrister-at-Law.]

(1) 66 L. T. 1

(2) 11 Times L. R. 86.

WARRINGTON, J. }
 1904. } EASTERN INVESTMENT
 Dec. 13. } Co., LIM., IN RE.

*Company—Voluntary Winding-up—
 Dissolution at Expiration of Three
 Months—Transfer of Assets not Possible
 within the Time—Staying Proceedings—
 Companies Act, 1862 (25 & 26 Vict. c. 89),
 ss. 89, 138, 142, and 143.*

Where a company went into voluntary liquidation with a view to amalgamation with another company, and it was subsequently discovered that certain assets of the old company, consisting of mining claims in the Transvaal, which were to be transferred to a new company, could not be transferred within the period of three months, at the expiration of which time the old company would, under section 143 of the Companies Act, 1862, automatically cease to exist, and a contributory before the expiration of the three months applied under section 138 for an order to stay the proceedings in the winding-up, the COURT, exercising the power conferred upon it by section 89 in a compulsory winding-up, made an order staying all proceedings in relation to the winding-up of the old company, with liberty to apply.

Crookhaven Mining Co., In re (36 L. J. Ch. 226; L. R. 3 Eq. 69), applied.

In April, 1903, an agreement was entered into by the Eastern Investment Co. with another company with a view to amalgamation, and it was thereby agreed that the assets of the Eastern Investment Co. should be transferred to a new company in consideration of certain fully paid-up shares in such new company. Those assets comprised, amongst other things, certain interests and participations in mining claims in the Transvaal, which were entered in the local registry in the names of trustees in defined shares and proportions for the company and other persons equitably entitled thereto. In May, 1903, the company went into voluntary liquidation, and the liquidator transferred certain of the assets to the new company, and directed the trustees in whose names the mining claims were entered in the local registry to hold them in trust for the new company. The

liquidator subsequently made up the account required by section 142 of the Companies Act, 1862, called a general meeting of the original company in accordance with the section, and made a return, under section 143, to the Registrar of Joint-Stock Companies, of the meeting having been held, and its date. The return was registered on September 22, 1904, and consequently the company would be "deemed to be dissolved" on December 22, 1904. In the meantime it was discovered that the revenue regulations of the Transvaal necessitated the transfer of the interests in the mining claims by the trustees to the old company, and then the transfer by the old company to the new one, and that such transfers could not be completed before the dissolution of the old company, which would take place on December 22.

This was a motion by the liquidator of the old company, and by the new company, in the matter of the voluntary winding-up, for an order to extend the period of three months prescribed by section 143 of the Act for the dissolution of the company, or, in the alternative, for an order to stay proceedings in the winding-up.

A. H. Jessel, for the applicants.—In view of the decision in *Scottish Fluid Beef Co., In re* [1898],¹ I admit that the Court has no jurisdiction to extend the period of three months prescribed by section 143 for the dissolution of the company, or to suspend its operation. If, however, the Court makes an order staying the proceedings in the winding-up, the dissolution of the company under section 143 will be prevented. The company will continue to exist, and the transfers can be effected. Such an order may be made in the matter of the winding-up before the expiration of the three months—*Crookhaven Mining Co., In re* [1866].² The Court has power under section 89 to stay proceedings in relation to winding up by the Court.

[WARRINGTON, J.—Only upon the application of a creditor or contributory.

(1) 25 Rettie, 1056.

(2) 36 L. J. Ch. 226; L. R. 3 Eq. 69.

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The application here is by the liquidator and the new company.]

I can amend the motion by adding a contributory. Section 89, taken in conjunction with section 138, which deals with a voluntary winding-up, gives the Court the same power in a voluntary winding-up as in a compulsory winding-up or a winding-up under supervision. If the winding-up is not stayed in the present case the mining claims cannot be transferred to the new company. A petition for winding-up by the Court, which would be the only alternative, would be an expensive proceeding.

WARRINGTON, J.—This is a somewhat peculiar application. It is an application, when amended as suggested in the course of the argument, by a contributory, under section 138 of the Companies Act, 1862, asking the Court to exercise the power conferred upon it in a compulsory winding-up by section 89, and to make an order staying all proceedings in relation to the winding-up of this company. The circumstances under which the present application is made are somewhat unusual. [His Lordship shortly stated the facts, and continued:] It is admitted at the Bar, on the authority of *Scottish Fluid Beef Co., In re*,¹ that the Court has no jurisdiction to stay the dissolution of a company, which takes place automatically under section 143, by extending the period of three months prescribed by that section, and this part of the motion has not been pressed; but the applicants ask for the alternative relief I have already mentioned—namely, a stay of all proceedings in the winding-up, suggesting that if all proceedings in the winding-up are stayed, then the company necessarily continues to exist, and the operation of section 143 will thus be prevented. There is no direct authority for this contention, but there is some authority in favour of the present application in *Crookhaven Mining Co., In re*.² In that case the dissolution of the company had actually taken place when the order was made, though the petition asking for the order was presented before the expiration of the three months limited by section 143, and Lord Romilly, M.R., in giving judg-

ment, says: "At the time when this petition was presented, the Court unquestionably had jurisdiction, under the Companies Act, to order the call to be made, and I am of opinion that the delay in the hearing of the petition, caused by the intervention of the Long Vacation, cannot affect the rights of the petitioner, and that he is entitled to stand in the same position as if the petition had been heard before the expiration of three months from the 4th of June." Pausing there for a moment, I think it clear that Lord Romilly must have considered that he had jurisdiction to make the order asked for at the time when the petition was presented—August 31; and I think he must have considered that the dissolution of the company had not then taken place, because otherwise the order which was afterwards made would have been wrong. Then he goes on: "That being so, it is unnecessary that I should go into the question whether the 143rd section of the statute deprives the Court of its jurisdiction over a company which, under the provisions of that section, is deemed to be dissolved; I am inclined to think that it was not the intention of the Legislature, by any provision of this statute—which was intended to provide a less expensive and more speedy and direct method of winding up companies—to fetter the jurisdiction of the Court, and compel parties to resort to more circuitous and expensive remedies. There must be an order for a call upon the holders of shares not fully paid up, for the purpose of adjusting the rights of the shareholders." That is not a direct authority as to the effect of the order when it is made, but I think it is an authority entitling me to make the order I propose to make. When one looks at the wording of section 89 of the Companies Act the language is very strong. The words are—"upon proof to the satisfaction of the Court that all proceedings in relation to such winding up ought to be stayed," then the Court may "make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit." Those words seem to me to cover everything, and if the winding-up of this company is

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still in operation, as I think it is until the dissolution has taken effect by the expiration of the three months limited by section 143, then, if I am at liberty to stay "all proceedings in relation to such winding-up," I think those words are wide enough to effect what the applicants want—namely, to keep the company on foot notwithstanding the expiration of the three months.

I propose therefore to make this order: The Court being satisfied that for the purpose of effecting the transfer of the assets of this company comprised in the agreement of April, 1903, to the new company, all proceedings in relation to such winding-up ought to be stayed, direct the same to be stayed accordingly, with liberty to apply.

Solicitors—Travers-Smith, Braithwaite & Co.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

BUCKLEY, J. }
1905. } WENBORN & Co., In re.
Jan. 31. }

Company—Voluntary Winding-up—Action Pending against Company for Damages—Repudiation of Claim by Liquidator—Adoption of Defence—Judgment for Plaintiff with Costs—Liability of Assets for Costs in Full.

Where the liquidator of a company in voluntary liquidation repudiates a claim for damages for which an action is pending or is brought against the company and defends the action, and the plaintiff obtains judgment with costs, the liquidator must pay the costs in full out of the assets.

Thurso New Gas Co., In re (42 Ch. D. 486), distinguished.

The liquidator's proper course would have been to apply to stay the action, when the Court, if allowing it to go on, might have done so on terms that the plaintiff should, if successful, add his costs to the damages recovered.

Summons by Louis Charlier, of Brussels, plaintiff in the action hereinafter mentioned, asking for an order directing the respondent Frederick Charles Harper, as

liquidator in the voluntary winding-up of Wenborn & Co., Lim., to pay 543l. 11s., the plaintiff's costs in an action brought by him against the said company for damages for breach of a contract to supply coals.

The action was to have been tried on May 17, 1904, but a postponement was made on the plaintiff's application, many of his witnesses being abroad, and it appearing doubtful whether the case would be reached before the Whitsuntide vacation, which was then approaching. The trial was eventually fixed for July 7.

Between these two dates—namely, on June 17, 1904—an extraordinary resolution was passed by the company for voluntary winding-up, and the respondent was appointed liquidator. An interview thereupon took place between the plaintiff's solicitors and the solicitor then acting for the company, after which the former, on June 22, 1904, wrote to the latter the following letter:

"*Charlier v. Wenborn & Co.—Re Wenborn & Co. Ltd.*

"In view of the resolution for the voluntary winding-up of the above company, we shall be glad if you will write us definitely, stating whether your client the liquidator is prepared to admit the claim of our client M. Charlier, in respect of the breach of contract for which the action is now proceeding, at the amount claimed or at any smaller amount, or whether your client proposes, as we understood at our interview with you that he does, to dispute the claim altogether. We should however like to have it definitely put in writing whatever course is proposed to be adopted."

The company's solicitor replied on June 23 as follows:

"In reply to your letter of yesterday's date, as I informed you at our interview, the liquidator cannot admit the claim of your client in this action."

The plaintiff's solicitors also wrote on June 22, 1904, to the liquidator as follows:

"*Re Wenborn & Co. Ltd.—Charlier v. Wenborn & Co. Ltd.*

"We understand that you are the liquidator appointed under the Extraordinary Resolution for winding up the

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above company, and we beg to give you formal notice that our client, M. Louis Charlier of Brussels, claims from the company the sum of 4000*l.* in respect of damages for breach of contract and which is the subject of an action now proceeding in the King's Bench Division of the High Court of Justice (Commercial Court); and we require you not to part with or distribute the assets of the said company without having regard to our client's said claim.

"We shall be obliged if you will kindly acknowledge receipt of this letter."

The liquidator replied on June 23 as follows:

"I am in receipt of your letter of the 22nd instant, the contents of which I note."

The trial took place in the latter part of July, the liquidator being represented by counsel, who called witnesses for the defence, and on August 4 judgment was given for the plaintiff for 750*l.* damages and costs. The latter, after taxation and allowance of certain items by way of set-off, amounted to the sum of 543*l.* 11*s.* now claimed, about 500*l.* being in respect of costs incurred since the date of the winding-up resolution.

The plaintiff's contention was that the sum claimed ought to be paid in full, since the liquidator had adopted the defence and failed in the action. The assets of the company were insufficient to pay more than 10*s.* in the pound on debts admitted to proof, and of this a dividend of 6*s.* 8*d.* in the pound had already been declared.

Ernest Todd, for the plaintiff.—The costs ought to be paid in full by the liquidator out of the assets. The company ought to be treated like any other unsuccessful litigant; and as the action has been defended for the benefit of the estate, the estate ought to be fixed with the costs to which the plaintiff has been unnecessarily put—*Trent and Humber Shipbuilding Co., In re; Bailey and Leatham's Case* [1869],¹ *per James, V.C.*

In London Drapery Stores, In re [1898],²

(1) 38 L. J. Ch. 485, 486; L. R. 8 Eq. 94, 97.

(2) 67 L. J. Ch. 690; [1898] 2 Ch. 684.

the company's liability to pay in full the costs of the defendant incurred after the winding-up was not disputed, and as to those incurred before they were also held liable on the principle of *Boynnton v. Boynnton* [1879].³

Thurso New Gas Co., In re [1889],⁴ is the only case against me. There the liquidation was under supervision of the Court, and the costs were foreign costs, the action being in the Scottish Courts. The judgment made no reference to *Bailey and Leatham's Case*,¹ though it was cited to the Judge. In the present case the liquidator had full discretion under section 133(7) of the Companies Act, 1862, which puts him in the same position as an official liquidator who has obtained the sanction of the Court under section 95. Therefore the principle of *Bailey and Leatham's Case*¹ is applicable.

J. W. Mansfield, for the liquidator.—The case is governed by authority and the settled practice of the Court. In *Buckley on the Companies Acts* (8th ed.), p. 285, the learned author, after dealing with *Bailey and Leatham's Case*¹ and other cases, says: "The intention of the Act, where there is a resolution passed to wind up voluntarily, is (s. 133) that all the creditors shall be paid *pari passu*, and the Court will therefore interfere by injunction to restrain one creditor from seizing an undue share of the assets for his own benefit. And, if a creditor commences or proceed with an action for his debt after the winding-up commences, he can at most only add his costs to his debt."

These words were quoted by Kay, L.J., in *Thurso New Gas Co., In re*.⁴

[BUCKLEY, J.—Is there in the present Winding-up Rules any equivalent to rule 27 of 1862?]

Rule 97 is the corresponding rule in those of 1903, and it is stronger than the old rule. *Poole Firebrick & Co., In re* [1873],⁵ shews that where a judgment is recovered against a company after the commencement of a voluntary winding-up the Court will stay execution on the terms of the creditor being admitted to

(3) 4 App. Cas. 733.

(4) 42 Ch. D. 486.

(5) 43 L. J. Ch. 447; L. R. 17 Eq. 268.

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prove for his judgment debt and costs and the costs of the application to stay; but it is questionable whether an application to stay the present action would have been granted. The question at issue was a somewhat obscure one—namely, as to the class of coal the company had contracted to supply. Under the circumstances it cannot be said, in the words of James, V.C., in *Bailey and Leatham's Case*,¹ that the action was improperly resisted.

In the cases cited for the plaintiff the action was commenced after the winding-up, which, moreover, was either compulsory or under supervision. Here the winding-up was voluntary, and the action had already been commenced, and would have been tried before the winding-up but for the state of the Cause List. The action being for damages and not for debt, the liquidator had no course open but to defend. It is an *a fortiori* case. *Thurso New Gas Co., In re*,⁴ was followed in *Snyder Dynamite Projectile Co., In re*; *Peck v. The Company* [1893].⁶ It is indistinguishable and ought to be followed.

BUCKLEY, J.—The cases which have been cited are not easy to reconcile, but the principle underlying them all is that, *prima facie*, where there is a winding-up, whether voluntary or compulsory, of a company, all claims against the company ought to be ascertained in those proceedings, and, together with the costs, dealt with according to the rules applicable to the distribution of the assets; but that if an action is pending, or is brought, to which the company is a party, and the company, by its liquidator, determines to prosecute or defend that action for the benefit of the estate, then the estate must be treated as a litigant party, and must on failure bear the costs; that is to say, the other creditors, for whose benefit the action is brought or defended, must pay the costs in full, and not only a dividend. The question here seems to be, Did the liquidator adopt this defence on behalf of the estate, and did he fail? If so, the estate must pay the costs as a whole. The case falls to be decided, as

many cases do, on its own particular circumstances. The plaintiff alleged that the company had committed breaches, extending over a considerable period, of a contract to supply him with coals, and he accordingly brought an action for damages—that is, for unliquidated damages—and not for debt. The action was prosecuted in the Commercial Court, and was ready for trial on May 17, 1904. The parties were not then ready, and accordingly the trial was postponed till after Whitsuntide; and on June 16, on application to the Court, a day in July was fixed. Meanwhile, on June 17, the company passed an extraordinary resolution for voluntary winding-up. Therefore the action was ripe for trial, and the winding-up commenced between the date first fixed and that on which the trial actually took place. Then certain letters passed, and on these I base my decision. [His Lordship read the material parts of the letters of June 22 and June 23, 1904.] The effect of these letters seems to be this: The plaintiff says: "I have a claim pending against your company for damages. You are the liquidator. Are you prepared to admit my claim for any, and if so for what, amount?" The liquidator replies, "I do not admit your claim at all."

It seems to me that the liquidator adopted the defence in the action and elected that it should go on. The action went on and the plaintiff obtained judgment for damages and costs. The proper course for the liquidator to pursue when he got the plaintiff's letter was to apply, as he could have done, to have the action stayed, and very likely the Judge might have taken the view that the claim was one that could be better established in the action, and would have let it go on, on the terms that the plaintiff, if successful, should add his costs to the amount for which he obtained judgment—which is what the liquidator now wants him to do. But the liquidator, instead of pursuing this course, resisted the claim altogether and adopted the defence on behalf of the estate, and it seems to me that the other creditors must bear the costs, in the sense that they must come out of the company's assets.

(6) 28 L. J. N.C. 166; W. N. (1893), 37.

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As regards *Bailey and Leatham's Case*¹ and the other cases cited to me there is no real difficulty. When a liquidator in a voluntary or compulsory winding-up comes to the Court and asks leave to bring or defend an action by or against the company, and obtains leave, the Judge in effect pledges the assets of the company for the costs of the action which he authorises the liquidator to adopt or defend. In *Bailey and Leatham's Case*¹ leave had been given to defend an action brought against the company, and when the company lost the action Vice-Chancellor James, as he then was, ordered the costs in full to be paid out of the company's assets. The principle of that case applies here, although the liquidator did not apply for leave. He was not bound to apply, though he might have done so. He determined to defend, and must be taken to have done so at the expense of the estate. His counsel has very properly pressed me with the case of *Thurso New Gas Co., In re*,⁴ but I have two observations to make on that case. One is that the passage, there relied on, at 42 Ch. D. p. 491, applies where a creditor is suing for a debt, and there is some difference between suing for a debt and suing for damages. The other is that in that case there was not, as here, a request and refusal such as I find in the letters of June 22 and 23. The latter constitutes such an adoption of the defence as brings the case within the principle of *Boynston v. Boynston*,³ which was followed by Mr. Justice Wright in *London Drapery Stores, In re*.² The defence has been adopted with all its consequences, including the liability to pay costs. It has been adopted as a whole, and the liquidator must pay out of the assets the costs of the action in full from its commencement, and also the costs of this application.

Solicitors—Church, Rendell & Co., for plaintiff;
Goodacre, Harrison & Darrell, for liquidator.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

WARRINGTON, J. } MIDLAND COUNTIES
1904. } DISTRICT BANK v.
Dec. 16, 17, 21. } ATTWOOD.

Company—Voluntary Winding-up—Agreement of Service—Resolution to Wind Up—Dismissal of Servants—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 131.

A voluntary winding-up of a company, unlike a compulsory winding-up or the appointment by the Court of a receiver and manager in a debenture-holders' action, does not operate as a dismissal of the servants of the company, inasmuch as there is no change in the personality of the employer.

Imperial Wine Co., In re; Shirreff's Case (42 L. J. Ch. 5; L. R. 14 Eq. 417), considered and not applied.

Reid v. Explosives Co. (56 L. J. Q.B. 388; 19 Q.B. D. 264) discussed.

This was an action by the plaintiff bank for an injunction to restrain the defendant from acting in breach of a certain agreement, and for damages. By the agreement in question, which was dated November 10, 1891, and made between the plaintiff bank by its then name of the Nottingham and District Bank, of the one part, and the defendant of the other part, the defendant agreed to serve the bank as manager of one of its branches at Ilkeston and Eastwood or elsewhere, and in the same or such other capacity as the bank should direct. Clause 2 of the agreement provided that the defendant should not during the continuance thereof engage in any other business or calling whatsoever without the previous written consent of the bank. Clause 7 provided for the salary that was to be payable to the defendant and for the termination of the agreement by one calendar month's notice on either side, and further provided that the defendant should not, within a year of the termination of the agreement, whether by notice or under the terms of the clause next mentioned, enter into the service of or in any way act for any bank carrying on business within a radius of five miles of Ilkeston, Eastwood, or any branch of the Nottingham and District Bank to which the defendant might thereafter be ap-

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pointed as manager. In case of any breach of this clause the sum of 500*l.* was fixed as liquidated damages. Clause 8 empowered the bank to put an end to the agreement in the event of the defendant being guilty of misconduct in connection with his duties. The defendant subsequently ceased to be manager of the Ilkeston and Eastwood branches, and became the manager of the plaintiffs' branch bank at Derby. In November, 1904, the Birmingham District and Counties Banking Co. agreed to purchase the whole of the assets, undertaking, and goodwill of the plaintiff bank as from December 31, 1903. Consequently it became necessary to wind up the plaintiff bank. A special resolution was duly passed on November 18, 1904, and confirmed on December 3, 1904, for the voluntary winding up of the plaintiff bank, and two liquidators were appointed to adopt and carry into effect the agreement of November, 1904, on behalf of the plaintiff bank.

The defendant had been instructed to assist in the transfer of the business of the plaintiff bank to the other bank, but on December 3, 1904, he left the plaintiffs' branch bank at Derby without any notice of his intention to do so, and subsequently entered the service of the Nottingham Joint-Stock Bank for the purpose of opening and managing a new branch of that bank at Derby. On December 5, 1904, the plaintiff bank gave the defendant a month's notice to determine their agreement with him, and commenced this action, in which the Birmingham District and Counties Banking Co. were joined as co-plaintiffs, for an injunction to restrain the defendant from acting for the Nottingham Joint-Stock Bank or any other banking company at Derby or within five miles round, in breach of the agreement of November 10, 1891, and they now moved for an interim injunction.

R. J. Parker, for the plaintiff banking companies, stated the facts.

G. P. C. Lawrence, for the defendant, thereupon admitted that there was no defence on the merits, but raised the point of law that the voluntary winding up of the Midland Counties District Bank

operated as a wrongful dismissal of the defendant, and that consequently he was no longer bound by the agreement.

R. J. Parker.—The agreement is still in force, and is binding on the defendant. An order for compulsory winding-up operates as a notice of discharge to the servants of the company—*General Rolling Stock Co., In re; Chapman's Case* [1866],¹ and *Oriental Bank Corporation, In re; MacDowall's Case* [1886].² The appointment of a receiver and manager in a debenture-holders' action has a similar operation—*Reid v. Explosives Co.* [1887].³ In each of these cases there is a change in the personality of the employer. The business is carried on by the Court, with the assistance in the one case of the official liquidator and in the other of the receiver and manager, who are both officers of the Court. In the case of a voluntary winding-up, however, different considerations apply. There is no change in the personality of the employer. The voluntary liquidator is the servant of the company; the assets remain under the control of the company; and the business may be continued by the directors if the company so desires. Consequently a voluntary winding-up does not operate to discharge the servants of the company.

G. P. C. Lawrence.—The agreement was not determined by notice, or by reason of the misconduct of the defendant, and therefore the restrictive provisions of clause 7 have no application. It was, however, terminated by the voluntary winding-up, which operated as a dismissal of all the servants of the company—*Imperial Wine Co., In re; Shirreff's Case* [1872]⁴; *Lindley on Companies* (6th ed.), vol. 2, p. 1015; *Buckley on the Companies Acts* (8th ed.), p. 400. In *Reid v. Explosives Co.*³ it appears to have been assumed that the manager was discharged by the voluntary winding-up. In the case of a voluntary winding-up the company ceases to carry on its business from the date of the commencement of the winding-up—*Companies Act, 1862, s. 131.*

(1) L. R. 1 Eq. 346.

(2) 55 L. J. Ch. 620; 32 Ch. D. 366.

(3) 56 L. J. Q.B. 388; 19 Q.B. D. 264.

(4) 42 L. J. Ch. 5; L. R. 14 Eq. 417.

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Consequently, on the passing of the resolution to wind up voluntarily, the plaintiff bank ceased to carry on its original business, and the business since carried on—namely, the winding up of the affairs of the bank—is a different business. The defendant might have waived the effect of the winding-up—*MacDowall's Case*²—but he left the service of the plaintiff bank on the day the resolution to wind up was confirmed. It makes no difference in the present case that the assets remained in the possession of the company, or that the winding-up was for the purpose of reconstruction—*Horsey Estate, Lim. v. Steiger* [1899],⁵ approved in *Fryer v. Ewart* [1902].⁶

Under the provisions of section 133 the assets of the company are dealt with by the voluntary liquidator in a manner similar to that in which they are dealt with by the official liquidator in a compulsory winding-up. The position of the official liquidator, who is appointed by the Court, is, as regards the company, the same as the position of the voluntary liquidator appointed by the company. In either case he is only the agent of the company for the purposes of the winding-up—*Anglo-Moravian Hungarian Junction Railway, In re; Watkin, ex parte* [1875].⁷

The voluntary winding-up operated as a wrongful dismissal of the defendant, and he was entitled to treat the agreement as rescinded on December 3, 1904, the day on which the special resolution was confirmed—*Lilley v. Elwin* [1848].⁸

[He also referred to the Companies Winding-up Rules, 1890, rules 89, 90.]

R. J. Parker, in reply.—In *Shirreff's Case*⁴ the point that a voluntary winding-up operates as a dismissal of the servants of the company was not argued. That point is not covered by authority. Under the agreement in question there was no obligation on the plaintiff bank to continue their business—*Hamlyn v. Wood* [1891]⁹ and *Rhodes v. Forwood* [1876].¹⁰ Even if the business had ceased alto-

gether, so long as they paid the defendant his salary there would have been no breach on their part of the agreement—*Turner v. Sawdon & Co.* [1901].¹¹ A change in the character of the person who carries on the business admittedly puts an end to a contract of service—*Brace v. Calder* [1895]¹² and *Phillips v. Hull Alhambra Palace Co.* [1900]¹³; but here there has been no change in the personality of the banking company, or in the nature of the business, although this latter would be immaterial. It is the same business, but carried on by the company by its agent, the voluntary liquidator.

Cur. adv. vult.

Dec. 21.—WARRINGTON, J., stated the facts, and continued: On these facts the plaintiffs would plainly be entitled to the relief they seek unless the defendant has some defence in point of law. The only defence relied upon is founded upon the contention that the voluntary winding up of the employing company operated in itself as a wrongful dismissal of the servants of the company, including the defendant, and that he is not under the circumstances bound by the restrictive provisions of clause 7. The question I have to determine is whether this defence is well founded.

It is well settled that an order for the compulsory winding up of a company operates as a notice to dismiss the servants; and it has been decided by the Court of Appeal that the appointment by the Court of a receiver and manager in a debenture-holders' action has the same effect—*Reid v. Explosives Co.*³ In order to determine whether a voluntary winding-up is to have that effect, one must consider what there is in the events I have mentioned which could terminate the agreement of service. It is contended by counsel for the defendant that it is the change in the nature of the business carried on by the employer. On the other hand, it is contended by counsel for the plaintiffs that the change in the nature of the business is immaterial; that the circumstance in the cases I have

(5) 68 L. J. Q.B. 743; [1899] 2 Q.B. 79.

(6) 71 L. J. Ch. 433; [1902] A.C. 187.

(7) 45 L. J. Ch. 115; 1 Ch. D. 130.

(8) 17 L. J. Q.B. 132; 11 Q.B. 742.

(9) 60 L. J. Q.B. 734; [1891] 2 Q.B. 488.

(10) 47 L. J. Ex. 396; 1 App. Cas. 256.

(11) 70 L. J. K.B. 897; [1901] 2 K.B. 653.

(12) 64 L. J. Q.B. 582; [1895] 2 Q.B. 253.

(13) 70 L. J. K.B. 26; [1901] 1 K.B. 69.

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mentioned which causes the termination of the relation is the change in the personality of the employer. The latter is, in my opinion, the correct view. If the business had ceased altogether, that would have been no breach by the employer of his agreement with the servant, provided he had continued to pay his salary—see *Turner v. Sawdon & Co.*¹¹; and it seems to me, therefore, that the change from a going banking business to one that is being carried on with a view to a beneficial winding-up could not have the effect contended for. On the other hand, a change of personality certainly puts an end to the contract of service—see *Brace v. Calder*.¹² This change of personality appears to me to take place in a compulsory winding-up. The business is from the date of the winding-up order carried on by the Court for the purpose of liquidation with the assistance of the official liquidator, who is an officer of the Court. Is there in a voluntary winding-up a change in the personality of the employer? In my opinion there is not. In that case the assets of the company remain under the control of the company; the liquidator is an officer of the company; the business may even be continued by the directors if either the company or the liquidators so think fit. The governing section in the Companies Act, 1862, as to the effect of a voluntary winding-up on the status of the company is section 131, which runs thus: "Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof." Those latter words imply that for the beneficial winding-up of the company the company does continue to exist. Then the section, after providing that transfers of shares or alteration in the status of members shall be void, continues: "but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up."

If, therefore, there is no authority binding me to decide otherwise, I should

be prepared to hold that the voluntary liquidation did not operate to dismiss the servants of the company. Is there any such authority? The only case referred to as such is *Shirreff's Case*,⁴ and it is quite true that in that case Lord Romilly said, "I am of opinion that the resolution to wind up the company *ipso facto* put an end to Mr. Shirreff's employment as manager, and was equivalent to his dismissal." But the point was not argued. It was assumed that Shirreff's employment had been determined, as, in fact, it had been, for not only had the company been wound up, but Shirreff himself had been appointed liquidator, and received 400*l.* for his services. The only question that was argued was whether he was entitled to prove for a certain sum payable to him under the articles of association in case he should be dismissed from his office as manager. I cannot, therefore, regard that case as an authority binding me to decide contrary to my own opinion. In *Reid v. Explosives Co.*³ there had been an appointment of a receiver and manager by the Court in a debenture-holders' action followed by a voluntary liquidation, and Mr. Justice Manisty had held, for what reasons I cannot ascertain, that the latter event had operated to dismiss the plaintiff, who had been in the service of the defendant company; but it was unnecessary to decide the point, because the same learned Judge decided that the appointment of a receiver and manager had had that effect. In the Court of Appeal the point was not decided, and I infer that Lord Esher, at all events, inclined to the view that, inasmuch as in a voluntary liquidation the liquidator is appointed by, and is an officer of, the company, there would not be such a change in the personality of the employer as to dismiss the servants.

On the whole, I am of opinion that the defence fails, and that the injunction must go as asked by the notice of motion.

Solicitors — Field, Roscoe & Co., agents for Pinsent & Co., Birmingham, for plaintiffs; Rawle, Johnstone & Co., agents for W. J. Holbrook, Derby, for defendant.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
 1905. } NELSON & Co., LIM., *In re*
 Feb. 7, 15. }

*Company—Compulsory Winding-up—
 Life Assurance—Other Business—Reduction of Contracts—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), ss. 4 and 22.*

Where a company carries on life insurance business in conjunction with other business, and, in consideration of an enhanced price charged for an article it sells, offers its customers contingent insurance benefits, the requirements of section 4 of the Life Assurance Companies Act, 1870, are not capable of being satisfied, for the price paid is a contributory sum to secure two benefits, and the proportion paid as premium cannot be appropriated in accordance with the section.

The Court will not sanction a scheme for carrying on such a life insurance business so as to avoid a compulsory winding-up on the petition of creditors.

Section 22 of the same Act allows a reduction of the contracts between a company and its creditors, but does not authorise a provision under which the latter would get reduced benefits from those contracts as the result of new contracts entered into with a new company.

What the last-named section allows is a reduction of all contracts for the relief of the common debtor, and not one which operates unequally as between the common creditors. Absolute arithmetical equality is not required, but a scheme which proceeds upon a principle of inequality of reduction is not within the Act.

Petition for the compulsory winding-up of Nelson & Co., Lim. The company was incorporated on July 11, 1901, under the Companies Acts, 1862 to 1900, to take over the business of Rasmus Jensen (trading as Nelson & Co.), tea dealer, and to transact and carry on the business of insurance in all its branches. The capital was 101,000*l.* divided into 101,000 fully paid shares of 1*l.* each.

With the view of advertising and extending his tea business, Jensen had inaugurated in the year 1897 a scheme by which any married woman who should

purchase from him, after Christmas of that year, not less than half a pound of tea per week during the last five consecutive weeks of her husband's lifetime, should receive a pension of 10*s.* per week as long as she continued a widow, and any woman who at that date, or before commencing to purchase from him, was already a widow, and who should purchase from him not less than half a pound of tea per week for ten years, should have a pension of 10*s.* per week for the rest of her widowhood. Pensions of 5*s.* per week were to be obtained by purchasers of half the quantity under the same conditions.

The scheme became very popular, and by the year 1901 the customers purchasing tea under it numbered from 150,000 to 200,000, representing practically the goodwill of Nelson & Co., whilst about three thousand widows were in receipt of pensions. In that year it was held by a Divisional Court of the King's Bench Division that the business so carried on was that of a life assurance corporation within the meaning of the Life Assurance Companies Act, 1870, and that a deposit of 20,000*l.* must be made in accordance with section 3 of that Act. The need for raising this sum was one of the reasons for the transfer to the present company. The money was paid into Court on July 3, 1901, and was still there at the date of this petition. It was provided by persons holding large contracts for the supply of tea to Nelson & Co., and who afterwards, under the name of "The Nelson Share Syndicate," acquired the bulk of the shares in the present company.

By article 110 of the articles of association of Nelson & Co., Lim., it was provided that the directors should set aside three-fourths of the profits on tea earned by the company in each week to meet the liabilities of the company in respect of the customers' cards (to be referred to hereafter) issued or to be issued by the company, and that the sum so set aside should be applied in discharge of the current liabilities thereunder; and in so far as in any week the whole amount should not be distributed, the balance should be carried forward, and might be applied at the discretion of the directors

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to make good any deficiency in any future week or weeks in respect of such pensions. But the company was not to be under any liability in respect of the said pensions beyond the amount of the three-fourths of the profits so to be earned by the company, and if in any week the three-fourths of the profits should be insufficient for the payment in full of the said weekly pensions, the same might at the discretion of the directors be abated rateably, or such deficiency might be made good out of any fund accumulated as thereinbefore directed.

After its incorporation the company continued to supply tea to those who had been Jensen's customers, using in many cases, for the purpose of keeping a proper record of the quantities purchased weekly, the "members" or "customers" cards which had been issued by him with the terms of his scheme printed thereon. The business increased largely, and the company from time to time printed and issued cards of their own. The terms of qualification for pensions printed on these new cards differed from the old scheme, and were also varied from time to time in some particulars not necessary to mention, but the vital difference consisted in this—that the limitation of the company's liability to three-fourths of the profits was expressly mentioned on the cards printed by them, whereas the old cards contained no such limitation, nor was any intimation conveyed to the old customers that the security for their pensions was in any way affected by the transfer.

The total amount received for tea sold by the company during the two years ended June 30, 1903, was nearly one and a-quarter million sterling, out of which 242,041*l.* was set aside to represent three-fourths of profits. The amount distributed in pensions during the same period was 202,703*l.*, leaving 39,338*l.* as an accumulated fund, which, however, was absorbed in the following year to make good deficiencies in the three-fourths of the profits realised up to June 30, 1904.

By this time the number of customers buying tea with a view to the receipt of pensions had risen to between 500,000 and 600,000, and that of widows in receipt of pensions to 19,000—two-thirds of

these being entitled to 10*s.* per week, and one-third to 5*s.* per week. To meet this large present and prospective liability there was no reserve except the 20,000*l.* deposit, whereas actuarial calculations placed the necessary reserve at thirty millions.

Under these circumstances it was arranged between the company and the Nelson Share Syndicate that, instead of three-fourths of the weekly profits on tea, 85 per cent. of the weekly profits on coffee, soap, cocoa, and other goods, as well as tea, sold by the company, should be set aside to meet pensions, but this change gave only temporary relief, and towards the end of 1904 it was found necessary to reduce the existing pensions of 10*s.* and 5*s.*, at first to 5*s.* and 2*s.* 6*d.*, and later to 2*s.* and 1*s.* respectively—reductions which, even if they enabled the emerged claims to be met *pro tanto*, would not provide any surplus that could be applied towards payment of pensions not yet become payable.

This petition was presented by (a) a widow entitled to a pension of 10*s.* a week in virtue of purchases made prior to the death of her husband in July, 1903; (b) a married woman who, having made weekly purchases of tea ever since January, 1900, would become entitled to a pension on becoming a widow; and (c) a widow who, having as such commenced her purchases in January, 1898, would become entitled, subject to continuing them, at the expiration of ten years from that date.

The company opposed the petition, and submitted for the sanction of the Court a scheme which they had already initiated by forming a company called the Nelson Trading Co., the object being the reduction of the contracts of Nelson & Co., Lim. (in the scheme called "the insuring company"), under section 22 of the Life Assurance Companies Act, 1870.¹

(1) Life Assurance Companies Act, 1870, s. 4: "In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company,

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The trading company was to take over for trading purposes all the customers of the insuring company who were not already widows. These were to be insured by the insuring company (which was to cease to be a trading company) for fixed sums payable on the death of their respective husbands according to tables which had been prepared, and one of which was applicable to such of the customers as were prepared to sign declarations as to the state of their husbands' health. Without a similar declaration no new customers were to be admitted by the trading company. Immediately on the scheme being approved, all customers of the insuring company who should till then have kept up their purchases were to become entitled to half-benefits according to their respective rates and conditions of insurance.

The arrangement between the two companies was to be as follows: For every pound of tea sold by the trading company they were to pay to the insuring company, who were to carry it to their insurance fund, the sum of 6*d.*, which was three-fourths of the "loading" or difference between the fair retail value of the tea (1*s.* 8*d.* per pound) and the price at which it was actually sold — namely, 2*s.* 4*d.* Moreover, 85 per cent. of the net profits of the trading company was to be paid to the insuring company, and was for five years to be carried to a general reserve fund, after which time only 70 per cent. of such profits was to be so treated, the remaining 15 per cent. being available for dividends of the insuring company. The trading company was to have 10 per cent. of its net profits for working funds,

and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance. . . ."

Section 22: "The Court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the Court thinks just, in place of making a winding-up order."

which left that company 5 per cent. as dividends on its shares.

Eve, K.C., and *Coldridge*, for the petitioners.

Asbury, K.C., and *E. O. Simpson*; *Frank Dodd, Eldridge*, and *W. Finlay*, for various persons supporting the petition.

Buckmaster, K.C., and *R. Rowlands*, for the company.—The Life Assurance Companies Act, 1870,¹ does not preclude the carrying on of an insurance business in conjunction with other business provided the deposit is paid. It is an Act grafting on to the other Companies Acts certain provisions relating to life insurance companies.

This company never bargained to pay annuities except out of a specified fund. It is true that one of the petitioners and other customers who held Jensen's cards had unlimited rights against Jensen; but when those cards had been filled up, and the holders accepted new ones from the company, the rights they acquired against the company were rights under a different contract.

The question is, What is best to be done? To wind up would be to sacrifice the goodwill, which, with so vast a number of customers, must be worth more than the 80,000*l.* at which it has been estimated. The scheme put forward is for the payment of lump sums, but the company would welcome any scheme the Court might prefer. Their object is not to prevent investigation, but to maintain, for the benefit of all, the connection between the company and its former customers.

R. J. Parker, for the Board of Trade, pointed out defects in the scheme.

Eve, K.C., in reply.—The effect of the scheme will be to alter the rights of the customers *inter se*, and this the Court will not sanction. The matured claims of annuitants are not subject to reduction—*Great Britain Mutual Life Assurance Society, In re* [1882],² and *Buckley on the Companies Acts* (8th ed.), p. 818.

BUCKLEY, J., made an order, as prayed, for compulsory winding-up, and intimated—
(2) 51 L. J. Ch. 506; 20 Ch. D. 351.

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mated that on a future day he would give his reasons for refusing to accede to the scheme. On February 15 he delivered the following written judgment :

This is a petition to wind up Nelson & Co., Lim., on the ground of its insolvency. The insolvency is not, and cannot be, disputed. The only defence has been that, in the interests of the unfortunate persons who are the policy-holders of or entitled to the benefit of annuity contracts in the company, the Court should adopt, with or without modification, a scheme which has been put forward, and which is said to be a scheme for the reduction of the company's contracts under section 22 of the Life Assurance Companies Act, 1870.

The business of Nelson & Co., Lim., may be described as that of attracting married women to become customers of the company and purchasers of the company's tea, at prices largely—say, 40 per cent.—above its fair market value, by the delusive and reckless promise of impossible pensions to be paid to them if and when they became widows. The pension scheme rested upon no actuarial basis of any kind. It ignored the age of the husband on whose death the pension would commence. It ignored the age of the wife during whose widowhood it would be payable. It ignored, with some exceptions, the health and expectation of life of the husband. The loading which was added to the price of the tea, and which may in a sense be regarded as the premium paid for the annuity contract, bore no actuarial relation whatever to the liability which the company was undertaking. Under no circumstances could it have justified a pension of anything approaching 10s. a week. If the customers had known that they were overcharged 8d. a pound for tea, and in the result might possibly during widowhood receive a pension of, say, 6d. a week, the number of the company's customers would probably have suffered considerable reduction. Even the 8d. a pound did not go to provide for the annuity contracts—it went into the general business; and under the limited company's contracts the policy-holders could look only to .75 per cent. of the profits realised by its

employment with the company's other funds in the business. The offer which the company made was a mere reckless promise of an impossible pension with a view to induce persons to become customers. The company was incorporated on July 11, 1901. It took over the business of a man named Rasmus Jensen. At that date Jensen had some 150,000 to 200,000 customers, and had become liable to pay pensions to a large number of widows. There is some difference between those who began purchasing tea in Rasmus Jensen's time, and whose contracts were taken over by the limited company, and those who began purchasing from the limited company after July, 1901. It is not material to state the difference accurately for the purposes of this judgment. The most material point is that, from the time of its incorporation, the limited company only offered payment out of a fund—namely, 75 per cent. of the company's net profits on tea. The originators of the scheme had not miscalculated the credulity of the public to whom they appealed. The number of customers increased rapidly, and ultimately reached something like 500,000 or 600,000. The number of widows who became entitled to pensions increased with like rapidity; and at the date of this petition there were 12,696 widows entitled to 10s. a week, and 7,084 widows entitled to 5s. a week, making a total of upwards of 19,000 widows entitled to pensions, which aggregate to a sum of between 8,000% and 9,000% a week. There is actuarial evidence which is altogether uncontroverted that the reserve which this company should have had to meet the pensions thus payable and the company's prospective liability in respect of current contracts which might result in pensions is nearly 30,000,000% sterling. The figure is not accurate, and cannot be made accurate without knowing the ages of the lives, a detail which, as I have said, the company ignored. Making large deductions—as, for instance, a deduction on the footing that, say, 75 per cent. of the persons who are now buying tea will cease to buy, and thus cannot become entitled to pensions—and making certain other allowances, the reserve ought to be a

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sum measured, at any rate, by millions—10,000,000*l.* would seem to be about the lowest sum. To meet this gigantic present and prospective liability the company have available for the annuitants less than 20,000*l.* There is the statutory deposit of 20,000*l.*, and, further, a sum of about 2,782*l.* to the credit of the widows' pension fund. But from these has to be deducted a sum of 3,358*l.*, which the company says has been paid to widows over and above the share of profits to which they were entitled. The amount available is thus something under 20,000*l.*, a sum sufficient to pay, even in respect of the present current pensions alone, the amount due to them for little more than a fortnight.

It would take a great deal to induce the Court to allow a company whose past history is such as I have sketched to continue business. I must add, however, something as to what I have been able to learn as regards the constitution of this company from the materials before me. The nominal capital is 101,000*l.* in 1*l.* shares. Of these, 100,000 were under a contract of September 19, 1901, issued as fully paid to Rasmus Jensen as vendor. Some further shares seem to have been issued, for in an agreement of December 6, 1901, I find Charles Alfred Goffin agreeing to sell 100,500 shares, being all the shares he held, to a company called the Nelson Share Syndicate, Lim., for a sum of 220,000*l.*, to be paid in fully paid preference, ordinary, and deferred shares of the syndicate. By clause 6 of that agreement Goffin was (subject to subsisting contracts which were not to be renewed) to have the exclusive right to supply to the syndicate and the company all tea and other commodities from time to time required for the business. Goffin was a secretary or representative of a man named Catton. There was originally a share qualification required of the directors of Nelson & Co., Lim.—namely, 100*l.* That was rescinded on March 19, 1902. Beyond Goffin and the person or persons (whoever they are) who stood behind Goffin, being no doubt the persons (whoever they are) who constituted the Nelson Share Syndicate, there were, so far as I can trace, no corporators of Nelson & Co., Lim., other than a few holders of one

share. Goffin and those who stood behind him were the persons who would derive the profit from being the exclusive vendors to Nelson & Co., Lim., of the prodigious amount of tea which was wanted to satisfy purchasers attracted by the devices which I have described. The machinery which will become available in the winding up of this company may perhaps be usefully employed in ascertaining whether the object of its existence has not really been to create by the promise of bogus pensions an enormous market for tea which was to be supplied to the company by Goffin, or those who stood behind him, to their own profit. The result of the company's proceedings has been to lead to what was perfectly obvious from the first—namely, a state of hopeless insolvency.

Upon every ground a stop ought to be put to such a company in such hands, carrying on such a system of business as this. In the interest of the unfortunate victims, however, the Court is asked to consider a scheme of reduction of contracts under the Life Assurance Companies Act. A scheme has been brought in. It is, in my opinion, open to insuperable objections upon several grounds. In the first place, it involves that this company shall continue business—a course to which, in the absence of overpowering reasons in the interest of the customers, I should not accede. Secondly, it proceeds upon the footing that a system of business shall be continued by which customers shall be attracted to become purchasers of tea at a price loaded with a sum to represent the premium on the insurance benefit, such sum, however, not being payable as a premium capable of being dealt with in manner required by section 4 of the Life Assurance Companies Act, 1870, but included in a lump sum which is to be dealt with in manner indicated in the scheme. Stating it in figures, the matter would stand somewhat thus: The tea purchased by the company costs, it is said, 1*s.* 3*d.* to 1*s.* 5*d.* per pound, and would fairly be retailed at 1*s.* 8*d.* per pound. Sale of the tea was made, and would under the scheme continue to be made, at 2*s.* 4*d.* per pound, thus providing a loading of 8*d.* per pound to form the

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premium income to support the annuity contracts. The scheme involves that a new company called the Nelson Trading Co., Lim., shall sell the tea and shall pay 75 per cent. of the loading (8d. a pound) to this company (Nelson & Co., Lim.), which shall, as between the two companies, be the insurer of what is called the insured customer of the Nelson Trading Co., Lim. A scheme of that kind is, to my mind, not a reduction of contracts of Nelson & Co., Lim. It is a scheme under which the customer, if he is minded to make a new contract with the Nelson Trading Co., Lim., is to be entitled to a reduced benefit out of his previously existing contract with Nelson & Co., Lim. This is not, in my opinion, within section 22 of the Life Assurance Companies Act, 1870. That section authorises a reduction of the contract between A and the company, but not a provision by which A shall enter into a new contract with a new company, and as the result of that shall be entitled to a reduced benefit from his contract with the old company. Again, section 4 of the Life Assurance Companies Act, 1870, requires that a separate account shall be kept of all receipts in respect of the annuity contracts, and that the receipts shall be carried to and from a separate fund absolutely the security of the annuity-holders. The scheme of business which I am now asked to wind up, and the scheme of reduction which I am asked to approve, is one under which the payment which the assured makes by way of premium is not a separate sum capable of being kept separate and appropriated, as required by section 4. The 2s. 4d. per pound which she pays is what I may call a contributory sum for securing two benefits—the present receipt of one pound of tea, and the expectation of a future sum of money contingent upon widowhood. I do not think that this is consistent with the Act of Parliament.

Another fatal objection is that, as counsel for the company conceded, the reduction of the contracts which they propose is a reduction of inequality as between the policy-holders. That which the Act allows is the reduction of all contracts to the relief of the common debtor, but not a reduction which operates in in-

equality as between the common creditors. I do not mean that absolute arithmetical equality must be ensured, but a scheme which proceeds upon a principle of inequality of reduction is not, I think, within the Act. Again, as is pointed out in the report made by Mr. Ackland to the Board of Trade, no sort of benefit is granted to the existing customers of the company which is not granted to new customers, unless it may be a trifling advantage in admitting the old customers to benefits within the first year.

Other objections there are of a commercial rather than a legal character. Thus, as matter of business, it is, I think, idle to anticipate that the new trading company could as a trading company ever legitimately get capital for its undertaking upon the terms proposed—namely, that 95 per cent. of its profits should be handed over under the scheme, and 5 per cent. of its profits should be the only fund for expectation of dividend. Again, there is no practical means of insuring that the trading company shall not so work its business, or so prepare its accounts, as that its net profits shall, as Mr. Ackland says, be whittled down to practically nothing. A suggestion was made by counsel for the company that some machinery should be provided by which this Court, or some authority, should retain control over the price which the company should charge for its tea, and to insure that the present system should not continue, under which the tea-dealing company should be bound to buy all its stock from particular persons, of course to their profit. Such suggestions, to my mind, are illusory. Another objection which weighs strongly with me is that the effect of this scheme is to create what I may call a tied insurance business—a system under which customers are to pay too much for their tea upon the terms that the excess shall be taken by them, not to such insurance office as they like, to insure an annuity, but that they shall be tied to Nelson & Co., Lim., being such a company as I have described, as their insurers. I see no advantage, but every disadvantage, to the customer in this provision. It is said, on the other hand, that to reject any such scheme is to throw

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away the value of what is called—using a term singularly inappropriate to the facts of this case—the “goodwill” of the company; and that the widows, being confined to 75 per cent. of the profits, can get nothing in the winding-up beyond the 20,000*l*. As to the latter, I am not sure that this is so; but I say no more upon the point, for it may well have to be considered in the course of the winding-up. I am clear, however, that, even if this be so, it is more to the interest of the policy-holders to put an end at once to this concern, even if that which they get out of the wreck be but a small sum.

For these reasons I think that the scheme for reduction of contracts is impossible and cannot be approved, and I, therefore, at the conclusion of the argument pronounced a winding-up order.

Solicitors—L. Weatherley and Helder, Roberts & Co., agents for Simpson & Co., Leeds, for petitioners and others supporting the petition; Baker, Baker & Co., for company; Solicitor to Board of Trade.

[Reported by R. Hill, Esq.,
Barrister-at-Law.

WARRINGTON, J. }
1905.
Feb. 28.
March 2.

ELLIS v. ELLIS.

Executor and Administrator—Letters of Administration Granted while Will Appointing Executor in Existence—Acts done before Administration—Validity.

Where letters of administration are granted while a will appointing an executor is in existence, and the will is subsequently proved and the letters of administration revoked, the grant of administration is void ab initio; and, generally speaking, dispositions of the assets by the supposed administrator are void also.

Abram v. Cunningham (2 Lev. 182) followed.

Graysbrook v. Fox (1 Plow. 275, 282) distinguished.

A mortgagor who had deposited the lease of a house to secure his mortgage-debt

died, leaving a will by which he appointed an executor. The mortgagor's son paid off the debt with money which he borrowed for the purpose, deposited the lease with the lender of the money as security for the loan, and obtained letters of administration to his father's estate. The will was subsequently proved, and the letters of administration were revoked. The house having many years afterwards been sold by the sole beneficiary under the will, the lender's representatives brought an action against the purchaser for foreclosure:—Held, that, the letters of administration being wholly void, the son had no power to create a valid mortgage to the lender, and, in the circumstances of the case, that any claim of the plaintiffs by subrogation was barred by the Statute of Limitations and by the fact that the son was a debtor to the father's estate.

The facts as found by the Court were as follows.

This was a foreclosure action brought by the executors of one James Ellis against the defendant, the owner of a certain leasehold house, 13 Upper Chalton Street, Marylebone, of which it was alleged that James Ellis had been mortgagee.

The lease of the house was originally granted to one George Ellis, by whom it was mortgaged by deposit to his brother, William Charles Ellis, to secure 100*l*. and interest.

George Ellis died in August, 1892, the mortgage to William Charles Ellis being then subsisting.

On his death William Charles Ellis demanded of George Ellis, a son of the deceased, payment of the debt, threatening to foreclose if he were not paid.

On October 20, 1892, George Ellis, the son, borrowed from James Ellis 100*l*., and the same day paid it, and a sum of 3*l*. for interest, to William Charles Ellis, receiving from him the lease. He then gave to James a promissory note for 100*l*. and deposited the lease with him. The promissory note referred to the fact that the lease was deposited as security for the 100*l*.

On November 9, 1892, letters of administration of the estate of George

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Ellis, the father, were granted to George Ellis, the son, on the assumption that the father had died intestate; there was in fact a will, and George Ellis, the son, knew of it, though he said at the trial it was, as he thought, not properly attested. That will appointed an executor. The Court did not find that George Ellis, the son, did other acts of administration than as above mentioned.

On November 23, 1892, an action was commenced against George Ellis, the son, for revocation of the grant of administration and to obtain probate of the will.

In June, 1893, the plaintiffs in that action obtained judgment, the will was proved in solemn form, probate was granted to the executor, the letters of administration were revoked, and George Ellis, the son, was ordered to pay the costs of the action. Those he had not paid, nor was it shewn that he had fully accounted for rents and other moneys received while he was administrator.

James Ellis, in 1896, made a claim against the sole beneficiary under the will for payment of his 100*l.*; his claim was repudiated, and he took no steps to assert it. He died in 1903, the present plaintiffs being his executors.

Except the payment to W. C. Ellis under the circumstances mentioned there had not been any payment of principal or interest, nor had there been any acknowledgment of the debt.

The house had been sold to the defendant, who happened to be the original mortgagee, W. C. Ellis, and on October 19, 1904, this action was commenced.

On the sale of the house to the defendant, it was stated that George Ellis, the son, asserted that the lease was lost; and in an agreement under seal dated July 12, 1902, which was entered into by the vendor and purchaser to provide for the indemnity of the purchaser against any adverse claim, it was recited amongst other things as follows: "And whereas George Ellis son of the said testator falsely alleging that his father died intestate obtained letters of administration to his personal estate in the month of November 1892 and thereupon the said William Charles Ellis not knowing of the existence of the said will received from

the said George Ellis payment of the said sum of 100*l.* and handed to him the said lease." It was said by the plaintiffs that that was an admission by the defendant that the payment was made by George Ellis, the son, as administrator. Assuming that to be so, the Court did not think it assisted the plaintiffs' case.

The defendant denied that the plaintiffs were mortgagees of the house, and he also pleaded the Statute of Limitations.

Norton, K.C., and *Ashton Cross*, for the plaintiffs.—The title of George Ellis, the son, on obtaining letters of administration to the estate of his father, related back to the death of the intestate, and the payment off of the old mortgage to W. C. Ellis and the creation of a new mortgage to James Ellis were made by George Ellis, the son, in the capacity of administrator; and the mortgage to James Ellis is now vested in the plaintiffs, who are entitled to enforce it—*Foster v. Bates* [1843],¹ *Welchman v. Sturgis* [1849],² *Hill v. Curtis* [1865],³ *Watson, In re*; *Phillips, ex parte* [1886],⁴ and *Pryse, In re* [1904].⁵

H. Terrell, K.C., and *J. W. Manning*, for the defendant.—Upon the facts as shewn there is no case upon which the plaintiff can succeed in law. The letters of administration, having been granted while there was the will in existence appointing an executor, were void *ab initio*—*Williams on Executors* (10th ed.), p. 461; *Abram v. Cunningham* [1677],⁶ and *Woolley v. Clark* [1822].⁷ There cannot be two different persons in whom the property of a deceased is vested, and entitled to contract on his behalf. *Boxall v. Boxall* [1884],⁸ proceeds on the authority of the two earlier cases. If *Abram v. Cunningham*⁶ is good law, it covers the present case. On this short ground the defendant is entitled to succeed.

(1) 13 L. J. Ex. 88, 90; 12 M. & W. 226, 233.

(2) 18 L. J. Q.B. 211; 13 Q.B. 552.

(3) 35 L. J. Ch. 133, 137; L. R. 1 Eq. 90, 100.

(4) 56 L. J. Q.B. 78, 79; 18 Q.B. D. 116, 119. Affirmed, 56 L. J. Q.B. 619; 19 Q.B. D. 234.

(5) 73 L. J. P. 84; [1904] P. 301.

(6) 2 Lev. 182.

(7) 5 B. & Ald. 744.

(8) 53 L. J. Ch. 838; 27 Ch. D. 220.

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[WARRINGTON, J.—The note on p. 501 of the 9th edition of *Williams on Executors*, which does not appear in the new edition, that *Woolley v. Clark*⁷ would seem to be a case of doubtful authority, will be found, on reference to an earlier page mentioned in the note, not to apply to the case upon the point which we are now discussing.]

Norton, K.C., in reply.—The estate of George Ellis, the father, took the benefit of the 100*l.*, and must bear the charge. It benefited to the extent of 103*l.* Even if George Ellis, the son, was not entitled as administrator to do what he did, yet he was entitled to stand in the place of William Charles Ellis by right of subrogation—*Devaynes v. Robinson* [1857]⁹—and to transfer the right to James Ellis.

In *Williams on Executors*, p. 462, it is said, "It would seem, however, that as between the rightful representative and a person to whom the administrator under a void probate, or grant of letters, has aliened the effects of the deceased, the act of alienation, if done in the due course of administration, shall not be void"—citing *Graysbrook v. Fox* [1565]¹⁰ and *Parker v. Kett* [1700].¹¹ What an administrator does, if done in due course of administration, is good, even though the grant of administration be afterwards revoked. James Ellis made a payment to George Ellis, the son, for which George had a right to give James a receipt and to hand him the lease. The meaning of the Court of Probate Act, 1857—see sections 77 and 78—is that acts done before revocation are good. Acts, if done in due course of administration, are good, even though done before administration granted—*Bodger v. Arch* [1854].¹² The true way to view the matter is to ask whether the acts in question could be done by an administrator, whether they were for the benefit of the estate, and whether they were done in the due course of administration. In the present case the answer to each question is Yes.

[WARRINGTON, J.—The syllogism seems to me to break down in the statement

that the acts done were for the benefit of the estate.]

It is enough that they were done in due course of administration. In *Abram v. Cunningham*⁶ and *Boxall v. Boxall*⁸ there was concealment of the will. Here the beneficiary under the alleged will knew of its existence.

[WARRINGTON, J.—But George Ellis, the son, concealed it from the Court of Probate or he would not have got administration.]

His dealing with the lease was such as to bind the rightful executor—*Thompson v. Harding* [1853].¹³

H. Terrell, K.C., in reply upon the further cases cited.—The plaintiffs must make out that George Ellis, the son, was executor *de son tort* acting in the due course of his administration—*Thompson v. Harding*.¹³ That they have not shewn. He paid the mortgagee and got the lease, and so far all was right. But then he went on to deposit the lease, and that was not in the course of administration. Nor was it for the benefit of the estate. If the contention of the other side is right, he prevented the Statute of Limitations from running in its favour.

Cur. adv. vult.

WARRINGTON, J. (after stating the facts).—If the letters of administration had remained unrevoked, then I think they would have related back to the death of George Ellis, the father, and the pledge of the house by the administrator for the purpose of securing money borrowed for the payment of a debt would have been valid, the statute would not have run, and the plaintiffs would have been entitled to succeed—see *Foster v. Bates*.¹ But, unfortunately for the plaintiffs, there was in existence a will by which an executor was appointed, that will was duly proved, and the administration was revoked. Under those circumstances I think it is clear law that the grant of letters of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also; the ground of this being that the assets are vested in the executor from the death, and the supposed administrator

(9) 27 L. J. Ch. 157; 24 Beav. 86.

(10) 1 Plow. 275, 282.

(11) 1 Ld. Raym. 658, 661.

(12) 24 L. J. Ex. 19, 21; 10 Ex. 333, 339.

(13) 22 L. J. Q.B. 448; 2 E. & B. 630.

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has no property in them and no power of dealing with them. This was determined in *Abram v. Cunningham*.⁶ In that case a testator, David Cunningham, being possessed of certain leaseholds as executor, died on September 15, 1665, leaving a will whereby he appointed executors, who, of course, became executors of the original testator. On October 21, 1671, administration *de bonis non* of the original testator was granted to a creditor, the Ordinary having no notice of the will. On March 1, 1672, the administrator sold the leaseholds to the plaintiff for 1,000*l*. On February 13, 1673 (the surviving executor of the will of David Cunningham having renounced probate), the administration granted to the creditor was revoked, and administration of the estate of the original testator was granted to the defendant. The question was whether the plaintiff or the defendant had the better title, and it was decided in favour of the defendant. The grounds of the decision appear in the argument for the defendant, and are that if there are in fact executors the Ordinary has no power to grant administration, the property is vested in the executors, and the letters of administration and the dealings by the administrator under them were simply void. This is recognised as good law by Mr. Justice Kay in *Boxall v. Boxall*⁸ and in the last (10th) edition of *Williams on Executors*, p. 461.

But it is contended by the plaintiffs that there is an exception to the general rule of acts done in the due course of administration, and that such acts are not void. For this reliance is placed on several authorities, and in particular on a *dictum* in the case of *Grayebrook v. Fox*.¹⁰ The headnote is as follows: "A. makes his will and appoints an executor, and dies, the Ordinary, without taking notice of the will, commits administration to J. S. before the executor has proved the will, the administrator sells the goods of the deceased, and the executor afterwards proves the will, and brings detinue for the goods against the vendee, and adjudged that he should recover, for the probate supersedes the administration *ab initio*, and the sale made under it"—so far the decision is the same as *Abram v.*

*Cunningham*⁶; then it goes on: "but otherwise if it be averred that the sale was made to discharge the funeral expenses or debts, which the administrator or executor was compellible to pay, for there such sale shall be indefeasible for ever." The *dictum* upon which the latter part of that headnote is founded is that of Justice Walsh, at p. 282, that "if the defendant here had averred that the administrator had aliened the goods to him for a certain sum, and had employed the money in discharge of the funeral, or of the debts of the deceased, or about other things which an executor should be forced to do, there the sale for such purposes should not be avoided, but should remain indefeasible; and the reason is, because by the commission of the administration to him by the Ordinary, who was ignorant of the testament, he has a colour of authority, though it is not a rightful one, and he that has the right suffers no disadvantage although he be bound by the act of the administrator, for it is no more than he himself was compellible to do, and the administrator having done that which the executor himself was obliged to do, his act shall be allowed good, because the executor himself is thereby freed and excused from the trouble of doing it. And so inasmuch as the administrator was compellible to do it, (for if he was sued for a thing which ought to be done, he could not disable or discharge himself for the time) it is reasonable, and no detriment to any one that the thing done should remain stable and firm without impeachment." It is to be observed that the essence of that statement of law is that the act is one which the executor is compellible to do. But in this case, though as between the real and the supposed legal personal representative the payment of the debt may well be treated as proper so as to entitle the latter to credit, the mortgage stands on a different footing. This was essentially a voluntary act, no title was in fact conferred by it, and on the authorities I have cited I hold it to have been simply void.

The plaintiffs then contend that George Ellis, having paid off the debt for the benefit of the estate, was entitled to stand in the place of the creditor, and

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transferred that right to James Ellis, who actually found the money. But, granting that such would be the right of George Ellis, and that the plaintiffs could assert that right by subrogation, any claim founded on it would now be barred by the Statute of Limitations. The debt is of course long since barred, and all claims under the original security are now barred also, for in this aspect of the case the payment of the interest was made by a stranger and was not such a payment as would prevent the statute from running. Moreover, even if it could be otherwise supported, the claim by way of subrogation to the rights of George Ellis would be effectually met by establishing his indebtedness to the estate in respect of the costs of the probate action, and possibly in respect of rents and other moneys.

On the whole, I think the present action fails, and there must be judgment for the defendant with costs.

Solicitors—A. B. Clifton, for plaintiffs;
Henry Fisher, jun., for defendant.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

WARRINGTON, J. }
1905. } BEVAN v. WEBB.
March 14, 15, 16. }

Partnership—Trustee—Lease of Partnership Premises—Purchase of Freehold Reversion.

The principle of Keech v. Sandford (Select Ca. Ch. 61) as extended by Phillips v. Phillips (54 L. J. Ch. 943; 29 Ch. D. 673), that a trustee, or person in a fiduciary position, cannot purchase for his own benefit the freehold reversion expectant on the determination of a lease, being part of the trust property, only applies in the case of leases renewable by contract, or where there is a reasonable expectation that the lease will be renewed.

Randall v. Russell (3 Mer. 190) and Longton v. Wilsby (76 L. T. 770) followed.

In the year 1854 W. Webb was possessed of certain leasehold premises at Aberbeeg in the county of Monmouth. The property was held under the same lessor. Part was held under a lease dated in the year 1839 for a term which expired in 1901; another part was held under a lease dated in the year 1840 for a term which expired in the year 1903; and the remainder under a yearly tenancy. In October, 1880, one moiety of the reversion expectant on the determination of the two leases of 1839 and 1840, and of the property of which W. Webb was yearly tenant, was put up for sale by auction. It was bought by W. Webb for his own benefit, and conveyed to him in fee-simple by deed dated January 1, 1881. W. Webb bequeathed his leasehold interest and devised his moiety of the freehold reversion in the premises to his two sons J. R. and T. A. Webb, and died on March 27, 1883. In the year 1892, J. R. Webb and T. A. Webb purchased and took a conveyance to themselves in fee-simple of the other moiety of the same freehold reversion.

In June, 1854, W. Webb made over to his two sons W. H. Webb and J. R. Webb and to his son-in-law the brewery business which he, W. Webb, had carried on on part of the premises. There were various changes in the constitution of the partnership, and at the date when this action was brought the plaintiffs were entitled as beneficiaries to one-fourth, and the defendants (other than the defendant company) to the remaining three-fourth shares in the partnership.

No formal lease nor an agreement for a lease of the premises upon which the business was carried on was ever granted to the various partnerships, either by W. Webb in his lifetime, or by his sons J. R. and T. A. Webb after his death. In his Lordship's opinion there was only a contract or licence entitling the partnership to continue carrying on the brewery business on that part of the premises whereon W. Webb had carried it on.

In this action (amongst other claims) the plaintiffs sought to obtain a declaration that the purchase of the freehold reversion in the premises enured, as to an apportioned part thereof, for the benefit

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of the partnership business, and for ancillary relief.

Henry Terrell, K.C., and Chubb, for the plaintiffs.—The principle of *Keech v. Sandford* [1726]¹ is that a person in a fiduciary position cannot acquire a benefit for himself and disappoint a beneficiary. The principle is of general application, and applies not only to cases where there is strictly the relation of trustee and *cestui que trust*, but, between partners, persons having a limited interest and remaindermen, and mortgagor and mortgagee—*Ranelagh's (Lord) Will, In re* [1884].² It applies to the purchase of a reversion—*Phillips v. Phillips* [1885].³ Partners stand to one another in a fiduciary position—*Featherstonhaugh v. Fenwick* [1810]⁴ and *Clegg v. Fishwick* [1849].⁵

Warmington, K.C., and Rolt, and Cave, K.C., and P. S. Stokes, for the defendants.—*W. Webb* and his sons were entitled to the leaseholds for their own benefit, and what they purchased was the reversion expectant upon the determination of the leases, and it is a graft or addition to that. The partnership had no interest in the leases. There is a distinction between cases where the leases are or are not renewable. It is only where the lease is renewable by contract or custom that the doctrine of *Keech v. Sandford*¹ is applied. Further, it is not an irrebutable presumption, but is a matter which can be explained by the circumstances—*Randall v. Russell* [1817],⁶ *Hardman v. Johnson* [1815],⁷ *Burdon v. Barkus* [1862],⁸ and *Longton v. Wilsby* [1897].⁹

Henry Terrell, K.C., in reply, referred to *Biss, In re; Biss v. Biss* [1903],¹⁰ *Acheson v. Fair* [1843],¹¹ and *Aberdeen Town Council v. Aberdeen University* [1877].¹²

(1) Select Ca. Ch. 61; 2 Wh. & Tu. L.C. (7th ed.), 693.

(2) 53 L. J. Ch. 689; 26 Ch. D. 590.

(3) 54 L. J. Ch. 943; 29 Ch. D. 673.

(4) 17 Ves. 298.

(5) 19 L. J. Ch. 49; 1 Mac. & G. 294.

(6) 3 Mer. 190.

(7) 3 Mer. 347.

(8) 31 L. J. Ch. 521; 4 De G. F. & J. 42.

(9) 76 L. T. 770.

(10) 72 L. J. Ch. 473; [1903] 2 Ch. 40.

(11) 3 Dr. & W. 512; 2 Con. & Law. 208.

(12) 2 App. Cas. 544.

WARRINGTON, J., after stating the facts, continued: I now propose to see what the law is on the first question applicable to this case. This is beyond dispute, and has not been disputed by the defendants, that if a trustee, or a person in the position of a trustee, holding a lease as part of his trust property, takes a renewal of that lease, the renewed lease is treated as a graft upon or addition to the trust property, and itself forms part of the trust property. As to that I think there can be no doubt. And I think there is also no doubt that that principle is applicable to the relations between partners; and if part of the assets of the firm consists of leasehold premises, one partner cannot take a new lease of those premises, and then insist on keeping that for his own benefit. But it is sought to extend that doctrine further by saying, in equally general terms, that no such trustee or partner is capable of taking to himself the reversion expectant on the determination of the lease of which the trust estate or the partnership, as the case may be, is possessed. In my opinion, in the wide terms in which I have expressed it, and in which alone it must be expressed if the plaintiffs are to succeed, the proposition is not sound.

The question was raised in a suit of *Randall v. Russell*⁶ before Sir William Grant. In that case a testator had been possessed of certain premises held under a college lease. He had given those premises, with others, to his wife during her widowhood, with gifts over, after her second marriage, to other persons. After his death his widow took a new lease, and she subsequently purchased the reversion, not from the college, but from a Mr. Hull, to whom the college had conveyed it. It will be noticed, therefore, that that case raised both the question as to the renewed lease and the question as to the title of the reversion. Sir William Grant held first, in accordance with the general principle which I have stated, that the new lease did belong to the estate of which the widow had been tenant for life, but that the reversion did not. The grounds on which he so held are most important. After alluding to the question with reference to the reversion

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he says: "No case was mentioned, in which this sort of equity had been carried to such a length. The ground commonly stated, on which the renewed lease becomes subject to the trusts of a will disposing of the original lease, is, that the one is merely an extension or continuation of the other. But the fee is a totally different subject, which the testator had it not in his contemplation to acquire or dispose of. Yet, if Mrs. Russell had purchased from the college, it might be said, that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests; although, as I have already said, I am not aware of any decision to that effect. But, here, the situation of the parties was altered by the act of the landlord, without any intervention of the tenant for life. The college had aliened the property to an individual. The benefit attending the tenant-right of renewal with a public body was gone. A lease at a rack rent was all that was to be expected from the private proprietor. Mrs. Russell's purchase from the first vendee wrought no change whatever in the situation of those who had had interests in the lease as a college lease. Before she bought, it had become a lease that must expire at the end of 14 years. Whether Mr. Hull sold or kept the reversion, was a matter of indifference to them." And then he proceeded to hold, in that case, that the tenant for life did not hold the reversion in trust for the persons interested under the will, and he makes his reasons as plain as reasons can be made. Holding under a college lease, there was a reasonable expectation of renewal at the old rent and under the old terms; holding from a private individual, there was no such expectation, and the tenant could not expect to get anything but an ordinary lease, if he got it at all, in competition with other persons, and at a rack-rent; and that learned Judge distinctly refused to apply to such a case the principle which, he said, he thought might be applied if the lease had remained a college lease.

There is an earlier case before the same learned Judge, the case of *Hardman v. Johnson*⁷; but I do not refer to that case further, because, although the same learned Judge in that particular case also held that the reversion did not belong to the trust estate, the reasons for that decision are not given, and it is therefore not of very much value as an authority.

No case questioning the decision in *Randall v. Russell*⁶ has been cited, and no other case has been referred to until 1885, when *Phillips v. Phillips*² came before the Court of Appeal. *Phillips v. Phillips*² was just the case which Sir William Grant said he thought might be determined in favour of the trust estate. In that case a testatrix had certain leaseholds which were renewable by custom—that is to say, they were leaseholds held under the City of London, the lease of which the City for many years had been in the habit of renewing on payment of a certain fine—as we all know, a very common thing in City leases. There is no legal obligation, but as a matter of fact the City continues to renew on those terms, and every tenant of any such property has an expectation that the lease will be so renewed. The testatrix devised those leaseholds to James Phillips for the residue of the term, and after the death of James to his children. James renewed the leases more than once, and he afterwards purchased the reversion. There was no dispute as to the renewed leases, but the question arose whether his children became entitled to the reversion. It was held by the Court of Appeal that they did. But why? I think quite plainly because the case was just that case which Sir William Grant referred to in *Randall v. Russell*⁶ as a case in which that equity might be applied. Sir W. Brett, M.R., who gives the first judgment there, puts it in perfectly plain terms. He says: "The will must be construed with reference to the facts which existed at the time when it was made, and which must be presumed to have been known to the testatrix. She was possessed of a term for twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only 3*l.*; but it was an

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ecclesiastical lease"—it was really a corporation lease, but that makes no difference—"and upon payment of a fine and upon surrender within a limited time it gave a right to renewal. She would, therefore, consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a Court of equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction." I ought to mention that *Randall v. Russell*⁶ had been cited there, but cited to distinguish it so far as the decision was concerned, and to rely upon it so far as the *dictum* of Sir William Grant was concerned. What I think the Master of the Rolls intended to do in that case was to turn the *dictum* of Sir William Grant into a decision of his own, and not to go further. He did not intend to overrule the decision in *Randall v. Russell*⁶ in the least. Lord Justice Cotton gives a judgment to the same effect, premising it by the statement that the question was, Who has the right to what was a reversion in property comprised in an ecclesiastical lease? Lord Justice Lindley gave no reasons of his own, but merely concurred in the judgments of the other Judges. In my judgment, that case carries the matter no further forward. That is a decision which is perfectly consistent with *Randall v. Russell*⁶. It carries out that which Sir William Grant thought possibly might be held to be the law, although he hesitated to affirm it positively.

Up to this point I have expressed my own view upon the effect of *Randall v. Russell*⁶ and *Phillips v. Phillips*,³ but the question came up distinctly for decision before Mr. Justice Stirling in *Longton v. Wilsby*.⁹ There the testator had been possessed of certain leaseholds not renewable, and had given them to a brother for life, with remainders over. The second tenant for life, during the life of the first, had purchased the reversion, and the question

there was, Was he a trustee for the remaindermen? That is the exact question which I have to decide. *Randall v. Russell*⁶ was referred to, as was *Phillips v. Phillips*,³ and Mr. Justice Stirling in his judgment stated the facts of *Randall v. Russell*⁶ and referred to that part of the judgment which I have read, and then said, "That is the decision eighty years ago of a very eminent Judge, and, as far as I can find, it has not been overruled nor dissented from." Then there is a reference to *Phillips v. Phillips*³ stating in express terms that that was a case with reference to leaseholds renewable by custom. Then he goes on: "the grounds of the decision are given by the Master of the Rolls. He says: 'She was possessed of a term of twenty-one years created by a lease granted shortly before she made her will; her interest was of a somewhat peculiar nature, for the yearly rent was only 3l.; but it was an ecclesiastical lease, and upon payment of a fine, and upon surrender within a limited time, it gave a right to renewal. She would therefore consider herself to be possessed of a renewable lease, and she must be assumed to have intended to dispose of a renewable lease by her will. It is a well-established doctrine of a Court of equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where a tenant for life has purchased the reversion. This is, no doubt, an extension of the principle, but I think that it is an extension which we ought to sanction.' Cotton and Lindley, LJJ. take the same view. But none of the learned Judges indicated any intention of overruling *Randall v. Russell*⁶ or departing from what was there laid down. That case was cited, and the passage I have read, from 'if Mrs. Russell had purchased from the college' down to 'decision to that effect,' was referred to and relied on on behalf of the remaindermen, and the Court adopted the view expressed by Grant, M.R. in that passage. If *Randall v. Russell*⁶ is, as I think, a binding authority, the present case falls well within it, because it is less favourable to the purchaser in two respects: first, the purchase there was made by an actual

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tenant for life in possession, whereas here it was made by a reversioner; and, secondly, in that case the leases were at one time renewable by custom, whereas here it is not so. Not finding any case in which the doctrine of *Keech v. Sandford*¹ has been applied to leaseholds which were not renewable by contract or custom, and finding that the case of *Randall v. Russell*² has not been overruled, I shall follow it, and I therefore hold that that case applies." Now I certainly think there is a slip in taking down the learned Judge's language. What the learned Judge obviously meant is: "Not finding any case in which the doctrine of *Keech v. Sandford*¹ has been applied to the purchase of the reversion of leaseholds," and so on. He obviously meant that. The rest of the judgment shews it. I assent to the principles enunciated in *Longton v. Wileby*,³ but even if I did not agree with that judgment of Mr. Justice Stirling, I should be bound by it. It seems to me, therefore, both on principle and on authority, that the purchase of the reversion in this case did not in any way enure for the benefit of the partnership firm, either on any doctrine including the consideration of trustee and *cestui que trust*, or by regarding William Webb or the purchasers of the other moiety as trustees for the Bevan family. On that ground, that part of the case fails.

But I do not want to part with it without saying that I think it fails on another ground, which is this: In my judgment, if the reversion could be treated as a graft upon or addition to something possessed by the firm or by the *cestuis que trust*, there is not in this case anything upon which it could be grafted. I need not repeat what I said when I was reading the documents in the case. In my judgment, the true effect of those documents was not to create an interest in the firm in these leasehold premises, but to give the members of the partnerships, by contract, a right to carry on the business on the premises. Then, if so, there is nothing upon which, even if a lease had been granted on the equitable doctrines which I have referred to, that lease could have been grafted. In my judgment, therefore, on this part of the

case, instead of the declaration asked for by the plaintiff, there ought to be a declaration that the freehold and inheritance of the brewery premises ought not to be treated as part of the assets of the firm.

Solicitors — Andrew Wood, Purves & Sutton, agents for Powell & Hughes, Brynmawr, for plaintiffs; Le Brasseur & Oakley, agents for Le Brasseur & Bowen, Newport, Monmouthshire, for defendants.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
1905. } HANFSTAENGL v.
Feb. 9, 10, 21. } W. H. SMITH & SON.

Copyright — Picture — Infringement — Photographic Reproduction — "Copy" of the Work or the Design thereof — Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 1 and 11.

The plaintiff, who was the owner of the copyright in an oil painting representing a winged female kneeling on a rock and gazing into water below, reproduced the picture in various forms and sizes by photographic processes. The defendants sold copies of an American magazine containing on a page of its advertising section a small and rude photographic reproduction of the more distinctive features of this picture, omitting the background and wings. This reproduction was placed amongst various other similar reproductions of other pictures grouped round an announcement in which the readers were offered a prize if they could name a certain percentage of the advertisers who used the pictures as advertisements. On complaint being made by the plaintiff the page in question was torn out of all copies of the magazine. In an action for an infringement of copyright,—Held, that the reproduction in question must be held to be a "copy" of the original "work, or the design thereof," within the meaning of the Fine Arts Copyright Act, 1862, and there must be judgment for the plaintiff with one farthing damages, and the costs of the action.

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The plaintiff was a fine-art publisher of Munich, London, and New York, and carried on a very large trade in reproductions of works of art of old masters by means of coloured facsimiles, photogravures, and photographs. The defendants were magazine and newspaper distributors and the proprietors of railway bookstalls throughout the kingdom.

In June, 1890, the plaintiff became the owner of the copyright in a picture called "Nature's Mirror," or "Psyche at the Spring," painted by Paul Thumann. This picture was an oil painting of considerable artistic merit and beauty, and represented a draped female with wings on her back, kneeling on a rock, and gazing into a pool of water below. Numerous reproductions of this picture in coloured photogravures and photographs of various sizes were made by the plaintiff and sold at prices varying from three guineas to sixpence.

In August, 1904, the defendants offered for sale at their bookstalls an American magazine called *Munsey's*, and in the advertising section of the August number of this magazine there appeared a rude photographic reproduction of "Nature's Mirror," about three-quarters of an inch in diameter, and placed amongst a number of other similar reproductions of pictures, all of which were stated to form pieces or parts of famous advertisements, and were grouped round an announcement in which the readers of the magazine were offered a prize if they could name 40 per cent. of the advertisers who used the pictures as advertisements. In this rude reproduction the background of the original was blotted out, the figure had no wings on her back, and the water was invisible.

On August 8, 1904, the plaintiff issued the writ in the action claiming an injunction to restrain the defendants from printing or otherwise multiplying, importing, or offering for sale, any copies or colourable imitations of "Nature's Mirror"; and on August 10, on an application for an interim injunction, the defendants undertook not to sell any further copies of the magazine with the advertisement complained of. The defendants accordingly issued a printed memorandum to all their clerks and employees, instructing them to tear out the advertisement page

in question in every copy of the August number of *Munsey's Magazine*, and not to sell any number without this having been first done; and these instructions were carried out. As terms could not be arranged, the plaintiff proceeded with the action, which now came on for hearing practically as an action for damages, the claim for an injunction not being pressed. Some evidence was given on behalf of the plaintiff to shew that the fact of a copy or reproduction of a picture being used as an advertisement tended to vulgarise it and diminish the sale of artistic reproductions of the original. The defendants did not admit that the advertisement complained of was a reproduction of the original picture, and they denied that they had ever infringed or intended to infringe the copyright of the plaintiff in the picture in question, or that the plaintiff had suffered any damage.

Stewart-Smith, K.C., and *Ashton Cross*, for the plaintiff.—By publishing this photographic reproduction of the original picture the defendants have committed a breach of the Fine Arts Copyright Act, 1862. The plaintiff being the owner of the copyright in this picture is entitled to restrain any infringement which tends to vulgarise or diminish the value of the original picture and the plaintiff's copyright. This reproduction in *Munsey's Magazine*, which shews that the picture has been made use of as an advertisement, has this effect, and is therefore damaging to the plaintiff. It is true that the reproduction is small, but if this is allowed to pass it may lead to other more serious infringements.

P. O. Lawrence, K.C., and *R. J. Parker*, for the defendants.—The action is of a trumpery character, and no appreciable damage can have been done to the plaintiff. This reproduction is not a "copy" or a colourable imitation of the original picture within the meaning of the Fine Arts Copyright Act, 1862. The artistic merit and design of the original picture, and of the plaintiff's large reproductions, is in no sense reproduced. In *Hanfstaengl v. Empire Palace* [1894],¹ which was the case of the

(1) 63 L. J. Ch. 452, 681; [1894] 3 Ch. 109.

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living pictures at the Empire Palace, Lord Davey points out that in the case before him the sketches were "mere outlines, descriptive more or less accurately of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art." Those remarks apply here. The object of the Copyright Acts is to protect the reputation of the artist; and in the present case the reproduction complained of could not possibly lessen the reputation of the original picture. It is not intended and does not purport to reproduce the essential qualities of the original, and is therefore not an infringement of the copyright. The case of *Hanfstaengl v. Baines & Co.* [1894]² also shews that there must be a reproduction of the artistic merits of the original picture to constitute an infringement; and in *Dicks v. Brooks* [1880]³ it was held that a wool pattern taken from an engraving was not a copy of the engraving within the Acts there mentioned.

Stewart-Smith, K.C., in reply.—This is a copy of the work, or the design thereof, within the meaning of the section. The pose of the figure, the rock, and the other essential features of the original are there. The case of *Gambart v. Ball* [1863]⁴ shews that copying by means of a photograph can be an infringement of copyright, whether it is the same size, or enlarged, or diminished. The word "work" in the section does not mean the entire "work." The essential part is taken here and also the "design," although it is difficult to define that word—*Hanfstaengl Art Publishing Co. v. Holloway* [1893].⁵

Cur. adv. vult.

Feb. 21.—KEKEWICH, J., delivered the following written judgment: The question for decision is whether a rude figure published in *Munsey's Magazine* for August, 1904, is a copy of the picture known as "Nature's Mirror," or of the design thereof, within the meaning of the

Fine Arts Copyright Act, 1862. That statute in section 1 provides that the owner of the copyright in a picture shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying the same, and the design thereof, and in section 11 enables him to recover damages against any person who, without his consent, repeats, copies, colourably imitates, or otherwise multiplies, or causes or procures to be repeated, copied, or colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such picture or the design thereof. For the moment I am not concerned to consider the meaning in this Act of the word "design," about which something shall be said presently, but it must be determined whether this figure in *Munsey's Magazine* can properly be regarded as a copy of the picture "Nature's Mirror." What is the meaning of the word "copy" when used in this statute and other statutes of a similar character?

The picture in the present case is admitted to be an oil painting, and, although we have not seen the original, we know from the plaintiff's reproductions that it is a picture of considerable size embodying a large amount of artistic work. It portrays a draped female, with wings, kneeling on a rock and gazing on the water below, from whose calm depth objects on the bank are picturesquely reflected. There is a background carefully treated so as to bring into prominent relief the figure, rock, and water. Pictures, and particularly some of the best-known pictures in home and foreign galleries, are often copied, and no student would claim to have copied one unless he had placed on his canvas all the contents of the original in the colours there employed, and had endeavoured to the best of his skill and ability to reproduce the artistic merits. The result of his labours is what is generally styled a "copy" of the picture. It is, I think, obvious that for the purpose of the Act under consideration the word "copy" cannot be limited to a reproduction of this character, but it is not equally easy to say to what reproductions it ought to be extended. The authorities are by no means without instruction on this point,

(2) 64 L. J. Ch. 81; [1895] A.C. 20.

(3) 49 L. J. Ch. 812; 15 Ch. D. 22.

(4) 32 L. J. C.P. 166; 14 C. B. (N.S.) 306.

(5) 62 L. J. Q.B. 347; [1893] 2 Q.B. 1.

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but much is left open for consideration and determination. It would be impossible fully to state the law as expressed in these authorities, most of which were cited in argument, without going through them at greater length than is convenient to do here, and comparing the language of different Judges. Each case deals with peculiar circumstances, and the endeavour of the Court in each was rather to apply the statutory provisions to the case in hand than to lay down principles or rules by which another Court might be guided in another case disclosing circumstances entirely different. In the following comment I have endeavoured, after careful study, to eliminate from these authorities what seemed specially applicable to the case before me, and to find therein a sufficient guide for its determination.

In *West v. Francis* [1822]⁶ Mr. Justice Bayley uses language coming, as Lord Watson says, nearer to a definition than anything which is to be found in the books. It runs thus: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." This oft-quoted language was criticised in *Hanfstaengl v. Baines & Co.*² by Lord Watson. He notices that the learned Judge was construing, for the purpose of the case before him, the provision in the Prints Copyright Act, 1777 (17 Geo. 3. c. 57), a statute for the protection of copyright in engraving, which differs in expression from the enactments of the Fine Arts Copyright Act, 1862, and contains no reference to reproducing the design of the protected work, and then he proceeds as follows: "As I read the later statute with which we have to deal in this case, the idea created by a picture or drawing does not necessarily form an element in the original work, or its design, which is protected by copyright. The same idea which is suggested by the copyright work may be expressed by another painting or drawing which is in no sense a copy, and does not borrow its design." This is a formidable criticism of Mr. Justice Bayley's definition, inasmuch as he strikes out of that definition the word "idea," which forms an important part of it; but I do not think

(6) 5 B. & Ald. 737.

that it was intended absolutely to destroy that definition. If it were altered thus— "A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it," the substance of the definition would be preserved, and Lord Watson's criticism would be avoided. I am far from saying that this is more than a rough attempt at a definition, or that it is wholly satisfactory; but if one must formulate in words the meaning of "copy," that is, I think, sufficiently accurate. Passing over Vice-Chancellor Bacon's remarks in *Dicks v. Brooks*,³ I find Lord Justice James saying in that case, "It appears to me that without going into any etymological definition of the word 'copy,' and using the word in the ordinary sense of mankind as applied to the subject-matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving—of that which was the engraver's meritorious work in the print?" He was there dealing with a pattern for Berlin woolwork, the description of which is to be found in the statement of the facts, and he held, with the concurrence of Lord Justice Baggallay and Lord Justice Bramwell, that this was not a copy of the engraving there in question. It may be that the Court would have also held that the woolwork pattern was not a copy of the original picture from which the engraving was made; but the substance of the decision was that nobody would ever take it to be the print, and that it was not calculated to injure the print, or the reputation of the owner, or the commercial value of the engraving in the hands of the proprietor. This last consideration has certainly played a large part in many decisions; and without quoting the language used respecting it, we may, I think, safely conclude that no alleged copy, whether of a picture or of an engraving, can properly be held to be a copy within the meaning of the statute, and prohibited thereby, unless commercial injury can be proved or reasonably presumed. In *Hanfstaengl v. Empire Palace*¹ Lord Justice Lindley says, "the possibility of injury to the plaintiff must be regarded, as was pointed out in *Dicks v. Brooks*,"² and he cannot be taken to have intended

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to contradict this in the following passage on the next page, which is particularly apposite to the present case. After mentioning the case of *Hanfstaengl Art Publishing Co. v. Holloway*,⁵ where copies of the plaintiffs' pictures were only used by being put on pill-boxes, but nevertheless were held to be infringements of his rights, he adds: "Again, unauthorised sketches of pictures made on purpose to convey, and, in fact, conveying, tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction." In the same case Lord Justice Davey thus expresses himself: "The point is not that these things are bad copies, but that they are not intended, and do not purport, to reproduce the value and essential qualities of the pictures as works of art, and are therefore not copies or reproductions at all within the meaning of the Act." The case in which these observations were made was taken to the House of Lords, and is reported there as *Hanfstaengl v. Baines & Co.*² It is worth while to read in this connection what was said by Lord Shand: "All that can I think be said is that the question of infringement of the right depends on the degree of resemblance. It must be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design—having adopted its essential features and substance." These extracts from the judgments of Lord Justice Lindley, Lord Justice Davey, and Lord Shand seem to me to embody the judicial view of the problem to be solved, and in general terms the guide to its solution.

Before leaving the authorities, it is well to say something about the meaning of the word "design" as used in the statute. The Legislature certainly con-

templated that there might be an infringement of copyright without a copy being made, and this possible event was intended to be covered to some extent by the employment of the word "design." To what extent? There are some pertinent remarks of Lord Herschell's in *Hanfstaengl v. Baines & Co.*²; but let it suffice to quote a passage from Lord Watson's judgment: "I do not doubt that the addition of the words relating to design was intended by the Legislature to reach invasions of copyright which might possibly escape the imputation of being copies or colourable imitations of the work itself, and yet appropriated and incorporated the substance of what is described as the design of the work." Precisely the same thing, as I understand his language, is intended by Lord Justice Davey in his judgment in the same case in the Court of Appeal: "But it is said that the Act protects not only the picture, but the design. These words are probably inserted in order to bring within the protection of the Act a copy through a different medium, for instance, a black and white copy of a picture made by the engraver, the photographer, or the draughtsman; but it must still be the design of the picture, and not a mere outline or descriptive sketch of it." I do not propose further to pursue this branch of the case, because, applying the rule of interpretation of the statute afforded by the passages quoted, there is not, in my opinion, any good reason for holding the figure in *Munsey's Magazine* to be a reproduction of the design of the original picture, if it is not a reproduction in the sense of being a copy of it. Therefore, I do not pause to notice so much of the argument on the part of the defendants as was devoted to detailed criticism of the figure as a work of art—a phrase which in the ordinary acceptance could scarcely be applied to it.

In considering, by the light thus thrown on it, the question whether the alleged infringement of the plaintiffs' copyright must be held to be one in fact, the first thing to be grasped is the character of the alleged infringement. At least I think that must in the particular case come before the appeal to the eye,

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without which no final decision is safe or possible. There is no occasion to pursue the process through the several stages; but what we see in the magazine is undoubtedly there by means of photography; and, however rough the reproduction may be—and rough it certainly is—there is intended to be, and there actually is, a reproduction of some parts of a photograph which is itself, perhaps, by many steps, a reproduction of the original picture. For the sake of convenience in dealing with a small surface, some portions have been blotted out, and they comprise features which contributed largely to the character of the original. The background is gone, and the wings, which were a poetical addition to the picture and are preserved in all the photographs, are missing. But there is the figure with the same drapery and in the same position, kneeling on the same rock, and intently gazing on what must be water, though it is no longer distinct and has no reflective surface. It is a base reproduction of the original, but still it is a reproduction embracing the more distinctive features, and obviously intended to represent them. The result of an appeal to the eye is equally conclusive. By this time I am tolerably familiar, not with the original picture, but with the photogravure which has taken its place for the purposes of this trial, and may be regarded as a fair equivalent. I cannot turn from the latter to the magazine without being reminded of Thumann's picture and instinctively recognising the work from which the base copy is taken.

To this conclusion must be applied the test referred to above and mentioned in the authorities on the subject. Can the publication of this figure in this manner injure the commercial value of the original? Taking for this purpose the original to be, as it really is, the oil painting, the question must be answered in the negative. It would be preposterous to suppose that the reputation of the painter or the value of his work was in any way affected by this publication, even on the assumption, which probably is correct, that *Munsey's Magazine* has a large and extensive circulation. But is it possible to say the same of the plaintiff

as the owner of the copyright and of his reproduction of the picture? Perhaps the question requires no answer as regards the larger reproduction, but as regards those of a smaller size, and particularly those, the smallest of all, which have been exhibited in Court, I cannot, on the evidence, or by the application of my own imperfect knowledge of such matters, come to the conclusion that there is no injury. It is, I think, impossible to measure in money the injury already done, or, rather, I think that it would be impossible to say that any injury capable of such measurement has been done; but I am struck by the view supported by the plaintiff's witnesses that such a publication as appears in *Munsey's Magazine* vulgarises that of which it is a reproduction—that is, tends directly to prevent the sale of the plaintiff's goods by reason of the familiarity of the publication with a base form.

The one issue of the magazine in which this alleged infringement of copyright appeared was promptly suppressed, and there is no occasion to grant an injunction in respect of it; but I adopt the plaintiff's argument that, if he desires to protect his copyright, he is bound to take action even in a case which is, on the face of it, of a trumpery character, or run the risk of encouraging more serious infringements. For the reasons above given I think the plaintiff is entitled to a verdict for nominal damages; and seeing that he has come here to assert a right, the assertion of which was, as already stated, required for his protection, I see no reason why he should be deprived of his costs, notwithstanding that the defendants acted innocently, and on having their attention called to the matter did their best, so far as I know with complete success, to obviate any further cause of complaint.

There will be judgment for the plaintiff, with a farthing damages and costs of action.

Solicitors—Watkin-Williams, Gray & Steel, for plaintiff; Bircham & Co., for defendants.

[Reported by G. Macan, Esq.,
Barrister-at-Law.]

FARWELL, J. }
 1905. } NESBIT AND POTTS'S
 Jan. 31. Feb. 1, 9. } CONTRACT, *In re*.

Vendor and Purchaser—Possessory Title—Restrictive Covenants—Extinction—Notice—Constructive Notice—Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), ss. 2 and 34—Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3, sub-s. 1.

A "squatter," who gains a possessory title to land by virtue of twelve years' uncontested adverse occupation, is not relieved from the burden of restrictive covenants affecting the land merely by lack of notice of the existence of such covenants during the period of his adverse occupation. Restrictive covenants constitute an equitable interest in the land, and this equitable interest is prior in validity to all equities on the land subsequently created, including the equity of a subsequent purchaser for value. The question of notice is only material as binding the conscience of a purchaser for value so as to prevent him from setting up possession of the legal estate. As a "squatter," however, cannot even set up the preliminary plea of purchaser for value, it becomes immaterial, in his case, further to consider whether he can or cannot set up the additional plea of possession of the legal estate, and in his case, accordingly, it is also immaterial to consider whether he has or has not had notice of the existence of restrictive covenants.

Restrictive covenants are not extinguished by virtue of section 34 of the Real Property Limitation Act, 1833.

Subsequent purchasers for value from the "squatter" are not protected against restrictive covenants by lack of actual notice, unless they show that they would not have been affected with actual notice had they searched the title for the usual period of forty years. It is not necessary for those who claim the benefit of the covenants to show that the title, if searched, would have affected the purchaser with actual notice; the burden, on the contrary, is on the purchaser to prove the negative.

Vendor and purchaser summons.

The purchaser, Potts, had contracted to buy certain land at Leytonstone for 3,200*l*. Prior, however, to the completion

of the sale it was discovered that the land was possibly subject to certain restrictive covenants contained in a deed dated 1872, of which, at the time of the contract, the purchaser had had no notice. The present summons was taken out to determine whether the land was, or was not, as a matter of fact, subject to the covenants in question.

It appeared that a possessory title in the lands had been perfected in a certain "squatter," called Thomas Headde, in 1890; that Headde had subsequently conveyed in that same year to an intermediate purchaser; and that the present vendor had purchased the property in 1901. It further appeared that neither the intermediate purchaser of 1890 nor the present vendor had had any actual notice of the existence of the covenants at the time of their respective purchases; but that neither of them had made any enquiry into the title prior to 1872, the year of the commencement of the possessory title in the "squatter," Thomas Headde.

A. H. Jessel, for the purchaser.—The land is bound in the hands of the vendor by the restrictive covenants. These restrictive covenants can only have been extinguished, if at all, by virtue of section 34 of the Real Property Limitation Act, 1833¹; but the section in question applies only to legal interests in the land. It is true that the section uses the words "or other action or suit," but these words must be construed strictly in accordance with the language of the now repealed section 2; and the language of section 2 is clearly limited to "actions" and "suits"

(1) Real Property Limitation Act, 1833: s. 2: "... no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued. . . ."

Section 34: "... at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

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for the vindication of legal interests in the land. The right, however, to enforce restrictive covenants of the kind now in question is not a legal interest in the land, and cannot, accordingly, be extinguished by section 34. It is, on the contrary, a mere equitable right affecting the land, binding on the conscience of those having the legal estate—*Tulk v. Moxhay* [1848].² In *Bolling v. Hobday* [1882]³ it was held that where the legal estate was extinguished in trustees the equitable estate was also extinguished. That case, however, is distinguishable, for the right there extinguished was an equitable right binding the land; not a mere outside equitable right, not binding the land, but binding on the conscience of those who hold it.

Similarly, *Tichborne v. Weir* [1892],⁴ in which it was held that the possessory title to leaseholds did not render its holder subject to the covenants contained in the lease, is distinguishable, on the ground that the title of the original lessee was not transferred by the statute to the intruder, and that the freeholder, in accepting rent from the intruder, had thereby treated him as a new tenant, and not as tenant under the original lease.

Jenkins, K.C., and *Romer Macklin*, for the vendor.—The land is not now bound by the restrictive covenants. The vendor's title is at least as good as that of Headde, from whom it is derived; and Headde's title was unaffected by notice of the existence of any restrictive covenants. Further than this, Headde's title was protected by section 34 of the statute, quite irrespectively of the question as to whether he had notice or not. It is true that these restrictive covenants constitute an "equity" that "attaches to the owner of the land"—*per* Cotton, L.J., in *Haywood v. Brunswick Permanent Benefit Building Society* [1881]⁵; but in every case it will be found that this equity, if traced to its ultimate source, is really the creation of contract—that they only have the benefit of the covenant who claim derivatively under the covenantee. This

equity, therefore, is the creature of contract—is something "carved out" of the estate; and it is liable, as such, to be destroyed by anything that destroys the estate out of which it is "carved." That being so, the equity is extinguished by the action of section 34. To argue otherwise it would be necessary to argue that the equity is not the creature of contract, but is something imposed from outside the contract by operation of law. That this is not true is clear from the cases in which the doctrine has been discussed—*Tulk v. Moxhay*,² *McLean v. McKay* [1873].⁶

[FARWELL, J.—Do you say that a right of way—of course, if not used during the period of prescription—would be lost by virtue of section 34? Or a right to heriots?]

A right to heriots is neither the creature of contract nor the creation of equity, but purely an incident of tenure. It would therefore be extinguished.

Even, however, had the land been bound by these covenants in the hands of Headde, yet the intervening purchaser and the present vendor were not themselves affected by notice, either actual or constructive. The vendor, accordingly, can make a good title.

A. H. Jessel, in reply.—That a restrictive covenant is an equity that attaches to the land quite independently of contract is shewn by *Clements v. Welles* [1865].⁷ That the vendor is affected with constructive notice, since he chose deliberately to forego his rights to a forty years' title, which might have disclosed the existence of the covenants, is shewn by *Cox and Neve's Contract, In re* [1891].⁸

Feb. 9.—FARWELL, J., delivered a written judgment. After stating the facts his Lordship continued: Under these circumstances the vendor contends that the land is not subject to the restrictive covenants in his hands, on the ground that neither Headde, nor the purchaser from him in 1890, nor the present vendor, had any notice of the existence of these covenants, and that there is nothing,

(2) 18 L. J. Ch. 83; 2 Ph. 774.

(3) 31 W. R. 9.

(4) 67 L. T. 735.

(5) 51 L. J. Q.B. 73, 77; 8 Q.B. D. 408, 409.

(6) L. R. 5 P.C. 327, 336.

(7) 35 L. J. Ch. 265; L. R. 1 Eq. 200.

(8) [1891] 2 Ch. 109.

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therefore, which will enable the Court to bind their consciences to give effect to them. It was argued that Headde was not bound—first, because he acquired title by possession under the statute, and had nothing to do with the title of any one prior to him; and secondly, because section 34 of the Real Property Limitation Act, 1833, protected him, whether he had notice or not, and that, if this was so, it was immaterial whether subsequent purchasers from him had notice or not; and, failing that, it was argued that the two subsequent purchasers were not bound unless they were affected with notice. It is necessary, therefore, to consider the exact nature of these restrictive covenants, and the mode in which the burden created thereby is imposed on land.

Covenants restricting the enjoyment of land, except, of course, as between the contracting parties and those privy to the contract, are not enforceable by anything in the nature of action, or suit, founded on contract. Such actions and suits alike depend on privity of contract—*Cox v. Bishop* [1857]²—and no possession of the land, coupled with notice of the covenants, can avail to create such privity. But, if the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to, and runs with, it in equity—*Tulk v. Moahay*.³ This equity, although created by covenant, or contract, cannot be sued on as such, but stands on the same footing as, and is completely analogous to, an equitable charge on real estate created by some predecessor in title of the present owner of the land charged. Such a charge was created in its inception by contract between A and B, the lender and the borrower; but when B has sold the land charged to C, A cannot sue C on the contract to repay, but can only enforce the charge against the land. This is the basis of the decision of the Court of Appeal in *Haywood v. Brunswick Permanent Benefit Building Society*,⁵ where it was held that, where land had been granted in fee in consideration of a rentcharge and

a covenant to lay out money in building and repairing, the assignee of the grantee of the land was not liable on the covenant to repair, because, as Lord Justice Cotton put it, "The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length." In other words, effect is given to the negative covenant by means of the land itself. But the land cannot spend money on improving itself, and there is no personal liability on the owner of the land for the time being, because there is no contract on which he can be sued in contract. So in *Mander v. Falcke* [1891]¹⁰ a mere occupation of land was held to be within the principle. In *London and South-Western Railway v. Gomm* [1882]¹¹ Sir George Jessel, M.R., states that in his view the doctrine is either an extension in equity of *Spencer's Case* [1583]¹² to another line of cases, or of the doctrine of negative easements, but that, whatever it was, "The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." He says also, "if it binds the land it creates an equitable interest in the land." These passages are cited as correct in the considered judgment of the Court of Appeal in *Rogers v. Hosegood* [1900].¹³

It is clear, therefore, that the person entitled to the benefit of the restrictive negative covenant over Blackacre has an equitable interest in Blackacre, and that such interest has the same nature and qualities as any other equitable interest in land in respect of priority, notice, and the like, but that notice forms

(10) 61 L. J. Ch. 3; [1891] 2 Ch. 554.

(11) 51 L. J. Ch. 530, 531, 532; 20 Ch. D. 562, 580, 583.

(12) 5 Co. Rep. 16a; 1 Sm. L.C. (11th ed.), p. 55.

(13) 69 L. J. Ch. 652, 656; [1900] 2 Ch. 388, 404, 405.

(9) 26 L. J. Ch. 389; 8 De G. M. & G. 815.

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no part of the cause of action in respect of such equitable interest. The plaintiff's claim depends upon the validity and priority of his own charge, not on any notice, unless, and until, the owner of the land sets up as a defence the plea of purchaser for value without notice and with the legal estate. The fact that the usual contest in such cases is whether the landowner had notice, or not, has doubtless made it usual to speak of notice as an essential part of the plaintiff's case, in order to enable the Court to bind the defendant's conscience; but it is quite clear that the equitable charge is created and exists independently of notice, and that no question of binding the defendant's conscience arises until he sets up the legal estate. Then notice became material because it enabled the Court of equity to bind the conscience of the defendant, and forbid him to set up such legal estate. Under the old law, "If the legal title were used at law for a purpose inconsistent with good faith, then, undoubtedly, this Court would interfere, on the established principle of preventing a legal right from being enforced in an inequitable manner and for an inequitable purpose"—*per* Westbury, L.C., in *Buckland v. Gibbins* [1863].¹⁴ It was suggested that the Privy Council, in *McLean v. McKay*,⁶ took the view that the person to be bound by the covenant must derive title from the covenantor; but the passage merely purports to state the effect of *Tulk v. Moxhay*,² and cannot fairly be read as deciding anything on the point. It has not been, and could not, of course, be contended that Headde, who was a trespasser until he acquired a title under the Statute of Limitations, was a purchaser for value. He could not, therefore, have set up any want of notice as an effectual defence to an action to enforce the restrictive covenants against him, and I am of opinion, therefore, that the land in his hands was bound by these covenants.

The next point is the plea of the Statute of Limitations. Section 34 is as follows: [His Lordship read the section.] It is now settled that the effect of this section is to extinguish the title of the dispossessed owner, not to transfer it to the statutory

(14) 32 L. J. Ch. 391, 395.

owner—*Tichborne v. Weir*,⁴ where it was accordingly held that the statutory owner, who had ousted a lessee, did not become liable to the payment of rent and performance of covenants to which such lessee was liable; and it is argued from this that Headde acquired a title free from all burdens attaching to the former owner's estate. But the decision is no authority for such a contention. The lessee's covenants and liabilities were incident to, and part of, the lessee's estate, and that estate was extinguished. The burden of these restrictive covenants is not incident, but paramount, to the estate of the dispossessed owner, and all that the Act extinguishes is the right and title of the person who fails to make an entry or bring an action for the recovery of the land in question. The right to enforce these covenants was no part of his title, nor is such right within the Act at all, for it is obvious that the person entitled to enforce them cannot do so by making any entry or distress, or bringing any action to recover land. On the contrary, his action proceeds on the assumption that the land is, and will remain, in the possession of the defendant. The real analogy is not to a lessee's covenants, but to rights of way and similar easements. If a trespasser acquires a statutory title to land over which such easements exist, he cannot plead the Statute of Limitations to persons seeking to enforce them, but must shew abandonment like any other landowner; for "In dealing with the Statute of Limitations [the Court] must do so upon the assumption that if it were not for the statute the action could be maintained"—*per* Lord Esher, M.R., in *Ecclesiastical Commissioners for England v. Parr* [1894],¹⁵ where it was held that a squatter on copyhold land, who has acquired a good title under the statute against the copyholder, has no title to the fee against the lord, but that time begins to run against the lord only from the date at which, after proclamation or notice, the tenant has failed to come in and be admitted. The Statute of Limitations therefore is no answer.

The third point is this: The vendor says that both he and the purchaser in 1890

(15) 63 L. J. Q.B. 784, 788; [1894] 2 Q.B. 420, 430.

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were purchasers for value without notice. The purchaser says that they had constructive notice. It is assumed that there was no actual notice, nor that form of constructive notice which arises from wilful abstention to enquire. Now it is well settled that a purchaser is bound to enquire into the title to the land offered to him by his vendor, and will be affected with notice of all that he would have ascertained if he had made proper enquiries, whether his abstention from enquiry is due to voluntary waiver, or waiver under contract—*Wilson v. Hart* [1866]¹⁶ and *Patman v. Harland* [1881].¹⁷ The law is now declared by section 3 of the Conveyancing Act, 1882: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—(1) It . . . would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him." Sir George Jessel, M.R., answers the question "What is reasonable inquiry?" thus in *Patman v. Harland*¹⁷: "It has been held that he is to require the usual title, whatever the usual title may be." Now the usual title is forty years—*Cox and Neve's Contract, In re.*⁸ In an ordinary case it is generally easy to shew what would have been discovered if the full title had been shewn by producing that title. But here it is said that the paper title, prior to the twelve years' possession, was not the title that the vendor could produce. But, however plausible this reason for not producing more than twenty years' title may have seemed, the purchaser was not bound to accept it. If authority is needed for this, the recent case of *Jacobs v. Revell* [1900]¹⁸ affords it. But it is obvious that such a title as the vendor in 1890, or 1901, had to offer was open to serious objections and risks, and that no Court would have compelled specific performance of an open contract to purchase land held under such a title. In *Moulton v.*

Edmonds [1859]¹⁹ Lord Campbell, L.C., points out some of the risks: "The vendor's counsel first relied upon the new Statute of Limitations, according to which no claim can be made to realty more than twenty years after the right has accrued, and here there has been an undisturbed enjoyment, according to the deed of 1815, for forty-four years. But I do not think that the new Statute of Limitations in any respect abridges the period of sixty years, for which previously a good title must have been proved by the vendor. There are exceptions to the bar by lapse of time, by reason of infancy, and other disabilities, and the estimated duration of the life of man is still regarded as measuring the period during which the title must be proved, although attempts have been made by very distinguished persons to abridge this period, so as to facilitate the transfer of real property." And, indeed, it is obvious in the present case, for the person dispossessed may have been a tenant for life still alive. It is true that there are cases in which a title depending on the Statute of Limitations has been forced on a purchaser, but they are cases in which a particular objection, apparent on the face of the title as shewn, has been held to be covered by possession for the statutory period. Thus, in *Games v. Bonnor* [1884]²⁰ an estate tail suggested as an objection to the title was held to be statute-barred; and in *Scott v. Nixon* [1843]²¹ the possible claim of the heir-at-law of the testator was disposed of in a similar way. But the Court in these cases adjudicated upon the existence of the suggested title; it did not compel the purchaser to take a leap in the dark. It follows, therefore, that, inasmuch as the present vendor and the purchaser in 1890 accepted a title that they could not have been compelled to take, they waived their right to the production of the full title on which they might have insisted, and must be liable for the consequences. Then it is said that there is nothing to shew that such title would have disclosed the deed of 1872. But the

(16) 35 L. J. Ch. 569, 572, 573; L. R. 1 Ch. 463, 467.

(17) 50 L. J. Ch. 642, 644; 17 Ch. D. 353, 355.

(18) 69 L. J. Ch. 879; [1900] 2 Ch. 858.

(19) 29 L. J. Ch. 181, 184; 1 De G. F. & J. 246, 250.

(20) 54 L. J. Ch. 517.

(21) 3 Dr. & W. 388.

NEBBIT AND POTTS'S CONTRACT, IN RE.

plea of purchaser for value without notice is a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice. Thus, in *Att.-Gen. v. Biphosphated Guano Co.* [1879],²² where an injunction was asked for to restrain interference with a right of way claimed under an agreement, the Court of Appeal (Lord Justice James, Lord Justice Baggallay, and Lord Justice Thesiger) say: "Upon the appeal it has been objected by the Appellants that, looking to the pleadings, the fact of notice was not put in issue by the Defendants except as regards Weguelin, and that the learned Judge was not justified in deciding the case upon the want of notice to persons prior in title to Weguelin. We are of opinion that this objection is a well-founded one. The defence of a purchase without notice is one which ought to be specifically alleged as well as proved by those who rely upon it." It is, therefore, for the vendor to prove that he had no notice from the prior deeds, and he can only do this by producing such deeds. I see no hardship in this, but it would indeed be strange if the vendor, whose title is deficient in that it lacks the proper evidences for forty years, could give a better title than the man whose muniment-room is filled with the proper equipment of deeds; and not the less strange because the deficiency of title results from the fact that part of the title depends on a successful trespass. The statutory title is due to the demerits of the owner, who was careless enough to allow himself to be dispossessed for twelve years, not to any merits of the trespasser, who was a mere wrongdoer up to the last day of the twelve years. The latter is entitled to what the statute gives him, but no more; and those who purchase from him must take the risk of suffering for the infirmity of his title.

Solicitors—Granville Smith, Coleman, Betts & Co., for purchaser; Harris, Chetham & Cohen, for vendor.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }
1905. } SIRDAR RUBBER Co.
Jan. 23, 24, 26. } v. WALLINGTON,
Feb. 18. } WESTON & Co.

*Patent—Infringement—Combination—
Subject-matter—Supplying and Fitting
New Component Part—Repair.*

A patentee by his specification claimed to have invented a wheel rim of a particular shape intended to receive a solid rubber tyre. The merit claimed for the invention was that the rim would hold the tyre without pinching and without the aid of inextensible wires. The patentee made separate claims for the rim, and the rim in combination with the tyre, but made no claim for the tyre itself. The defendants made a new rubber tyre and fitted it to an old patent rim of the plaintiffs, the owners of the patent, to replace a previous tyre which had become worn out. In an action brought by the plaintiffs for infringement,—Held, that what the defendants had done was a fair repair, and not a repair amounting to a reconstruction and a new article, and that there was therefore no infringement. Held, also, that, assuming the claim for the rim to be valid, the claim for the combination of the rim with the rubber tyre was invalid, inasmuch as that was the only and obvious manner in which the rim was intended to be used, and that there was no invention or merit in the combination apart from the novelty in the shape of the rim itself.

Action by the plaintiffs for an injunction to restrain the defendants from infringing their letters patent No. 11686 of 1900, and for damages.

The patent in question was granted to the plaintiff J. M. MacLulich for "improvements relating to rims and tyres for vehicle wheels." The patentee claimed to have invented a wheel rim of a particular shape, intended to receive a solid india-rubber tyre. The width of the mouth of the rim, or the space between the inner edges of the flanges, was approximately the same as the width of the base. The flanges projected outwardly from the base, and then returned the same distance inwardly. The inner sides of the flanges were flat and of equal length, or, as the

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patentee said, resembled in cross-section the two equal sides of an isosceles triangle. The rubber to fit the tyre was of such a shape in cross-section that under ordinary pressures it would not overhang or project laterally beyond the edges of the flanges, and accordingly the patentee claimed that when under pressure it would not be cut or injured by being pressed against the unyielding metal edge, but would have free access within the rim; and, moreover, the tyre would not be pinched by the edges of the flanges of the rim, as in Clincher tyres. The patentee also claimed that with a tyre so shaped inextensible wires or bands for securing the tyres to the rims were unnecessary, and he was thus able to dispense with what was frequently a cause of injury to, or destruction of, the rubber.

The defendants, who were rubber manufacturers, denied infringement and disputed the validity of the patent on the usual grounds.

The defendants had not made or supplied any rim. They had made by way of repair a new rubber tyre for an old patent rim of the plaintiffs, and they had fitted it into the rim to replace the previous rubber tyre, which was worn out. This work was in fact actually done for the plaintiffs, although the person sent with the old rim did not disclose the plaintiffs' name.

The plaintiffs admitted that the defendants were entitled to make and sell rubber tyres of any suitable section to fit their rims; but they contended that the defendant could not fit them into the rims, even by way of repair, as by so doing they made the combination claimed in the second claiming clause of the specification and infringed the patent.

The only matters calling for a report were—first, whether what the defendants were doing amounted to more than repair; and secondly, whether the claim for the combination was valid, assuming that the claim for the rim was valid. The arguments on the other parts of the case are therefore omitted.

Moulton, K.C., and *A. J. Walter*, for the plaintiffs.—The plaintiffs are entitled to the combination of the rubber tyre with

the rim. The defendants by fitting a new rubber tyre to the patented rim have infringed the plaintiffs' patented combination. They have made a combination of the rim with a suitable tyre. This is not a mere repair, but a new combination.

Bousfield, K.C., and *W. Neill*, for the defendants.—What the defendants have done amounts to a mere repair. The test in such cases is, Is what the defendants are doing a mere repair, or are they making a substantially new article? As to what constitutes "repair," see the observations of *Cozens-Hardy, L.J.*, in *Dunlop Pneumatic Tyre Co. v. David Moseley & Sons, Lim.* [1904].¹ It cannot here be successfully contended that the putting of a new rubber tyre, for which the plaintiffs do not claim any patent, upon their patented rim, is making a new combination.

Further, the claim for the combination is bad for want of merit or invention.

[They also referred to *Incandescent Gas Light Co. v. Cantelo* [1895].²]

Moulton, K.C., in reply.—On the sale of a patented article there is no implied licence of a right to use the article as long as the longest-lived part of it lasts. The right is to wear out the thing sold. Full licence to use the article is implied from the sale, but that licence does not extend to the use of a part of the article sold with another article. Here what is sold by the plaintiffs is the combination of the rim with the tyre.

Cur. adv. vult.

Feb. 18.—*SWINFEN EADY, J.*, delivered a written judgment, in which, after stating the facts as above set forth, he held upon the evidence that the patent was invalid. He continued: If the patent is invalid there is an end of infringement; but assuming the patent to be valid, have the defendants infringed it, and do they threaten and intend to infringe it in the future? The defendants have supplied a new rubber tyre and inserted it into an old rim of the plaintiffs to replace the old tyre worn out. This was done *bona fide* by way of repair. The plaintiffs contend that this is an in-

(1) 73 L. J. Ch. 417, 421; [1904] 1 Ch. 612, 621.

(2) 12 Rep. Pat. Cas. 262.

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fringement of their patent, although they concede that any one is entitled to make and sell rubber tyres to fit the rims. The infringement alleged is placing the tyre in the rim. This is done in a way which is old, and by use of machinery which is old, and by which all solid tyres of this kind are placed in metal rims. Have the defendants infringed the patent? In the recent case of *Dunlop Pneumatic Tyre Co. v. David Moseley & Sons, Ltd.*,¹ Lord Justice Cozens-Hardy said: "I think, speaking for myself, that there may be a third class of cases in which the supply by the defendants might be perfectly lawful—I mean for the purpose of repair. The word 'repair' is no doubt a difficult one to construe, but I do not think that *Dunlop Pneumatic Tyre Co. v. Neal* [1899]³ justifies the construction which was put upon it by the appellants' counsel. I certainly doubt—I will not say any more than that—whether the holder of a licensed tyre may not replace a worn-out cover without being guilty of an infringement of the patent. It is not necessary to decide that point now, and I only desire to keep that point open for future consideration." I fully appreciate the difficulty felt by Lord Justice Cozens-Hardy in construing the word "repair," but, in my opinion, it is a question of fact in each case whether the work which has been done may fairly be termed a "repair," regard being had in each case to the exact nature of the invention. The purchaser of a patented article has a right to prolong its life by fair repair, but he has not any right to obtain, without licence from the patentee, a substantially new article, made in accordance with the invention, retaining only some subordinate part of the old article, so that it may be said that the combination is not entirely new. Such a retention of an old part would be colourable only, and would not prevent the article from being substantially a new article, instead of being substantially a repair of the old one. This was the case of *Dunlop Pneumatic Tyre Co. v. Neal*,³ where Mr. Justice North held that the tyre was really a new tyre; nothing was left of the old tyre but the wires, and one of these

had been broken and was mended by the defendants. In the present case, assuming validity, the plaintiffs' real invention is a metal rim of a particular shape to receive a rubber tyre; the soft wearing part is the rubber tyre, and in the nature of things the rim is calculated to wear out several tyres. Unless the purchaser is able to have new rubbers placed in the rim, he cannot obtain the use of the patented article for the fair period of its life. This is not a repair amounting to reconstruction, and a new article, but a fair repair; the old metal rim, the distinguishing feature of the invention, being retained, not colourably, but because essential and practically as good as new, and a fresh rubber put to replace the old one worn out. In my opinion, there has not been any infringement.

It may, however, be further urged that in the present case the patent also claims as new "a wheel rim and solid rubber tyre constructed substantially as described, and that the defendants, by fixing the tyre in the rim, have assembled the parts and made the plaintiffs' combination." But I cannot in any case regard this claim as valid, even if the patent were otherwise valid as regards the rim. No doubt there may be a valid patent for a combination, even though all the parts be old, but there must be novelty, invention, and merit in the combination to support validity. Where the only invention is in the form of one part of an article or machine, which part is separately claimed as an invention, the scope of the patent cannot be enlarged by claiming that part in every combination in which it can be used, however obvious. The patentee, having claimed the rim, cannot extend the scope of the patent by claiming the rim in combination with a rubber tyre, as that is the only and obvious manner in which the rim is intended to be used, and there is no invention or merit in the combination apart from the novelty in the shape of the rim itself. If the patent be restricted to the form of the rim it is obvious that the defendants have not infringed; and as that is all that the plaintiffs can claim to have invented they cannot extend the ambit of the patent by an additional claim for a combination,

(3) 68 L. J. Ch. 378; [1899] 1 Ch. 807.

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and so bring within it something as an infringement which would not have been an infringement if the patent had been for the rim alone. It was pointed out by Lord Cairns in *Clarke v. Adie* [1877]⁴ that a patent may be granted for a larger invention and also for certain subordinate integers properly specified and claimed; but then the patentee "is, as was said by the Lords Justices, at the peril of justifying those subordinate integers as themselves matters which ought properly to form the subject of a patent of invention." I apprehend that the converse of this proposition also holds true—that where a subordinate integer is specified and claimed, and a larger combination of which this integer is part is also claimed, the patentee is at the peril of justifying the combination as matter which ought properly to form the subject of a patent of invention; and he does not discharge this burden where there is no novelty or invention in the larger claim, but the combination is merely an obvious one if the subordinate integer is to be used at all.

The only remaining question is as to the true and first inventor. [His Lordship referred to the evidence on this point, and held that the plaintiff, Mac Lulich, was the true and first inventor. He continued:] The result is that the action fails and must be dismissed with costs, except that the plaintiffs must have the cost of the issue of the true and first inventor, and there will be a set-off.

Solicitors—Shaen, Roscoe, Massey & Co., for plaintiffs; Collyer-Bristow, Hill, Curtis, Booth & Co., agents for Forsyth, Bettinson & Co., Birmingham, for defendants.

[Reported by W. Irimy Cook, Esq.,
Barrister-at-Law.

SWINFEN EADY, J.
1904.
Nov. 22.
1905.
Feb. 21.

SPARK'S LEASE, In
re; BERGER v.
JENKINSON AND
ALLARDYCE.

Landlord and Tenant—Lease—Covenant not to Assign without Leave—Leave not to be "Unreasonably" Withheld—Unreasonableness.

Where a landlord and tenant occupy different parts of the same premises, and the tenant has covenanted not to assign or under-let his part of the premises without the written leave of his landlord, but this leave is not to be unreasonably refused, it is not unreasonable for the landlord, as conditions of granting such leave, to enquire for what purposes the proposed under-tenant intends to use the premises, and to stipulate that the under-tenant shall enter into a covenant with him with reference to the assignment or sub-letting of the premises similar to the covenant already in existence between him and his own immediate tenant.

Originating summons.

A lease dated March 9, 1897, contained a covenant on the part of the lessee not to assign or under-let without the written leave of the lessors, such leave not to be unreasonably withheld. The lease also contained a covenant on the part of the lessee not to use the premises for the purpose of certain prohibited trades.

The lease comprised part of certain business premises, the other part of which was occupied, also for business purposes, by the lessors. Both lessors and lessee used a common entrance.

The lessee being desirous to under-let, the lessors agreed to grant the required licence, but only on condition that they should be informed for what purpose the proposed under-lessee intended to use the premises, and on further condition that the proposed under-lessee would agree not himself again to under-let without the lessors' written consent, such consent not to be unreasonably withheld.

The lessee informed the lessors that the under-lessee would not use the premises for any of the prohibited trades, but he rejected the second condition as unreasonable.

(4) 46 L. J. Ch. 585, 588; 2 App. Cas. 315, 321.

SPARK'S LEASE, IN RE.

As the lessors thereupon refused to give their written consent, the lessee issued this summons to determine whether this refusal of the lessors was, or was not, unreasonable.

When the summons came on for hearing it stood over; and finally it was agreed between the parties that the lessors should be parties to the under-lease, and that the under-lease should contain a covenant by the under-lessee to the lessors in the terms already mentioned.

The summons now came on again solely on the question of costs.

Martelli, for the lessee.—The conditions imposed by the lessors were unreasonable, and the lessee is therefore entitled to his costs.

Eve, K.C., and *Daniel Jones*, for the lessors.—The conditions were perfectly reasonable, and the lessors are entitled to costs.

SWINFEN EADY, J., after stating the facts: The only question now before me is the question of costs, but this involves my deciding whether the lessors were unreasonable in thus seeking protection against any further assignment or under-letting without their written consent. These lessors occupy part of the premises, and are thus directly concerned in the use of the remainder. This might conceivably be used for a business such as that of a dressmaker or milliner, employing a great number of hands, who would frequently be passing to and fro through the common entrance. If this occurred it might seriously depreciate the property from the point of view of the lessors. I am quite satisfied that where a landlord occupies part of premises and has let off another part, and where there is a covenant by the tenant not to assign or under-let without the written leave of the landlord, though such leave is not to be unreasonably refused, the landlord is not unreasonable in asking for what purpose a proposed under-tenant is going to use the premises, and in stipulating for a covenant between the under-tenant and himself with regard to under-letting similar to that which already exists between himself and his own tenant.

The lessee must therefore pay the costs of this summons.

Solicitors—Downey & Linnell, for lessee;
Boyce & Son, for lessors.

[Reported by J. E. Morris, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} MORDAN, <i>In</i> <i>re</i> ; LEGG <i>v.</i> MORDAN.
STIRLING, L.J.	
SIR GORELL BARNES, P.	
1905.	
March 13.	

Will — Construction — Investment —
"Freehold ground-rents" — "Leasehold
ground-rents" — Power to Purchase.

A testator gave his estate and effects upon trust for conversion and to invest, amongst other things, "upon freehold ground-rents or upon leasehold ground-rents not having less than 60 years unexpired and held direct from the freeholder." The will contained no trust or power for conversion of freehold or leasehold property purchased by the trustees:—Held, that the investment clause authorised not mortgages upon the security of, but purchases of, freehold and leasehold ground-rents.

Appeal from decision of Kekewich, J.

Francis Mordan, by his will dated December 7, 1867, gave and bequeathed unto his executors and trustees therein named all his estate and effects whatsoever, whether real or personal (except the copyhold hereditaments thereafter bequeathed to Julia Frances Brindley), which he might be possessed of or entitled to at the time of his decease, upon trust, as soon as possible after his decease, to realise and convert the same (except the aforesaid copyhold hereditaments) and any Government stock standing in his name at his decease, into cash; and after making various bequests and dispositions as to all the residue and remainder of his estate and effects not thereinbefore specifically bequeathed, and which he

MORDAN, IN RE, App.

might be possessed of at the time of his decease subject to the payment of his debts, funeral and testamentary expenses, and legacies, the testator gave and bequeathed the same to his executors and trustees "Upon trust to invest the same at their sole discretion on Government securities of Great Britain or upon freehold ground-rents or upon leasehold ground-rents not having less than 60 years unexpired and held direct from the freeholder and as to such leaseholds with or without going into lessor's title as at the sole discretion of my two trustees they may see fit and be advised and to receive the dividends rents and annual income thereof and to divide and pay the same unto and equally between" the testator's two daughters Ursula and Ellen Mordan, during the terms of their natural lives, and upon the decease of either of his said daughters leaving issue her surviving then he gave and bequeathed the share of the *corpus* of his said trust estate as last aforesaid to which such of his daughters so dying and leaving issue as last aforesaid might be entitled to for a life interest unto and equally between such issue as tenants in common, with a gift over, in the event of either daughter dying without leaving issue her surviving, to the survivor of his said two daughters. The will contained no trust for conversion of freehold or leasehold ground-rents purchased.

The executors and trustees invested part of the testator's estate upon leasehold ground-rents not having less than sixty years unexpired, and held direct from the freeholder. The plaintiff, who was the only child of the testator's daughter Ellen, submitted that the investment in the purchase (not on mortgage) of leasehold ground-rents was unauthorised by the will and a breach of trust.

Kekewich, J., held that upon the true construction of the will the trustees were not authorised to invest the residuary estate of the testator in the purchase of freehold ground-rents or of leasehold ground-rents, being of opinion that investment on mortgage of freehold and leasehold ground-rents was alone authorised by the clause in question, and

declared that the plaintiff was entitled to elect either to adopt or repudiate any such purchase; and that in the event of her repudiating any such purchase she was entitled to a lien on the hereditaments comprised in the purchase so repudiated for the moneys expended in the purchase. The defendants Percy Charles Mordan and Clara Mordan, who were legal personal representatives of Augustus Mordan, who was a trustee of the will when the purchase of leasehold ground-rents was made, appealed.

Eve, K.C., and *Daniel Jones*, for the appellants.—The wording of the will is quite clear, and carefully framed so as to authorise the purchase of freehold and leasehold ground-rents.

T. L. Wilkinson, for the present trustee of the will.—If there is power to invest in the purchase of land the trustees are in a considerable difficulty, because they have no power to sell when the necessity for distribution arises.

Stewart-Smith, K.C., and *Ribton*, for the respondents.—It is clear that the clause must authorise either a purchase of or investment on security of a mortgage of freehold or leasehold ground-rents. It cannot authorise both. It is inconsistent with the whole scheme of the will that the trustees should be able to purchase land. There is an imperative direction to convert the testator's real and leasehold estate. Furthermore, there is no power to sell real or leasehold estate purchased. The Trustee Act, 1893, would not give the trustee power to realise such purchases if once made, and a partition action would be rendered necessary.

The word "upon" means "on the security of," and mortgages only are authorised. This is a money settlement in its frame, and the more reasonable and natural construction is that it only authorises investments on mortgages of ground-rents.

VAUGHAN WILLIAMS, L.J.—The real question which we have to decide in the present case is whether under the terms of this will an investment in the purchase of leasehold ground-rents is authorised. In my judgment it is. It was argued

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before us that we ought to put a very limited meaning on these words; but I do not think myself that we ought to put on them the limited construction which has been suggested. It has really hardly been argued that the words are not quite wide enough to cover an authority to make the investment which has been made. In my judgment the whole of the arguments merely comes to this—that if one looks at the consequences that must follow on so construing the will, it is improbable that the testator would have intended to authorise this investment. I do not think that any of these considerations are sufficient to justify us in restricting the natural meaning of the words. I go a step further. Assuming that the words are capable of the construction which counsel for the respondents put upon them, when one looks at the clause regulating the distribution of the receipts, it is really a natural inference from the words “and to receive the dividends rents and annual income thereof” that the testator intended that the investment clause should have the wide effect which I think ought naturally to be attributed to it. If the clause is to have the other meaning suggested one would have expected to find the words “dividends interest and annual income” used. I do not think we ought to read the words in question as if they had been “upon the security of” freehold or leasehold ground-rents. I think for these reasons that the appeal should be allowed.

STIRLING, L.J. — The short question arising under this will is whether the testator has authorised the purchase of freehold ground-rents and leasehold ground-rents. [His Lordship read the investment clause.] Let us take the first words, “on Government securities of Great Britain.” Is that limited to an investment upon the security of Consols or other Government stock? Clearly not. It is admitted that under these words the trustees were at liberty to purchase Consols. Then come the words “upon freehold ground-rents or upon leasehold ground-rents.” It is said that that means “upon the security of.” The words “upon the security of” are not there. It seems to me that if

the words are sufficient to justify a purchase of Government stock they will equally justify a purchase of freehold or leasehold ground-rents. Whatever the consequences may be, I think that the words are too plain to allow us to put the limited construction upon them which has been contended for.

SIR GORELL BARNES, P.—I agree.

Appeal allowed.

Solicitors—Boyce & Son, for appellants; A. F. Church and Woodbridge & Sons, for respondents.

[Reported by A. J. Spencer, Esq.,
Barrister-at-Law.]

BUCKLEY, J. } LONDON PRESSED HINGE
1905. } Co., *In re*; CAMPBELL v.
Feb. 24. } COMPANY.
March 3, 4. }

Company — Debentures — Floating Charge—Jeopardy—Receiver—Equitable Mortgagee—Judgment Creditor.

Where a company has issued debentures giving a floating charge on its present and future property, the debenture-holders are entitled to the appointment of a receiver on the sole ground of jeopardy to the security, even although nothing may be due and presently payable to the debenture-holders. The fact that a creditor has issued a writ and signed judgment, and is in a position to issue execution, may constitute jeopardy. Persons supplying such a company with goods have an expectation of being paid only when such payment would be in the ordinary course of business. This expectation is intercepted when a receiver is appointed, but even before the appointment those creditors, as between themselves and the debenture-holders, have no right to enforce payment of their debts in priority to the latter.

An execution creditor takes subject to all equities of the debenture-holders.

Standard Manufacturing Co., *In re* (60 L. J. Ch. 202, 298; [1891] 1 Ch. 627, 641), followed.

LONDON PRESSED HINGE Co., IN RE.

Motion, in a debenture-holders' action, for the appointment of a receiver and manager.

The company was incorporated in 1903, under the Companies Acts, 1862 to 1900, as a company limited by shares, and had issued debentures to the aggregate amount of 4,000*l.* in forty debentures of 100*l.* each, of which thirty-five were held by the applicants and their friends.

These debentures were payable on May 19, 1908, with interest in the meanwhile payable on May 19 and November 19 in each year at 5 per cent., and the company thereby charged with such payments its undertaking and all its property, present and future, the following conditions (*inter alia*) being indorsed :

"(1) The debentures shall rank *pari passu* as a first charge on the property hereby charged, without any preference or priority one over another, and such charge shall be a floating security, but so that the company shall not be at liberty to create any mortgage or charge in priority to the said debentures."

"(10) The principal moneys hereby secured shall immediately become payable (a) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof, before such interest is paid, by notice in writing to the company, calls in such principal money ; and (b) if an order is made or an effective resolution is passed for the winding-up of the company."

None of these events had happened, and all interest had been paid up to November 19, 1904. On February 8, 1905, a creditor of the company issued a writ for 109*l.* 18*s.* 8*d.* owing by the company, and afterwards a summons for judgment under Order XIV. On the day the summons was heard—namely, February 24—this motion came before Buckley, J., who directed that it should stand over for a week, appointed a receiver and manager for that period, and ordered that notice should be given to the creditor. The creditor signed judgment, and now appeared by counsel.

Buckmaster, K.C., and *A. J. Chitty*, for the motion.—A legal mortgagee is

entitled to possession of the mortgagor's property when he pleases, because he has the legal estate. An equitable mortgagee, not having the legal estate, must come to the Court for a receiver, and the Court, on a proper case being made out, will exercise its discretion. It will not appoint simply because the mortgagor consents, but will do so if money is in arrear or the security in jeopardy. It will also restrain third parties from injuring the property—*Legg v. Mathieson* [1860].¹

The position of a creditor holding a floating charge is now settled. His charge is over the whole of the property of the company, and the Court by its receiver will take the whole property, including the equity of redemption, under its control. The principle is based on the fact that under the Companies Acts any person can find out the position and rights of the debenture-holders. But for the Bills of Sale Acts, and perhaps the "order and disposition" clause in bankruptcy, an individual debtor giving a floating charge is in the same position as a company—*Tailby v. Official Receiver* [1888].² It is immaterial that no money is due under the security—*Wildy v. Mid-Hants Railway* [1868]³ and *Davey v. Williamson* [1898].⁴ There was a clear decision in *Standard Manufacturing Co., In re* [1891],⁵ that an execution creditor takes subject to the equity of the debenture-holders—*Opera, Lim., In re* [1891],⁶ *per* Lindley, L.J.

F. H. Schwann, for the company, did not oppose the application.

Crossfield, for the execution creditor, said he only appeared as having been served with notice of the interim order. He asked that the creditor might be made a defendant, so as to obtain costs if successful, or to be in a position to appeal if necessary. He was prepared to issue execution on the judgment.

[BUCKLEY, J. — Treat the writ as amended by adding the creditor as a

(1) 29 L. J. Ch. 385; 2 Giff. 71.

(2) 58 L. J. Q.B. 75; 13 App. Cas. 523.

(3) 16 W. R. 409.

(4) 67 L. J. Q.B. 699; [1898] 2 Q.B. 194.

(5) 60 L. J. Ch. 292, 298; [1891] 1 Ch. 627, 641.

(6) 60 L. J. Ch. 839, 841; [1891] 3 Ch. 260, 261.

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defendant, and give notice of motion for an injunction to restrain execution.]

There is a clear distinction between a specific and a floating charge, and the authorities on the one do not apply to the other. A floating charge was first defined in *Panama &c. Co., In re* [1870],⁷ where it was said that a receiver will only be appointed when principal or interest is unpaid or the company insolvent. That is on the principle that to support the order there must be default by the company in some express or implied stipulation of the contract. A floating security allows the company to carry on its business until it makes default — *Florence Land &c. Co., In re* [1878],⁸ and *Government Stock &c. Co. v. Manila Railway* [1896].⁹

The Court will not appoint a receiver merely on the ground that the security is in jeopardy. In *Legg v. Mathieson*¹ the security was not really a floating charge. *Wildy v. Mid-Hants Railway*² is the only really difficult case to get over, and it is not an easy one to understand or explain. The attention of the Lord Chancellor was not drawn to the difference between a floating and a specific charge, and he followed *Legg v. Mathieson*¹ without distinguishing the facts. In *M'Mahon v. North Kent Ironworks* [1891]¹⁰ the company was not carrying on business, which was a breach of an implied condition, and it was the same in *Thorn v. Nine Reefs, Ltd.* [1892].¹¹ In *Victoria Steamboats, Ltd., In re* [1896],¹² there was a breach of an express condition. In *Davey v. Williamson*⁴ the ground of decision was that the security had become enforceable. In *Hubbuck v. Helms* [1887]¹³ the company was being wound up, and, moreover, had attempted to sell its assets. *Edwards v. Standard Rolling-Stock Syndicate* [1892]¹⁴ only followed *Wildy v. Mid-Hants Railway*.³ No case can be found where a receiver

has been appointed at the instance of an equitable mortgagee merely because the security is in jeopardy; the practice has grown up because the difference between specific and floating charges has been disregarded.

[He referred to *Ashburner on Mortgages*, p. 252.]

A floating charge does not attach on any specific property until default has been made. In *Standard Manufacturing Co., In re*,⁶ there had been a breach of the conditions. In *Taunton v. Warwickshire (Sheriff)* [1895]¹⁵ there had been a sale of property by the sheriff. When the charge attaches it must be according to the terms of the contract, not at the will of one of the parties. In the present case the charge is still floating.

Buckmaster, K.C., in reply.—A condition in debentures that the company will pay no debts before paying off the debentures would be legal, although it would paralyse the business. The doctrine is the same as in a mortgage of book debts. The result comes near to the criminal law, but it is not a fraudulent preference, for there is no voluntary payment by the company. The appointment of a receiver is not confined to cases in which there has been a breach of contract. There had been no default in *Davey v. Williamson*,⁴ and the very point was argued. The company would have no right to oppose the application. They are entitled to carry on their business, but that does not include submitting to an execution.

Cur. adv. vult.

March 4.—BUCKLEY, J.—This is a debenture-holders' action in which the plaintiffs are holders of debentures by way of floating security upon the undertaking and all property, present and future, of the company. Nothing is due and presently payable in respect of either principal or interest. The principal is payable on May 19, 1908, or, by virtue of the 10th condition, (a) upon six calendar months' default in payment of interest, or (b) if the company is wound up. Neither of these events has happened. The interest is payable in May and November. All interest has been paid down to and

(15) 64 L. J. Ch. 497; [1895] 1 Ch. 734.

(7) 39 L. J. Ch. 482, 483; L. R. 5 Ch. 318, 322, 323.

(8) 48 L. J. Ch. 137, 142; 10 Ch. D. 530, 540.

(9) 66 L. J. Ch. 102, 105; [1897] A.C. 81, 86.

(10) 60 L. J. Ch. 372; [1891] 2 Ch. 148.

(11) 67 L. T. 93.

(12) 66 L. J. Ch. 21; [1897] 1 Ch. 158.

(13) 66 L. J. Ch. 586.

(14) 62 L. J. Ch. 605; [1893] 1 Ch. 574.

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including November, 1904. In this state of facts the plaintiffs move for a receiver on the ground that their security is in jeopardy. The jeopardy consists in the fact that a creditor has issued a writ and signed judgment, and is in a position to issue execution. Under these circumstances, the plaintiffs, to whom nothing is presently payable, ask for a receiver, the effect of which will be that the company can no longer pay the creditor to whom payment is presently due, in priority to the debenture-holders to whom nothing is presently due. The company, as is commonly the case, appear and consent to the order. Why, indeed, under the circumstances, should they oppose?

These applications are becoming so frequent that I have taken the opportunity to look into the cases in order to see whether, as the authorities stand, it is possible to prevent the injustice which is now of frequent occurrence, and which I will describe. I directed the motion to stand over last week and notice to be given to the judgment creditor, hoping that he would come in and argue the point. That hope has been realised. I have had the advantage of an argument from counsel for the execution creditor, which is none the less valuable because I find myself unable to accede to it.

The cases are numerous in which the undertaking of a limited company is so loaded with debentures that the profits are barely sufficient, or perhaps not sufficient, to keep down the debenture interest, and that if the company is wound up there is nothing for any one but the debenture-holders. In short, the facts often are that the undertaking is substantially carried on only for the benefit of the debenture-holders who have a floating security over it. In this state of facts money is lent or goods consigned to the company in respect of which a debt accrues to a creditor, and so long as the security "floats," as it is termed, and no receiver is appointed, the creditor has a possibility or expectation of being paid by the company, for, as between the company and the debenture-holders, the former may pay "in the ordinary course of business." But directly a receiver is appointed this expectation of the creditor is intercepted.

He may have lent his money or consigned his goods to the company last week, but if he has the audacity to ask for payment and to enforce his legal remedies to obtain it, the debenture-holders obtain a receiver in a proceeding to which the execution creditor is not a party, and thus close the door against him, taking his money or his goods as part of the security, and leaving the creditor, who supplied the money or the goods, to go unpaid. I regret to be driven to the conclusion that, as the law stands, those are the rights of the debenture-holders entitled to a floating charge.

It was decided in the Appeal Court in *Standard Manufacturing Co., In re*,⁵ that an execution creditor takes subject to all equities, and that the sheriff cannot, by seizing, get rid of the rights of debenture-holders to which the property was subject when in the hands of the debtor company. The Court of Appeal in *Opera, Lim., In re*,⁶ stated that the decision in *Standard Manufacturing Co., In re*,⁵ was a clear decision that the execution creditor takes subject to the equity of the debenture-holders. From this decision it has resulted that in interpleader—that is to say, even in the case where no receiver has been appointed—the execution creditor can have no more than the benefit of the equity of redemption, and that the rights of the debenture-holders prevail over his rights—*Davey v. Williamson*,⁴ *Simultaneous Colour Printing Syndicate v. Fowleraker* [1901],¹⁶ and *Duck v. Tower Galvanising Co.* [1901].¹⁷ This being the law, the fact is that the appointment of a receiver does not, as between the execution creditor and the debenture-holder, disappoint the execution creditor of anything which otherwise would be his right. For from those authorities it results that the creditor never had any right, as between himself and the debenture-holder, to enforce payment in priority to the debenture-holder. If he availed himself of his legal right to judgment and execution, the debenture-holder could intercept his execution. In fact, the unfortunate creditor had no right enforceable by legal process in cases where the equity of

(16) 70 L. J. K.B. 453; [1901] 1 K.B. 771.

(17) 70 L. J. K.B. 625; [1901] 2 K.B. 814.

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redemption was of no value, notwithstanding the fact that his money or his goods had gone to increase the property included in the security. His right to look for payment from the company rested only upon the expectation that the debenture-holder would not put an end to the company's authority to pay the creditor in the ordinary course of business. The authorities seem to me to involve that the creditor has no right to complain because steps are taken to put an end to the authority thus given by the debenture-holders to their mortgagor.

The appointment of a receiver at the instance of an equitable incumbrancer, at any rate where nothing is presently payable to him, is no doubt matter of discretion—*Thorn v. Nine Reefs, Lim.*¹¹ But if the execution creditor's rights are not affected, except as above stated, by the appointment of a receiver, there exist, so far as I see, no grounds why the Court should exercise its discretion against the appointment of a receiver by reason of any considerations arising as between the execution creditor and the debenture-holder. The only relevant consideration would seem to be whether, as between the company and the debenture-holder, it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped. As between those parties, it would seem reasonable that the authority should be stopped if its continuance would injure the debenture-holder. A legal mortgagee may take possession simply because he chooses. In so doing he accepts the responsibility of a mortgagee in possession. An equitable mortgagee must shew good reason why the Court should, at his instance, take possession by its receiver. Lord Chelmsford, in *Wildy v. Mid-Hants Railway*,³ held that danger to the security by anticipated acts of an execution creditor is good reason. Jeopardy of the security thus becomes relevant. The mere fact of consent by the mortgagor would not be enough. This probably explains the fact that in both the more recent cases in which a receiver has been appointed on the ground of jeopardy—*M^cMahon v. North Kent Ironworks*¹⁰ and *Edwards v. Stan-*

*dard Rolling-Stock Syndicate*¹⁴—the question of jeopardy was treated as material, although the company appeared and consented. But for this consideration, the fact that jeopardy was treated as material might be thought to tend, to some extent, in the direction in which I desire to find authority, but the implication, even if it exists, seems to me inconsistent with the express decisions. I am unable upon the authorities to find anything to enable me to put a stop to what I feel to be an injustice. It is an injustice arising from the nature, as defined by the authorities, of a floating security. The mischief arises from the fact that the law allows a charge upon all future property. The subject, however, is one which, I think, urgently requires attention. I should be glad that the authorities should be reviewed in a Court of higher jurisdiction than this, in case the execution creditor should be able to find grounds for thinking that the decisions which bind me can be successfully impeached elsewhere. It is not for me to say whether the matter requires the attention of the Legislature. In my judgment the plaintiffs, as the authorities stand, are entitled to an order for a receiver, and I make an order accordingly. The costs will be costs in the action.

[His Lordship appointed the receiver to act as manager for three months, and granted an injunction against the execution creditor.]

Solicitors—Ward, Perks & McKay, for applicants and company; A. R. Gillman, agent for Lucas, Hutchinson & Meek, Middlesbrough, for judgment creditor.

¶ [Reported by R. Hill, Esq.,
Barrister-at-Law.

FARWELL, J. } THAVIE ESTATE (TRUSTEES),
1905. } *Ex parte.*
Feb. 7. }

Lands Clauses Act—Purchase Moneys in Court—Re-investment in Purchase of Real Estate—Contract for Sale—Simultaneous Conveyance and Lease—Sanction of Court—Costs of Lease—Taxation—Disallowance—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

An order of the Court under section 80 of the Lands Clauses Consolidation Act, 1845, sanctioning the re-investment of moneys in Court in the purchase of real estate, directed that, pursuant to that section, the promoters should pay to the purchasers their costs (including all reasonable charges and expenses of and incident thereto) of obtaining that order and of all proceedings relating thereto, such costs to be taxed by the Taxing Master in case the parties differed:—Held, that the order did not authorise the allowance on taxation of the costs of a lease which the purchasers had by the contract for sale agreed to grant to the vendors immediately upon the completion of the purchase, the purchasers bearing their own costs of such lease.

Adjourned summons.

The applicants were the Corporation of the City of London, who, in pursuance of the powers conferred upon them by the Holborn Valley Improvement Acts, 1864 and 1867, and the Acts incorporated therewith, had taken land belonging to the trustees of the Thavie estate, and at the date of the contract next herein-after mentioned a sum represented by 11,152*l.* 11*s.* 6*d.* New Consols, to be invested in the purchase of real estate, was standing in Court to the credit of "Ex parte the Mayor, Commonalty, and Citizens of the City of London. The Trustees of Thavie Charity," in respect of such land.

By a contract dated January 28, 1904, the respondents, the trustees of the Thavie Charity, agreed to purchase certain freehold land and premises in the City of London for the sum of 3,000*l.*, subject to the approval of the Court. It was one of the terms of the contract that the trustees should at the time of completion of the purchase grant to the vendors who were

in actual occupation of the property, an immediate lease of the premises for the term of seventy-three years at a rent of 105*l.* per annum, and that each of the parties to the contract should pay their own costs of the lease.

On May 25, 1904, the trustees obtained the usual order of the Court approving the investment, and stating that a good title had been shewn to the premises, and ordering that, pursuant to section 80 of the Lands Clauses Consolidation Act, 1845, the Corporation should pay to the trustees their costs (including therein all reasonable charges and expenses of and incident thereto) of obtaining that order and of all proceedings relating thereto, such costs to be taxed by the Taxing Master in case the parties differed.

The solicitors to the trustees carried in their costs for taxation, including the costs under Schedule II. to the General Order under the Solicitors' Remuneration Act, 1881, of the lease above-mentioned. To these latter costs the City Solicitor objected, on the ground that he was not liable to pay anything in respect of such lease, as the same was granted after the purchase was completed and was quite a subsequent and independent transaction to the investment of the money in Court in the purchase of the lands, but the Master disallowed the objections. In his answers to the City Solicitor's objections, the Master, after stating the facts, said, "Application was made to the Court to sanction the purchase, the Corporation appearing and raising no objection to the form of the contract, which (*inter alia*) provided that the costs of the lease in question should be borne by the parties equally; the proposal is sanctioned, and I am directed to tax 'the costs of the applicants (including therein all reasonable charges and expenses of and incidental thereto) of obtaining the order and of all proceedings relating thereto.' In my opinion the costs of this lease fall within the terms of the order, and, as between the applicants and the Corporation, are payable by the Corporation. The purchasers cannot accept the conveyance unless accompanied by the counterpart of the lease stipulated for, and the lease and conveyance really form one transaction."

THAVIE ESTATE (TRUSTEES), EX PARTE.

On January 16, 1905, the City Solicitor took out a summons to review the taxation, and this summons was now adjourned into Court.

W. Baker, for the applicants.—The costs of this lease cannot properly be brought within the terms of section 80 of the Act or of the order of May 25, 1904, and upon the principle of *Christ's Hospital (Governors)*, *Ex parte* [1875],¹ and *Eastern Counties Railway, In re; Sawston (Vicar)*, *ex parte* [1858],² ought not to be allowed.

Owen Thompson, for the respondents.—This was nothing else than the purchase of a ground-rent, the conveyance and the lease being really one transaction. They were simultaneous and fall within the provisions of section 80 of the Act, and are covered by the order.

FARWELL, J.—If the Master had not thought otherwise, I should have considered this question unarguable. It is well settled that the only costs which the promoters of the undertaking will be directed to pay upon a re-investment in land, under section 80 of the Lands Clauses Consolidation Act, 1845, are such costs as under an open contract a purchaser would bear. That seems to me to be in accordance with common sense and common justice. In this particular case the vendors have added a lease on to the conveyance, and the Master has thought fit to allow the costs of the lease. [His Lordship then read the Taxing Master's answers to the applicants' objections, and continued:] I am unable to agree with him. He seems to have thought that the Corporation ought to have raised an objection to the form of the contract. But why should they have done so? If the purchasers choose to enter into a contract in this form, what has that to do with the Corporation? The only plausible ground is that adopted by counsel for the respondents—namely, that the lease and conveyance constituted in effect one transaction; but unfortunately for his contention that is not really the case. The order of May 25, 1904, is clear on the subject, and takes no account of the

(1) L. R. 20 Eq. 605.

(2) 27 L. J. Ch. 755.

lease. I therefore hold that these objections to the taxation must be allowed, and it must be referred back to the Taxing Master to vary his certificate accordingly.

Solicitors—City Solicitor; Pontifex, Hewitt & Pitt.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905.
Feb. 16. }

MANSEL v. COBHAM
(VISCOUNT).

Literary Institution—Trustees' Power to Mortgage—Rebuilding or Improving—Necessary Repairs—Authorised Purposes—Billiard and Card Rooms—Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), ss. 1, 11, 18, 19, and 33.

Trustees to whom land has been conveyed as a site for an institution under the Literary and Scientific Institutions Act, 1854, have power to mortgage the same for the purpose of paying for necessary repairs to the buildings of such institution, but not for rebuilding or improving them.

The provision, in such an institution, of rooms, or of facilities, for billiards, cards, or other amusements, as distinguished from instruction, is not among the purposes authorised by the Act.

Originating summons as to the power of the trustees of the Stourbridge Institute, an institution holding land under the Literary and Scientific Institutions Act, 1854,¹ to raise money by mortgage

(1) The following are the material parts of the Literary and Scientific Institutions Act, 1854, referred to:

Section 1: "Any person . . . being seised in fee simple . . . of and in any manor or lands of freehold, copyhold, or customary tenure, . . . may grant, convey, or enfranchise, by way of gift, sale, or exchange, in fee simple or for a term of years, any quantity not exceeding one acre of such land, whether built upon or not, as a site for any such institution as herein-after described. . . ."

Section 11: "Where the institution shall not be incorporated, the grant of any land for the purpose of such institution, whether taking

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of such land for the purpose of rebuilding or improving a billiard-room and executing necessary repairs.

Before 1890 the institution, then called the Stourbridge Mechanics and Working Man's Associated Institute, comprised two societies, each having a separate reading-room and lending-library, and furnishing instruction to its members by means of classes, lectures, and debates, and by examinations held under the Science and Art Department at South Kensington.

By an indenture dated September 4, 1857, in which parts of sections 1 and 11 of the said Act were recited, a message and hereditaments known as the Falcon Inn were conveyed to certain persons as trustees for the said associated institute,

effect under the authority of this Act or any other authority, may be made . . . to any trustees whatsoever, to be held by such . . . trustees for the purpose of such institution."

Section 18: "If it shall be deemed advisable to sell any land or building . . . held in trust for any institution . . . the trustees in whom the legal estate in the said land or building shall be vested may, by the direction or with the consent of the governing body of the said institution, if any such there be, sell the said land or building, or part thereof, . . . and apply the money arising from such sale . . . in the purchase of another site, or in the improvement of other premises used or to be used for the purposes of such trust. . . ."

Section 19: "The trustees of such institution who, by reason of their being the legal owner of the building or premises, shall become liable to the payment of any rate, tax, charge, costs, or expenses, shall be indemnified and kept harmless by the governing body thereof from the same, and in default of such indemnity shall be entitled to hold the said building or premises and other property vested in them as a security for their reimbursement and indemnification, and, if necessity shall arise, may mortgage or sell the same, or part thereof, free from the trusts of the institution, and apply the amount obtained by such mortgage or sale to their reimbursement. . . ."

Section 33: "The Act shall apply to every institution for the time being established for the promotion of science, literature, the fine arts, for adult instruction, the diffusion of useful knowledge, the foundation or maintenance of libraries, reading rooms for general use among the members or open to the public, of public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs. . . ."

to be held in fee-simple "for the purposes of the said recited Act, and to be applied as a site for the rooms and offices of the Stourbridge Mechanics and Working Man's Associated Institute, such Associated Institute to be under the management and control, as regards all the said buildings, hereditaments and premises . . . of a committee to be annually elected. . . ." The purchase-money was provided partly from the subscriptions of the members and partly by the contributions of friends. Part of the land was afterwards exchanged for other hereditaments, which were conveyed to the trustees to be held on the trusts of the above-named indenture.

In the year 1890 the two societies were amalgamated, in accordance with section 27 of the above-named Act, under the name of the Stourbridge Institute, which continued in possession of the same building and was managed by a council consisting of a president, vice-presidents, treasurer, secretary, and eighteen other members elected at general meetings. It was described in its book of laws as "established for the promotion, amongst its members, of literature, science, and art, and for instruction by means of libraries, reading rooms, exhibitions, lectures, classes, examinations, innocent recreation and such other means as may from time to time be available."

About the year 1897 the council opened a billiard-room on an upper floor of the institute buildings, and three tables were from time to time obtained. A card-room was also opened where whist was played, but not for money, and facilities were provided for the game of "ping-pong." The billiard-room was much frequented, and, partly from this cause and partly from the age of the building, the floor and walls had now become unsafe. The ceiling also was low and the ventilation consequently bad.

Under these circumstances it was desired by the council to enlarge and improve the institute buildings by erecting a new billiard-room on the ground floor and by repairing and reconstructing the existing billiard-room to fit it for other purposes of the institute, or, if that should be found impracticable, to repair and reconstruct the present room so as to put

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it into a safe and sanitary condition, the estimated cost of the first scheme being 800*l.* and that of the second 300*l.*

There were no funds available to meet these expenses, and the council were therefore desirous of raising the money by mortgage. They had, under the laws of the institute (clause 8 (1) to (6)) various express powers, none of which had reference to borrowing money on mortgage, and they were also enabled by clause 8 (7) of those laws "to exercise such other powers as shall from time to time be vested in the council at general meetings of the members of the institute, and generally to manage the affairs of the institute," and at a general meeting, duly convened, a resolution was passed by a very large majority purporting to authorise the council to raise, by mortgage of the institute buildings, the funds necessary to carry out the proposed work.

The present trustees, in whom the legal estate had become vested, were divided in opinion, some being in favour of the proposed mortgage, while others objected to it as being *ultra vires*, and on the ground that the playing of cards, billiards, and other games was a departure from the proper objects of the institute. The majority passed a resolution intimating their willingness to create a charge for the purposes suggested, provided the trustees incurred no personal liability, and that the council obtained a decision of the Court on the question.

The treasurer and secretary, who were the persons authorised to sue and be sued on behalf of the institute, accordingly issued the present summons, to which all the trustees were made defendants, asking:

1. That it might be determined whether the Stourbridge Institute, or the council or trustees thereof, had power to mortgage the premises of the institute comprised in or subject to the trusts of the deed of September 4, 1857, for the purpose of raising money for (a) the enlargement and improvement of the buildings and premises of the institute, and (b) necessary repairs to the said buildings and premises.

2. That the defendant trustees might be authorised to concur with the council

of the institute in executing a proper mortgage of the premises for the purpose aforesaid, and that such mortgage might be sanctioned by the Court.

It appeared that the Charity Commissioners, on being applied to, had expressed the opinion that a certificate from them under section 17 of the Charitable Trusts Act, 1853, was not required before instituting the proceedings.

Buckmaster, K.C., and *Seddon*, for the plaintiffs.—There is power under section 19 of the Act for the trustees to mortgage in order to reimburse themselves for expenses which they, as legal owners, may have been called on to incur. It is unreasonable that they should not be able to raise in the first instance money which they are authorised to raise after the need for repairs has become so great as to lead to the expenditure of their own money under a ruinous-structure notice. If an institution requires money to carry out the objects for which it exists, a power to borrow is implied. The Court often allows trustees to borrow for the purposes of their trust though the trust deed contains no power to do so.

Whitmore Richards, for the assenting trustees.—Section 18 of the Act in terms confers on the trustees a power to sell land, and a purchaser would not be put on enquiry as to the validity of the sale. From this is to be implied a power to mortgage, for a mortgage is a conditional sale. In *Stroughill v. Anstey* [1852]² it was held that an express power of sale did not carry with it a power to mortgage, but the judgment of Lord St. Leonards in that case shews that the power to mortgage is implied where the intention is to preserve the estate.

Asbury, K.C., and *Underhill*, for the dissenting trustees.—The grant of this property was either made under the Act, or else it is bad by reason of the rule against perpetuities, the institute not being a charitable institution—*Dutton, In re* [1878].³ The Act is permissive in respect of allowing something otherwise illegal, but the purposes in question are

(2) 22 L. J. Ch. 130, 134; 1 De G. M. & G. 635, 644.

(3) 48 L. J. Q.B. 350; 4 Ex. D. 54.

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not such as the Act contemplates. If a literary society can build a billiard-room it can turn its whole premises into a club for such purposes. The institute cannot make rules in contravention of the Act—*Bristol Athenæum, In re* [1889].⁴ The power of sale in a will no doubt includes a power to mortgage, but it is not so with a power of sale conferred by a statute for a limited purpose. The trustees have no power under the Act to mortgage except for salvage purposes, nor would they have a lien for expenses incurred for repairs unless for those purposes.

BUCKLEY, J.—Under a deed of September 4, 1857, certain gentlemen as trustees of an institution, which is now called the Stourbridge Institute, became grantees of certain land conveyed to them for the purposes of the Literary and Scientific Institutions Act, 1854, and to be applied as a site for the rooms and offices of the institute, and to be under the management and control of a committee as therein mentioned. The institute is governed by that Act, section 1 of which authorises certain institutions to acquire, by purchase or gift, land, not exceeding one acre in extent, as a site for any such institution as thereafter described. The institutions are described in section 33, and include those established for the promotion of science, literature, the fine arts, and the diffusion of useful knowledge. I need not further particularise the objects, except negatively by saying that there are no words in the section authorising the establishment of an institution for recreation or enjoyment as distinguished from instruction. The Stourbridge Institute has in recent years gone somewhat beyond the bounds of the statute by establishing in its building a billiard-room and card-room and facilities for playing ping-pong. The billiard-room is on an upper floor and is in need of repair; its roof is low and the ventilation consequently defective. It is proposed to build a new one on the ground floor, which will be better adapted for the purpose, or in the alternative to raise the roof of the present room and effect other improvements. This is an excellent thing

(4) 59 L. J. Ch. 116; 43 Ch. D. 236.

in itself, but the institute has not the funds wherewith to carry out the suggested alterations. The majority of the members wish that money should be borrowed for the purpose; the minority say that the institute has not the power to borrow for this particular purpose.

The first question is, Has the institute power to borrow money for the purpose of enlarging and improving its premises in the manner I have mentioned? In my judgment it has not, and I base my decision on two grounds. In the first place, as I understand the law, *prima facie* a commercial undertaking, or a trading undertaking, has, as has been said more than once, an implied power to borrow money for the purposes of its business, if such borrowing is not expressly prohibited. The fact that that proposition has been confined to commercial or trading undertakings goes strongly to shew that a power to borrow is not implied where the body in question is other than a commercial undertaking. This institution is not a commercial undertaking, and in my judgment it has no implied power to borrow for the purpose I have indicated, and certainly no express power to do so. I should come to the conclusion that there was no implied power to borrow if the Act gave no power to borrow for any purpose; but section 19 does give power to the trustees to mortgage the building or premises of the institution for certain purposes which do not include this purpose. [His Lordship read section 19, and continued:] That is a special power addressed to a case which is not this case. Beyond that, subject to limitations which I will presently mention, the trustees have no power to borrow money.

The second ground on which I base my judgment is this: Looking at the definition of institutions in section 33, it seems to me that the providing of a billiard-room is outside the purposes which the Act contemplates, and that the words of the section shew that the development of an institution of the kind therein described into a social club is not warranted by the statute.

An argument has been addressed to me in support of the plaintiffs' case to

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the effect that section 18 of the Act allows the trustees, by the direction or with the consent of the governing body, if any, to sell the land or buildings of the institution, and that a power to sell includes a power to mortgage. I think that section has nothing to do with the present question. It is meant to apply to cases where it is deemed advisable to get rid of land which is not wanted. That is plain from the words of the section. In my opinion, therefore, the trustees have not power to borrow money for the purpose of rebuilding or enlarging the billiard-room.

But then the question is asked whether they have power to borrow for the purpose of paying for necessary repairs. That is a different matter. If there is anything in the building really requiring repair, I think it would be the trustees' duty to do those repairs; and if in so doing they expend money of their own they will be entitled to a lien on the property of the institution for the money spent. This result might be arrived at in a different way, for under section 19 they would have a charge for the amount expended if they had been called on by the proper authority to do the repairs. I think, therefore, that the trustees doing necessary repairs would be entitled to a charge for the moneys expended, and I do not see why, in that state of things, they should not mortgage for the purpose of raising the necessary funds. In my judgment they may mortgage for necessary repairs.

Solicitors—Robbins, Billing & Co., agents for William Waldron, Brierley Hill, Staffordshire, for plaintiffs; Robinson & Bradley, agents for E. A. Sheldon, Stourbridge, and for H. T. F. King, Stourbridge, for two sets of trustees.

[Reported by R. Hill, Esq.,
Barrister-at-Law.

[IN THE HOUSE OF LORDS.]

1905. } CHAPMAN AND OTHERS v.
March 3. } PERKINS.*

Will—Construction—Forfeiture Clause
—“*Shall thenceforth cease and determine*”
—*Marriage within Certain Degrees of*
Kindred—Marriage in Testator's Life-
time.

A clause in a will by which the interest of any child of the testator who “shall contract any marriage forbidden by me as hereinafter expressed . . . shall thenceforth cease and determine,” held not to apply to a child who after the date of the will, but before the testator's death, had contracted a forbidden marriage.

Decision of the COURT OF APPEAL
(73 L. J. Ch. 291; [1904] 1 Ch. 431)
affirmed.

Appeal from an order of the Court of Appeal dated February 19, 1904, reversing an order of Kekewich, J., dated July 30, 1903.

The question was whether the respondent, by marrying her first cousin, Charles Steele Perkins, during the lifetime of her father, the late Edward Chapman, who died December 23, 1902, had forfeited the share of her father's estate to which she would otherwise be entitled under his will.

The testator had at the date of his will nine children, of whom one—namely, Alice Eliza Perkins—had, shortly before that date, married her first cousin, George Chapman Steele Perkins.

The will was dated March 24, 1881, and contained the following clause:

“And I declare that if any son or daughter of mine shall do or suffer any act whether by way of alienation charge or otherwise and including any act under any statutes of bankruptcy or for the relief of insolvent debtors for the time being by reason or means whereof any part or share of him or her in any income or capital of my said estate to or of which he or she shall not have already become entitled in possession or be for

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord James of Hereford, and Lord Lindley.

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the time being actually entitled to the receipt shall or but for this present clause would become wholly or in part vested in or payable to any other person or persons or if he or she shall contract any marriage forbidden by me as hereinafter expressed then and in any such case his or her share right title and interest of in and to my said trust estate and the income thereof shall thenceforth cease and determine and my said trust estate shall thenceforth go and be held in such manner as the same would have been held if he or she had died before me without leaving any child or children living at my death. And I declare that the marriages forbidden by me are in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will or if more than two of a majority of them."

The respondent married her first cousin, Charles Steele Perkins, on November 9, 1886.

Kekewich, J., made an order declaring that the respondent had forfeited her share of the testator's trust estate and the income thereof.

This order was reversed by Vaughan Williams, L.J., and Stirling, L.J.; Cozens-Hardy, L.J., dissenting.

Levett, K.C. (Iselin and W. A. Russell with him), for the appellants.—The plain meaning of the words is that a child who should thereafter—that is, at the date of the will—marry within the specified limits of kinship should be excluded. A will is only deemed to speak from death with respect to the property comprised therein. For other purposes it speaks from the date of its execution—Wills Act, 1837 (1 Vict. c. 26), s. 24, and *Bullock v. Bennett* [1855].¹ The respondent's contention requires the insertion of the words after "shall," "after my death" "contract any marriage forbidden by me." Forfeitures on bankruptcy have always been construed as from

the date of the will, and there is no reason for applying different constructions to the two parallel cases. In cases of bankruptcy or alienation, even where they have been words importing a different construction, forfeiture has been enforced on the happening of the event before the testator's death—*Ancona v. Waddell* [1878]² and *Metcalfe, In re; Metcalfe v. Metcalfe* [1891].³ The words "cease and determine," relied on by Stirling, L.J., as shewing that marriage after the testator's death only was contemplated, proves no more than that such a marriage was included.

Upjohn, K.C., and Edward Clayton, for the respondent, were not heard.

THE LORD CHANCELLOR (EARL OF HALSBURY).—I do not propose to go over this elaborate argument again. It appears to me that the decision of Lord Justice Vaughan Williams and Lord Justice Stirling is perfectly right. There is an intention on the part of the testator, to my mind, overwhelmingly established upon the words of the will itself, and I decline to go beyond that. The argument from words used with reference to bankruptcy seems to me to be disposed of by this consideration. Cases in which there was a desire on the part of the testator that his property which he was dealing with should not go to strangers, but should go to his children, and a plain intention was shewn that the forfeiture clause should apply if the thing happened during his own lifetime, have no reference to the subject-matter with which we are dealing. To my mind, the reasoning of Lord Justice Vaughan Williams and Lord Justice Stirling as to the intention of the testator is perfectly satisfactory, and I move that the appeal be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. I agree with the majority of the Court of Appeal. I think in this particular will the marriages forbidden are marriages taking place after the testator's death.

(1) 24 L. J. Ch. 397, 512; 7 De G. M. & G. 283.

(2) 48 L. J. Ch. 115; 10 Ch. D. 157.

(3) 60 L. J. Ch. 647; [1891] 3 Ch. 1.

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LORD JAMES OF HEREFORD.—I concur.

LORD LINDLEY.—So do I.

Appeal dismissed.

Solicitors—John F. Child, for appellants;
Ward, Parks & McKay, for respondent.

[Reported by J. Eyre Thompson, Esq.,
Barrister-at-Law.

FARWELL, J. }
1905. }
Feb. 9, 10. }

GENT AND EASON'S
CONTRACT, In re.

*Vendor and Purchaser — Trustees —
Power to Invest in Purchase of Land—
"Securities"—"Investments"—Power to
Vary and Transpose Securities—Purchased
Land—Power of Sale.*

A testator authorised his trustees to invest trust moneys in the purchase or upon mortgage of freehold or leasehold properties, or in or upon Government stocks or funds, or debentures or preferential stocks of certain railway companies, or in or upon trustee investments authorised by law, with "power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorised." On the sale by the trustees of real estate purchased by them out of the trust funds,—Held, that the testator had used "securities" as synonymous with "investments," and that, by virtue of the power to vary and transpose securities, the trustees could sell the real estate in question and give the purchaser a valid receipt for the purchase-money.

Vendor and purchaser summons.

By his will dated February 15, 1893, William Gent devised his real estate and bequeathed the residue of his personal estate to his trustees therein named, upon trust, after the death of his wife, to stand possessed of the sum of 6,000*l.* for each of his daughters in manner therein mentioned, and to hold the remainder of his real and personal estate upon trust for his sons and daughters in equal shares. The will contained the following provisions: "I authorise and empower my

said trustees or trustee to sell and absolutely dispose of all or any part of my real and personal estate of a saleable nature at such time or times and in such manner and form as they or he shall think beneficial. I authorise and empower my said trustees or trustee to lay out and invest the moneys coming to their or his hands under the trusts of this my will in the purchase or upon mortgage of freehold or leasehold properties in England or in or upon the Government stocks or funds or in or upon the debentures or preferential stocks of the Great Western Railway Company the Midland Railway Company or the London and North-Western Railway Company or in or upon any other investments in or upon which trustees are for the time being authorised or empowered by law to invest trust funds with full power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorised."

The testator died in 1895.

In 1896 the trustees purchased out of moneys coming to their hands under the trusts of the will freehold ground-rents in London, which were duly conveyed to them "upon the trusts and subject to the powers and provisions upon and subject to which the same powers ought to be held by virtue of the said will of the said William Gent deceased."

In 1904 the testator's wife died, and subsequently the trustees entered into a private contract for the sale of the above-mentioned freehold ground-rents to Messrs. Eason, and into the contract was incorporated the following condition: "The vendors are selling as trustees of the will of the late William Gent in consequence of the death of the testator's widow and for the purpose of distributing his estate, and the beneficiaries under the said will shall not be required to concur in the sale or to join in the conveyances to the respective purchasers."

The purchasers raised the objection that the vendors had no power to sell the real estate purchased by them under the above-mentioned power in the will and to give a good receipt for the purchase-moneys, and they required the concurrence of all the beneficiaries in the conveyance

GENT AND EASON'S CONTRACT, IN RE.

to them. The vendors insisted that the power to vary and transpose securities enabled them to sell and give a good receipt for the purchase-moneys, and the purchasers accordingly took out this summons for the determination of the question, and the summons was now adjourned into Court.

H. Fellows, for the purchasers. — It would be going a very long way to say that the power to transpose and vary the securities authorises the sale of purchased land; that construction can only be attained by dragging it in under the word "securities." Unless there is a power to sell under the power to transpose and vary or by implication arising from the context or from the necessity of the case, the trustees have no power to sell this purchased real estate. The express power to sell "my real estate" has, by virtue of section 24 of the Wills Act, reference only to the real estate to which the testator was entitled at his death, and the usual trust for the re-conversion of purchased realty has been omitted. Where trustees hold real estate in which infants are interested, as here, they ought not to alter the possible devolution of the infant's shares unless they have power, either express or implied, to do so. In *Tait v. Lathbury* [1865]¹ there was an express direction which is wanting here. In *Rayner, In re; Rayner v. Rayner* [1903],² it was held that there was sufficient in the will to shew that the testator used "securities" as equivalent to "investments," but that is a long way from the present case. In the circumstances, the purchasers were justified in taking the opinion of the Court.

Upjohn, K C., and *Druce*, for the vendors.

FARWELL, J., read the provisions of the will above set out, and continued: I am unable to bring myself to feel any doubt about this case. The Court of Appeal, in *Rayner, In re*,² had to consider the meaning of the word "securities," and Lord Justice Romer says: "the word is a flexible one, and I recog-

nise that it is largely used in a wider or different sense, and in particular is widely used as a synonym for 'investments.'" It is quite plain to my mind that in the present case the word "securities" is used as a synonym for "investments." The reference to "preferential stocks" of the Great Western and other railway companies as securities is sufficient to shew that the word "security" is used in the wider sense as equivalent to "investments," for preference stock is not a "security" in the strict meaning of the word. Then there is also the phrase "or in or upon any other investments in or upon which trustees are for the time being authorised or empowered by law to invest." It is clear that he uses the word "securities" as synonymous with "investments." Here I have a trust to invest money in the hands of the trustees in the purchase or mortgage of land, with a power "to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorised." I cannot see any ground for doubting that power to sell purchased realty comes within the words of the will. I am not impressed with counsel's comment on the absence of the usual trust for re-conversion. It would no doubt be very fantastic for a testator to give his trustees power to convert his own real estate as they thought fit, and not to give them a like power to turn back into personality what was made realty by their own act; but in this case he has, in my opinion, given them the latter power by virtue of the power to vary or transpose securities. With regard to the title, I can see no difficulty which the purchasers need fear, and I must dismiss the summons and order them to pay the costs.

Solicitors—*Lathey & Hart*, for purchasers;
Gamlen, Burdett & Co., agents for *Cottrell & Son*, Birmingham, for vendors.

[Reported by *R. J. A. Morrison, Esq.*,
Barrister-at-Law.]

(1) L. R. 1 Eq. 174; 35 Beav. 112.

(2) 78 L. J. Ch. 111; [1904] 1 Ch. 176.

KEKEWICH, J. }
1905. } GILLING, *In re*; PROOTER
March 31. } v. WATKINS.

Husband and Wife—Separation Deed—Construction—Covenant to Pay Annuity to Wife "for her life if she shall so long continue to live separate and apart"—Cessation of Annuity on Death of Husband.

*In a separation deed a husband covenanted to pay to his wife for her sole and separate use during her life if she should "so long continue to live separate and apart," 150*l.* for her maintenance, clothing, and other necessities. The husband having died, the wife re-married:—Held, on the construction of the deed, that the annuity ceased to be payable on the death of the husband.*

Charlesworth v. Holt (43 L. J. Ex. 25; L. R. 9 Ex. 38) distinguished.

Adjourned summons.

By a deed of separation made June 4, 1887, between Walter Gilling and Annie M. Gilling, after reciting that the parties had agreed to separate from each other for the future owing to unhappy disputes and differences, and that the husband had agreed to allow and pay the wife the sum of 150*l.* per annum for her maintenance, clothing, and all other necessities during the continuance of such separation, it was witnessed that the parties mutually covenanted and agreed each to live separate and apart from the other upon the terms thereafter contained, which included covenants by the husband that so long as the separation should continue he would not molest or interfere with the wife, and that he would "pay or cause to be paid unto her for her sole and separate use and without power of anticipation by her by quarterly instalments during the life of the said Annie M. Gilling if she shall so long continue to live separate and apart as aforesaid the full sum of 150*l.* per annum (being the yearly allowance hereinbefore mentioned) for her maintenance clothing and other necessities," and it was further mutually stipulated and agreed that the acknowledgments and receipts in writing of the wife should, notwithstanding coverture, be effectual discharges to the husband for the respective sums to be paid

to her as aforesaid. The deed further contained the usual covenants by the wife not to institute divorce proceedings during the performance of the husband's covenants, or to molest him, and it was further agreed that the husband should have charge of the children.

The parties lived apart in accordance with the deed until the husband died on July 4, 1901.

The wife married again on December 7, 1901.

This summons was issued by one of the executors of the husband's will asking the Court to determine whether the annuity of 150*l.* to be paid to the wife ceased to be payable on the death of the husband, or whether the executors were bound to provide for payment of the annuity out of his estate.

G. D. Pepys, for the executor.

Clayson, for the wife.—These words comprising the gift of the annuity are a departure from the words "annuity payable during their joint lives," usually found in the books of precedents and forms. The only condition on which payment was here to cease was the event of their coming together again; for such a purpose separation is separation, whether caused by the hand of Providence or by a misunderstanding. In *Charlesworth v. Holt* [1873]¹ an annuity given to a wife while living separate during the joint lives of the husband and wife was continued even when the parties were subsequently divorced.

A. F. Peterson, for a son of the first marriage, was not called upon.

KEKEWICH, J.—Notwithstanding the apparent novelty of the question here raised, I have no difficulty in construing the words which create it against the lady. It is a deed of separation, and one is entitled to consider generally what is the acknowledged purview and object of a deed of separation. The primary object is to provide for the wife so long as she is the wife, while separated from her husband—that is, provided the coverture is still in existence. Of course separation deeds often go far beyond that, but this is

(1) 43 L. J. Ex. 25; L. R. 9 Ex. 38.

GILLING, IN RE.

a plain deed for the purposes of the kind I have named. The words in question do not provide for a payment on a condition, but for a conditional payment to the lady so long as she fulfils the character of living separate and apart from her husband. She cannot be said to be doing that when he is dead.

I am referred to the case of *Charlesworth v. Holt*,¹ which no doubt turned on the construction of particular words in a particular deed. [His Lordship read the words of the gift in that case.] There the husband and wife were both alive and living separate. There was no difficulty there, while here there is just the variation from that. I therefore declare that the annuity ceased to become payable on the death of the husband.

Solicitors—Nash, Field & Co.; Lanfear, Tanner & Lanfear.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905. } BANKS'S TRUSTS, *In re*;
Feb. 3, 4. } BANKS v. BUSBRIDGE.

Will — Construction — Exoneration of Personalty—Bequest of "all my personal estate"—Devise of Real Estate subject to Debts, &c.—Expression of Intention.

A specific gift of all a testator's personal estate to A, followed by a devise of real estate to B and C subject to the payment of his debts, &c., is not an expression of intention sufficient to exonerate the personalty from its primary liability for those payments, especially when in the will a wish is expressed that none of the realty shall be sold while any descendants of testator's name are living.

Originating summons raising questions as to the construction of a will, one only of which requires notice in this report.

Alfred Banks, by his will dated March 24, 1902, appointed the defendants James Lewis Busbridge and Mark

Adaley executors and trustees thereof, and gave all his personal estate to Keziah Ann Banks, the widow of his deceased son Alfred Henry Banks, absolutely. He devised two cottages to his daughter Isabella Sarah Richardson for her life, and subject to that devise he gave all his real estate wheresoever situate to his said trustees, "subject to the payment of my just debts and funeral and testamentary expenses," upon certain trusts for the benefit of the said widow and the children of his said son until the youngest of such children should attain the age of twenty-one years, after the happening of which event he made sundry dispositions not affecting the present question. At the end of the will occurred the following passage: "It is my express wish that none of my real estate shall be sold whilst there are any of my male descendants living of the name of Banks."

One of the questions raised by the summons was whether the testator's debts and funeral and testamentary expenses were payable out of his personal estate in the first instance, or whether the personal estate was exonerated from such payment.

Stuart Sankey, for the plaintiff Keziah Ann Banks.—This is a specific bequest, and therefore the rule laid down in *Ancaster (Duke) v. Mayer* [1785]¹ does not apply. The importance, for this purpose, of the distinction between a specific gift and one to an executor, or as residue, is pointed out in *Gilbertson v. Gilbertson* [1865]² and *Powell v. Riley* [1871].³ There is here sufficient indication of an intention to exonerate the personalty. Besides, the words charging the realty would otherwise mean nothing—*Kilford v. Blaney* [1885].⁴

A. G. Mathews, for the other beneficiaries.—There must be a clear intention, either expressed or to be extracted from the whole will, in order to make the real estate the primary fund for payment of debts—*Greene v. Greene* [1819]⁵ and

(1) 1 Wh. & Tu. L.C. (7th ed.), 1.

(2) 34 Beav. 354.

(3) 40 L. J. Ch. 533; L. R. 12 Eq. 175.

(4) 55 L. J. Ch. 185; 31 Ch. D. 56.

(5) 4 Madd. 148.

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Michell v. Michell [1820],⁶ Here an intention is shewn at the end of the will that the real estate should not be sold. In both the cases cited above, and also in *Lance v. Aghionby* [1859],⁷ there was a trust to pay debts and not, as here, a mere charge.

W. A. Peck, for the trustees.

BUCKLEY, J.—The personal estate is primarily liable for the payment of debts and funeral and testamentary expenses, but the testator may exonerate it either by express words or by an indication of intention to be found in the will which leads to the Court being judicially satisfied that it was the testator's intention to exonerate it. It is not enough that he charges his real estate with the payment of debts. It is necessary to find not that the real estate is charged, but that the personal estate is discharged. This need not be done by express words, but there must be found in the will plain intention or necessary implication to operate as an exoneration. This testator gives his personal estate to Keziah Ann Banks. He specifically devises certain real estate, and, subject to that devise, devises all his real estate to his trustees "subject to the payment of my just debts and funeral and testamentary expenses." The argument addressed to me has been that, because the personal estate—that is to say, the whole personal estate—is given to Keziah Ann Banks, I ought to find in that fact an expression of intention that the personal estate shall not bear the debts subject to which the real estate is afterwards devised. I am unable from that fact to find that intention. There is an indication to the contrary at the end of the will—namely, that the testator desires that none of his real estate be sold whilst male descendants of the name of Banks are living. In *Brummel v. Prothero* [1796]⁸ the Master of the Rolls (Sir Richard Pepper Arden) says: "This [case] is stripped of every circumstance except that of a devise to a trustee for payment of debts and a general bequest of the personal estate to the executor. There is no one case since

French v. Chichester [1707],⁹ the first upon the subject, in which such words as these have been alone sufficient to exempt the personal estate. It has been over and over again decided, that such words are not sufficient to raise such a demonstration, as Lord Thurlow says is necessary."

The personal estate was there held not to be exonerated—and that notwithstanding that there was in that case, not, as here, a mere charge of debts, but a trust to pay the debts. The present case differs in the fact that Keziah Ann Banks is not here the executor; but this does not, I think, differentiate the case. A gift to A is none the less a beneficial gift because A is also appointed executor. In *Haslewood v. Pope* [1734]¹⁰ there was a devise of real estate to trustees upon trust to sell so much as would raise money to discharge all the debts the testator should owe at his death, and a gift of all the personal estate to the testator's daughter, whom he made sole executrix. Lord Chancellor Talbot held that the personal estate was not exonerated. I agree that there was a special reason upon which he founded himself—namely, that the same person was donee of the personal estate and also devisee of the surplus of the real estate in tail. The passage in Mr. Theobald's book (6th ed.), at the top of page 802, is not, I think, borne out by the cases which he cites. There was in those cases, not, as would seem to be there implied, a mere charge of debts on the real estate (which is the case in the will before me), but a trust to sell the real estate and thereout pay the debts. There is nothing more here than a devise of the real estate subject to the debts. In my judgment, the personal estate is not exonerated, and the real estate is only charged in aid of the personal estate.

Solicitors—Long & Gardiner, agents for Montague Bradley, Dover; C. M. Barker, agent for Smith & Payn, Faversham.

[Reported by R. Hill, Esq.
Barrister-at-Law.]

(6) 5 Madd. 69.

(7) 27 Beav. 65.

(8) 8 Ves. 111, 114.

(9) 3 Bro. P.C. 16.

(10) 8 P. Wms. 322.

FARWELL, J. }
 1905. }
 Jan. 12. } BOWLES, *In re*; PAGE v.
 PAGE.

*Will—Construction—Power to Appoint
 Life Estate to Surviving Husband—Ultimate Gift—Perpetuities—Independent and
 Alternative Trusts.*

A testatrix directed her executors to stand possessed of an aggregate principal sum in trust as to a certain specified share thereof for each of her four nieces for life with power to appoint a life or any less interest to any husband who might survive her, and subject thereto in trust for such nieces' children at twenty-one, with a proviso for accruer to the other shares of the share of any niece dying without leaving either husband or children who should take an interest in her share; and in case neither of her nieces should have any child who should become entitled to her share under the trusts aforesaid, then the testatrix directed the aggregate principal sum to be held in trust for such of her nephews, sons of a deceased sister, as should be living at the time of the determination of the trusts aforesaid, or the issue then living of any of her said nephews who might be then dead leaving issue, as the last surviving of her said four nieces might by her will appoint. None of the nieces ever had any children, or exercised her power of appointment in favour of a husband, and the survivor duly appointed the fund to objects of the power. On the death of the survivor the question arose whether the ultimate gift or power was not void for remoteness, because the husbands to whom the nieces had power to appoint life interests need not necessarily have been born in the testatrix's lifetime, and consequently the period for ascertaining the class to take under the ultimate gift might have been postponed beyond the period prescribed by the rule against perpetuities:—Held, that this was a case of independent and alternative gifts, and that the ultimate gift or power to appoint in favour of the testatrix's nephews and their issue was not void for perpetuity, and that the appointment in their favour was valid.

Action.

By her will dated July 3, 1861, Mary Bowles, the above-named testatrix, bequeathed certain legacies to her nieces Mary Albinia Rowden, Eliza Anne Page, Blanche Page, and Jane Anne Page, and gave and bequeathed the residue of her real and personal estate unto and equally between the children of her deceased sister Elizabeth Page who might be living at the testatrix's death.

By a codicil, dated February 13, 1863, to her will, the testatrix revoked the legacies given by her will to her nieces—Mary Albinia Rowden, Eliza Anne Page, Blanche Page, and Jane Anne Page, and in lieu thereof directed her executors to stand possessed of the sum of 4,200*l*. "Upon trust as to 1200*l*. part thereof to invest the same in some or one of the securities hereinafter specified and to pay the annual income arising therefrom when due and payable unto my said niece Mary Albinia Rowden during her life for her own sole and separate use free from the debts and control of any husband and without power of anticipation And I empower my said niece to appoint all or any part of the said income to any husband who may survive her for any period determinable on or before his death And subject to the trusts aforesaid the principal of the said sum of 1200*l*. shall be held upon trust for the child or children equally of my said niece who either before or after the determination of the previous trusts shall respectively attain the age of 21 years And I direct my executors to stand possessed of three several sums of 1000*l*. constituting together the remainder of the said sum of 4200*l*. Upon such trusts and with such powers in favour of my respective nieces Eliza Anne Page Blanche Page and Jane Anne Page and their husbands and child and children respectively if any as shall correspond with the preceding trusts and powers in favour of my said niece Mary Albinia Rowden and her husband and child or children if any And in case either or any of my said four nieces shall die without leaving either husband or children who shall take an interest in the legacies aforesaid I empower each such

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niece to appoint by her will all or any part of the income both original and accruing to which she shall herself be entitled as aforesaid unto or amongst any one or more of her sisters who shall survive her and shall not have been married for the life or respective lives of such last mentioned sister or sisters either contemporaneously or in succession And subject to such powers of appointment the principal sum or sums respectively producing the income so received by the niece or respective nieces so dying without leaving either husband or children as aforesaid shall be added to the other or the others equally of the sums hereinbefore bequeathed and be subject to the trusts and powers hereinbefore expressed or referred to concerning the sum or sums to which the same shall be added And in case neither of my said nieces shall have any child who shall become entitled to the said principal sums under the trusts aforesaid then all the same principal sums shall subject to the preceding trusts be held In trust for such of my nephews sons of my late sister Elizabeth Page as shall be living at the time of the determination of the trusts aforesaid or the issue then living of any of my said nephews who may be then dead leaving issue in such proportions at such times and in such manner as the last surviving of my said four nieces may by her last will appoint And in default of appointment the said principal sums shall be divisible amongst the next of kin (exclusive of a husband) of such last surviving niece living at the time of the determination of the previous trusts in a course of distribution according to the statutes."

The testatrix died on January 8, 1868, and her will and codicil were duly proved.

Mary Albinia Rowden died on December 9, 1868, intestate, and without having had any issue. Her husband, F. M. Rowden, died in January, 1903.

Eliza Anne Page died a spinster and intestate on June 20, 1871.

Jane Anne Page died a spinster on July 8, 1890, having by her will bequeathed all her real and personal estate to her sister Blanche Page, whom she appointed sole executrix.

Blanche Page, in exercise of the power vested in her as the surviving niece of the testatrix, by her will directed the trustees of the testatrix's will to hold the said sum of 4,200*l.* and the investments representing the same upon trust to pay the dividends and income thereof to her brother, the plaintiff George Hyde Page, during his life, and after his decease in trust as to both capital and income for her nephew, the defendant Robert Henry Frederick Page, absolutely. Blanche Page died on May 10, 1903, and her will was duly proved by the defendant Thring, one of the executors therein named.

The plaintiff George Hyde Page was the only one of the sons of the testatrix's sister Elizabeth Page who survived Blanche Page, but at her death there were living issue of the plaintiff's three brothers who had predeceased him.

The remaining defendants were the public officer and estate trustees of the Legal and General Life Assurance Society, to whom the defendant Robert Henry Frederick Page had assigned his interest in the said trust fund of 4,200*l.* The said defendant R. H. F. Page was out of the jurisdiction.

The plaintiff, who was the administrator of the sole acting executor of the testatrix, and had acted for many years as trustee of the said sum of 4,200*l.*, commenced this action claiming (*inter alia*) that it might be determined whether all or any of the ultimate trusts declared by the codicil concerning the said sum of 4,200*l.*, in case of the failure of issue of all the four nieces of the testatrix therein named were void for remoteness, and whether the appointment of the said sum by Blanche Page's will was a valid appointment for all or any part thereof.

Seymour Eastwood, for the plaintiff, stated the case.

Upjohn, K.C., and *T. L. Wilkinson*, for the Legal and General Life Assurance Society.—The question is whether the period for ascertaining this class is too remote. The words here are sufficiently obscure and ambiguous to admit of weight being given to the consideration that it is better to effectuate than destroy the testatrix's intention—*per* Lord Selborne in

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Pearks v. Mosley [1880].¹ The "determination of the trusts aforesaid" refers to the children's trusts—that is, the chain of trusts declared by the will—not to the trusts which might arise if the power of appointment in favour of a husband were exercised.

J. D. Davenport, for the next-of-kin of *Blanche Page*, took no part in the argument.

J. K. Young, for parties claiming under the residuary gift in the will.—The ultimate gift is void for remoteness. In questions of remoteness, possible and not actual events have to be regarded.

[*FARWELL, J.*—Is not this in fact an independent and alternative trust?]

Contingencies cannot be split up to enable effect to be given to the gift upon the contingency which is good—*Hancock v. Watson* [1901].²

Upjohn, K.C., in reply.—There are really two lines of limitation in this will, the one not subsequent but alternative to the other. The event on which the valid alternative is limited has occurred and effect can be given to it—*Longhead v. Phelps* [1770]³ and *Monypenny v. Dering* [1852].⁴

FARWELL, J.—The question in this case is whether the ultimate gift, having regard to the power to appoint among a certain class of persons, is or is not void for perpetuity. There are limitations, putting it quite shortly, to the nieces and their children, and then there is a power to the nieces to appoint to any husband whom they may marry and who may survive them for a life interest or any less interest. Those husbands, of course, need not necessarily be born in the testatrix's lifetime. If, therefore, there had not been a power to appoint to such husbands, but an actual life interest given to them, and the class to take was not to be ascertained until the death of the survivor of such nieces and such husbands, the gift would be void for perpetuity because the class to take would not be necessarily

ascertainable within a life or lives in being and twenty-one years afterwards.

In my opinion, in the present case, if the power had been in fact exercised in favour of any such husband the same result would follow; I do not see my way to adopt the construction—which I thought was rather a forced one—that counsel invited me to put upon the word "trusts" in the ultimate gift. I think *Lord Hardwicke's* words in *Marlborough (Duke) v. Godolphin (Lord)* [1750]⁵ would apply: "The meaning that the persons must take under the power, or as if their names had been inserted in the power, is, that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take, as if all, that was in the instrument executing, had been expressed in that giving the power." I do not see my way to saying that if the power had been executed the object of that power would not have become a *cestui que trust* so as to be able to predicate successfully that he claimed under "the trusts aforesaid"; but inasmuch as the power never was exercised, and having regard to what a power is and what the nature of the interest created under it is, I am of opinion that this falls within the class of cases of alternative independent gifts. The person who takes under the exercise of the power takes an executory interest in an event which might or might not have happened; in fact, what the testatrix has done is to give the property to a class of persons ascertained within due limits, but she has enabled one of the beneficiaries named in her will to alter that limitation by the insertion of a life interest to a person who would be beyond the limits of perpetuity, and alter the period for ascertaining the class to the date of the death of the survivor of that person and herself. Those appear to me to be alternative independent gifts within the cases of *Monypenny v. Dering*⁴ and *Longhead v. Phelps*.³

The result is that in this case I am able to give effect to the gift without in any way departing from the stringency of any of the cases which say that I must

(1) 50 L. J. Ch. 57; 5 App. Cas. 714, 719.

(2) 71 L. J. Ch. 149; [1902] A.C. 14.

(3) 2 W. Bl. 704.

(4) 22 L. J. Ch. 313; 2 De G. M. & G. 145.

(5) 2 Ves. sen. 61, 78.

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give effect to the rule against perpetuity whatever the consequence may be. The result is that I hold that the ultimate gift or power is good.

Solicitors—Routh, Stacey & Castle; Lawrence, Graham & Co.; Cunliffe & Davenport.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

BUCKLEY, J. } GRASSI, *In re*;
1905. } STUBBERFIELD v. GRASSI.
March 16. }

Will—Naturalised British Subject—English Domicil—Will Made in Italy in Foreign Form—Validity to Pass Leaseholds—“Personal estate”—Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1.

“Personal estate” in the Wills Act, 1861, includes leasehold property.

A will made out of the United Kingdom by a British subject, whatever his domicile at the time of making it or at his death, and made according to the law of the place where it was made, or where he was domiciled when it was made, or where in the King's dominions he had his domicile of origin, is effectual to pass his beneficial interest in leaseholds.

Carlo Omobono Grassi (hereinafter spoken of as the testator) was born of Italian parents, and more than thirty years ago came to England, where he since carried on business.

In 1894 he obtained letters of naturalisation, and thenceforth till his death was an English subject.

In 1895 he married Louisa Frances Grassi (then L. F. Cook), one of the defendants.

During a visit to Italy he died at Viadana on December 22, 1901, leaving a holograph will dated November 1, 1901, made in Italian form.

The will was unattested.

He thereby bequeathed the usufruct for life of all his property to his wife Louisa Frances Cook (*sic*), wherever the

said property might be situate and existing, and exempted her from the obligation of making an inventory and giving security. He appointed as his universal heirs to the bare ownership of his property the Congregation of Charity of Viadana in order that upon the death of his wife an institution might be founded as an asylum for poor people. He appointed James William Stubberfield (the plaintiff) and two other persons executors.

Louisa Frances Grassi survived the testator.

In February, 1902, the plaintiff proved the will in the Principal Registry of the High Court in England, and probate was subsequently granted to one of the other executors. The third executor did not prove.

In May, 1903, the present action was commenced.

In July, 1903, an order was made directing enquiries, in answer to which the Master by his certificate found that the testator was a naturalised British subject at the time of making his will and thenceforward till his death; that he was domiciled in England; that his will was made according to the forms of the law of Italy; and that the word “usufruct” had a technical meaning according to the Italian law, the definition given by the Italian Civil Code being, “Usufruct is the right to enjoy things the ownership of which belongs to another in the manner in which the owner would enjoy the same but with the obligation to preserve the substance of them as regards both the matter and the form thereof”; that every species of property, movable and immovable, might be the subject of a usufruct; and that the legal effect according to Italian law of the bequest of “the usufruct for life of all my property to my dearest wife Louisa Frances Cook wherever the said property may be situate and existing,” was to give a specific legacy to Louisa Frances Grassi of the usufruct for her life of all the property the testator was possessed of or entitled to at his death, and to entitle her to the possession and enjoyment of it from his death, subject to the duties and liabilities imposed on usufructuaries by the Italian Civil Code (save so far as such duties or

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liabilities were modified or excluded by the will).

On January 11, 1905, the plaintiff took out a summons for the determination of the question whether, having regard to the provisions of section 1 of the Wills Act, 1861 (known as Lord Kingsdown's Act),¹ the beneficial interest of certain leasehold premises in Gerrard Street, Soho, and elsewhere in London, which formed part of the testator's estate, was disposed of by the will, and, if so, whether Louisa Frances Grassi was entitled to the specific enjoyment thereof during her life or for any other and what period.

Herbert B. Cohen (*T. Boston Bruce* with him), for the applicant, stated the facts.

Birrell, K.C., and *A. J. Chitty*, for the widow.—This will is good according to the law of Italy, and by virtue of the Wills Act, 1861, s. 1,¹ good also under the law of England, although not attested by two witnesses. The leaseholds therefore passed under it to the widow. Leaseholds, though immovables, are personal property by the general law of England—*Freke v. Carbery* (*Lord*) [1873],² *Watson, In re*; *Carlton v. Carlton* [1887],³ *Dicey's Conflict of Laws*, pp. 72, 73—and equally

(1) Wills Act, 1861, s. 1: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate . . . if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin."

Section 2: "Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate . . . if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

(2) L. R. 16 Eq. 461, 466.

(3) 35 W. R. 711.

so within the meaning of "personal estate" in the Wills Act, 1861—*Foot's Private and International Jurisprudence* (3rd ed.), p. 268, note (b). Section 1 of the Wills Act, 1837, expressly defines personal estate as including leaseholds, and they would pass under a soldier's or sailor's will under section 11. When an Act does not mean personal estate to include leaseholds it says so. They have always been regarded as different from real property—*Davis v. Gibbs* [1729].⁴ If the leaseholds did not pass by the will, no other personal property passed.

[BUCKLEY, J.—Section 1 of the Wills Act, 1861, says the will shall "be held to be well executed for the purpose of being admitted to probate." The language of section 2 is different. Section 1 seems to suggest that it might not be well executed for some other purpose. What other purpose?]

[*Whinney* suggested an answer might be found in *Hood v. Barrington* (*Lord*) [1868],⁵ referring to *Laneville v. Anderson* [1860].⁶]

The difference in language between sections 1 and 2 is puzzling, but they mean the same. Probably they were drawn up independently, and they must be construed upon their own merits respectively.

[BUCKLEY, J.—*Watson, In re*; *Carlton v. Carlton*,³ is a clear decision under section 2 on the point we are discussing.]

Whinney, for the Congregation of Charity, supported the above argument, and cited *Butler v. Butler* [1884].⁷

Buckmaster, K.C., and *Sheldon*, for next-of-kin.—Leaseholds did not pass under the will, because it was not so executed as to pass immovable property in this country. No one disputes that but for the Wills Act, 1861, leaseholds would not pass. That Act may have intended to effect much, but it did effect little; at any rate, it did not remove the restraint which formerly attached to immovable property, and only allowed it to be disposed of by a will made in accordance with the law of the country where it was situate. It has

(4) 3 P. Wms. 26.

(5) L. R. 6 Eq. 218, 224.

(6) 6 Jur. (N.S.) 1260.

(7) 54 L. J. Ch. 197; 28 Ch. D. 66.

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been decided that the Act does not enable a power to be exercised. The leaseholds go as under an intestacy.

[They referred to *Pepin v. Bruyère* [1901],⁸ *Dicey's Conflict of Laws*, p. 491, and *Jarman on Wills* (5th ed.), pp. 8, 9.]

BUCKLEY, J.—The question which I have to determine in the present case is whether “personal estate” as used in the Wills Act, 1861, includes leasehold property. The division of subjects of property into real estate and personal estate, and into movable and immovable is familiar to all of us. They are not coterminous. Leaseholds are immovables, but they are nevertheless personal estate. Does the Wills Act, 1861, when it uses the phrase “personal estate,” mean to limit it to movables? Section 1 of the Wills Act, 1837, enacts that “the words ‘personal estate’ shall extend to leasehold estates and other chattels real.” It cannot be suggested that section 11 of that Act, which provides that any soldier on active service or any mariner or seaman at sea may dispose of his personal estate as before the Act, does not include leaseholds. Section 26 of the Wills Act, 1837, provides that a general devise of a testator’s lands shall include leasehold estates. The Act throughout proceeds on the footing that leasehold property is not real estate, but personal estate, so that section 26 was wanted to include leaseholds under “lands.” All this tends to shew that the Legislature was proceeding on the principle of the division of property into real and personal, and not on that of the distinction between *mobilia* and *immobilia*. In this state of things the Wills Act, 1861, was passed. It is intitled “An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.” It is true it does not expressly refer to the Wills Act, 1837, but it was clearly intended to amend that Act. Under the Act of 1837 wills were required to be executed in a certain way. The Act of 1861 was introduced to affect that, and to allow in certain cases the admission to probate of writings not attested by two witnesses. Section 1 of the Act deals with testamentary instru-

(8) 71 L. J. Ch. 39; [1902] 1 Ch. 24.

ments made outside the United Kingdom by British subjects; section 2 deals with those made within the United Kingdom. The framework of the two sections is substantially the same; but they contain certain verbal differences which may, and I think must, have arisen from an omission to scan the difference of language minutely, but cannot, in my judgment, have any real difference of meaning. For instance, section 1 speaks of “a British subject”; section 2 of “any British subject”; and “the law of the place” in section 1 corresponds with “the laws for the time being in force in that part of the United Kingdom” where the will was made, in section 2. But there are differences of language in the words pertinent to the matter which I have to decide between the two sections which I confess I do not so easily understand. Section 1 says that a will “shall as regards personal estate be held to be well executed for the purpose of being admitted . . . to probate”; section 2 that it “shall as regards personal estate be held to be well executed, and shall be admitted . . . to probate.” Does section 1 mean that it shall be held to be well executed for the purpose of probate only and not for some other purposes—as, for instance, not for the purpose of passing property? I cannot think that this is the meaning. I think the distinction between the two sections is merely one of words. What, then, is the effect of “shall as regards personal estate be held to be well executed for the purpose of being admitted . . . to probate”? Do the words extend to and include leaseholds? I cannot see why not. The definition of “personal estate” in section 1 of the Wills Act of 1837 expressly includes leaseholds. General personal property includes leaseholds, and section 4 of the Wills Act, 1861, providing that nothing therein shall invalidate a will “as regards personal estate which would have been valid if this Act had not been passed,” must mean the same personal estate as section 1, and must have reference to the Wills Act of 1837, which expressly includes leaseholds.

But there is another consideration which helps to lead me to the conclusion

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at which I have arrived, and it is this: Before the Wills Act, 1861, if a British subject domiciled abroad made a will according to the form required by the law of his domicile, it would be admitted to probate in this country and would be effectual to pass the legal estate in his personal property, but it would not pass the beneficial interest. Counsel for the next-of-kin contend that the Act of 1861 has done nothing for a testator in such a case. On the other side it is said that something has been done, and that he has been put into a position which enables him to dispose of the beneficial interest in his personalty. I am fortified by that view in coming to my present decision.

It is unnecessary to refer to authorities which establish certain familiar propositions. There is a difference between rendering a will valid so as to make it effective for the purpose of all its dispositions, and rendering it effective so as to be admitted to probate. *Freke v. Carbery (Lord)*² is a well-known authority, which was a case of a testator directing something which was inconsistent with the law of the land, and it was held that a declaration by a testator domiciled in Ireland of trusts of leaseholds in England, for accumulation for a period beyond that allowed by the Thellusson Act, was invalid. And the same applies in the case of a disposition offending against the rule of perpetuities. Considerations of this kind may supply a reason why in the Wills Act, 1861, it is not said that the will is to be held to be well executed for all purposes. The section in effect says that a will shall be valid for the purpose of being admitted to probate, and then shall be valid for such other purposes consequent on probate as the law allows.

In the present case a testator who was an Italian by birth and by domicile of origin, but who was at the time of making his will and his death a naturalised British subject and domiciled in England, died in Italy, having made there a holograph will which was good according to Italian law, and which I hold to be also good under English law by virtue of the provision in section 1 of the Wills Act, 1861, that such a will "shall as regards personal estate be held to be

valid for the purpose of being admitted in England and Ireland to probate . . . if the same be made according to the forms required . . . by the law of the place where the same was made." The will has been proved in this country. By it the testator bequeathed the usufruct for life of all his property to his wife Louisa Frances Grassi, wherever the same might be situate. In my judgment the leasehold property which formed part of the testator's estate passed under that bequest, and I hold that the widow is entitled to enjoyment *in specie* during her life.

Solicitors—Herbert F. Oddy, for applicant and widow; Markby, Stewart & Co., for Congregation of Charity; T. Richards & Co., for next-of-kin.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

BUCKLEY, J. }
1905. }
March 17. }

PAWLEY v. PAWLEY.

Married Woman—Separate Property—Restraint on Anticipation—Order for Payment of Costs—Receiver—Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2.

Where an order is made against a married woman for payment of costs out of her separate estate, the party obtaining the order is prima facie entitled, under section 2 of the Married Women's Property Act, 1893, to enforce payment by obtaining the appointment of a receiver of her property which is subject to a restraint on anticipation, and the onus is upon her to shew why the appointment should not be made.

In November, 1903, an action was commenced in the King's Bench Division in the names of C. J. C. Pawley, Hamilton E. Pawley, Emily De Hoog (whose name was afterwards struck out), and Lucy Dresel (a married woman), against Ernest Frederick Pawley for breach of an agreement.

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The action was transferred to the Chancery Division; and on December 9, 1904, an order was made that the action be dismissed, with costs to be taxed and paid by the plaintiffs O. J. O. Pawley, H. E. Pawley, and Lucy Dresel to the defendant; as to the plaintiff Lucy Dresel, out of her separate property as thereafter mentioned, and not otherwise. And it was thereby ordered that execution against Lucy Dresel be limited to her separate property not subject to any restraint against anticipation, unless by reason of section 19 of the Married Women's Property Act, 1882, such property should be liable to execution notwithstanding such restraint. And it was ordered that the defendant be at liberty to apply as to enforcing payment of the costs, as regards Lucy Dresel, out of any of her property which was subject to restraint on anticipation and otherwise as he might be advised.

The costs were taxed at the sum of 125*l.* 11*s.* 6*d.*, and the defendant was unable to obtain payment.

Under the will of C. Pawley, deceased, Lucy Dresel was entitled to the income of a share of the residue of the testator's estate during her life for her separate use, without power of anticipation; and the trustees of the will (one of whom was the defendant) had in their hands about 200*l.* of income accrued due in respect of her share.

The defendant now moved, on notice to Lucy Dresel, for an order that he might be at liberty, notwithstanding the restraint upon anticipation imposed by the will upon the income payable thereunder to Lucy Dresel, to apply all or any part of the income accrued or as it accrued due, which came into his hands as a trustee under the will, and which under the will and a deed of family arrangement was payable to her, in payment of the 125*l.* 11*s.* 6*d.* and interest and of his costs of the motion, and that, if necessary, he might be appointed receiver of the income up to the value of 125*l.* 11*s.* 6*d.* and the amount of the costs of the motion.

Cozens-Hardy, for the motion.—If, as here, an order is made against a married

woman for payment of costs out of her separate estate, though the separate estate is subject to a restraint against anticipation, the person entitled to the costs may have a receiver appointed of the separate estate—*Godfrey, In re; Thorne-George v. Godfrey* [1894],¹ *Cummins v. Perkins* [1898],² Married Women's Property Act, 1893, s. 2,³ *Seton's Judgments and Orders* (6th ed.), vol. ii. pp. 886 and 887, forms 5 and 6, and *Annual Practice*, 1905, vol. ii. pp. 365 and 366.

[BUCKLEY, J.—Is it a matter of course in such a case that an order should be made against the property restrained from anticipation? What is the principle to be acted upon?]

The cases do not lay down any principle—*Hood-Barrs v. Cathcart* [1895].⁴ The question in the cases has always been, Does the Married Women's Property Act, 1893, apply?—*Crickitt v. Crickitt* [1902].⁵

[BUCKLEY, J.—If the order is a matter of course, it comes to this—that by a passion for litigation a married woman may fritter away the property which it was intended should be preserved for her.]

Where the Court has made an order for payment of costs by her, the onus is on her to shew why she should not be made to pay them out of her property, though restrained from anticipation. Besides the jurisdiction of the Court under the Married Women's Property Act, 1893, there is another jurisdiction under section 39 of the Conveyancing Act, 1881, to remove the restraint on anticipation with her consent where it is for her benefit, but that jurisdiction is not invoked now. Here it is "just" to enforce the order for payment of costs

(1) 71 L. T. 568. Affirmed in C.A., 72 L. T. 8.

(2) 68 L. J. Ch. 57; [1899] 1 Ch. 16.

(3) Married Women's Property Act, 1893, s. 2: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

(4) 64 L. J. Q.B. 520; [1895] 1 Q.B. 873.

(5) 71 L. J. P. 65; [1902] P. 177.

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within the meaning of section 2 of the Act of 1893.

Mrs. Dresel, in person, said that in October, 1904, one of the other plaintiffs mentioned to her that he was bringing the action, and she shortly afterwards learned that her name had been joined as a plaintiff, but she at once wrote to the solicitor and said that she was no party to the action, and disclaimed all responsibility in the matter.

BUCKLEY, J.—On December 9, 1904, there came on for trial before me an action in which one of the plaintiffs was *Mrs. Lucy Dresel*, a married woman, with the result that an order was made dismissing the action with costs to be paid by the plaintiffs, including *Mrs. Dresel*, to the defendant *E. F. Pawley*—as to *Mrs. Dresel* out of her separate property—and the defendant was to be at liberty to apply as to enforcing the order as against *Mrs. Dresel* out of any of her property which was subject to a restraint on anticipation. The costs were taxed at 12*5*l. 1*1*s. 6*d*., and the defendant has not been able to obtain payment. An application is now made to me under section 2 of the Married Women's Property Act, 1893, to enforce the order against property of *Mrs. Dresel* which she is restrained from anticipating. No principle is laid down in the reported cases for the guidance of the Court as to how these applications ought to be dealt with. If the Court, upon proof of the mere fact that a married woman had brought an action and failed, is to remove the restraint on anticipation so as to give to the successful party payment of his costs as a matter of right, the result would be that any married woman might fritter away her property restrained from anticipation by becoming a professional litigant. It cannot, I think, be a pure matter of course that the Court should make the order. Nor in the present case does the order of December 9, 1904, decide the matter. That order left open the question which is now before me. It gave the defendant who had obtained the order for payment of costs out of the separate property liberty to come to the Court and apply that payment should be enforced

out of any of the property which was subject to a restraint. I do not find here, upon the facts, any ground either for or against removing the restraint other than the fact that the married woman has been ordered to pay costs. *Prima facie*, a party who has recovered judgment and obtained an order for payment of his costs is entitled to enforce his order, and to have the benefit of any Act of Parliament which may assist him to do so. The onus is, I think, on the married woman who has been ordered to pay costs to shew why the jurisdiction which is given to the Court by section 2 of the Married Women's Property Act, 1893, should not be exercised so as to enforce payment by freeing her property which is subject to a restraint on anticipation. In the present case the married woman has not discharged that onus. I therefore propose to make an order as asked under section 2.

I ought, perhaps, to add that *Mrs. Dresel* has appeared in person, and has made an affidavit in which she states that on or about October 5, 1904, her brother *Hamilton* mentioned to her that he was bringing the action, and about two months afterwards it came to her knowledge that her name had been joined as a plaintiff, and she at once wrote to her brother's solicitor a letter, a copy of which was produced, in which she said that she never gave permission for being made a plaintiff, and only had consented to be a witness. That letter was dated December 7, 1904, and the action was tried on December 9. For more than a year *Mrs. Dresel* had been a co-plaintiff. I cannot attend to what she now says in dealing with the order for payment of costs. Whether or not she has any remedy against the solicitor is a matter I have nothing to do with on the present occasion.

I make an order appointing the applicant receiver to the amount of 12*5*l. 1*1*s. 6*d*. and the costs of the motion. The form of the order will be adapted from form 6 in *Seton*, p. 887.

Solicitors—*Sandom, Kersey & Knight*, for applicant.

[Reported by *Arthur Lawrence, Esq.*,
Barrister-at-Law.

BUCKLEY, J. } WEST COAST GOLD FIELDS,
1905. } *In re.*
March 28. }

Company — Winding-up — Bankrupt Shareholder — Proof by Company for Amount Unpaid on Shares—Dividend—Contributories — Claim of Trustee to Hold the Shares as Fully Paid.

A contributory of a company in liquidation must satisfy his liabilities as owner of shares not fully paid before he can share in the distribution of surplus assets.

Where a shareholder is bankrupt, and the company before winding-up has proved for the amount unpaid on his shares and received a dividend of less than 20s. in the pound, the shares cannot be treated in the liquidation as fully paid.

Proof is not equivalent to payment. It is a record that the estate remains liable, though the bankrupt is discharged.

Principle of Grissell's Case (35 L. J. Ch. 752; L. R. 1 Ch. 528) applied.

Originating summons by the trustee of a bankrupt shareholder in the company.

The bankrupt, A. S. Rowe, held, together with some fully paid shares as to which no question arose, 1,800 l. shares in the company, on which 10s. per share had been paid up, and on which a further call of 1s. per share was made in December, 1902. On January 19, 1903, a receiving order was made against him, and on January 22 he was adjudicated a bankrupt, the applicant being appointed trustee.

By its articles of association it was provided that the company should have a first and paramount lien on all its shares not fully paid up, and on the interest and dividends declared or payable in respect thereof, for all moneys due (including calls made even though the time appointed for the payment might not have arrived) to the company, or liabilities subsisting with it from or on the part of the registered holders, and might enforce such lien by sale or forfeiture of all or any of the shares on which the same might attach.

On January 26, 1903, the company, without valuing the security thus held by it, lodged a proof against the bank-

rupt's estate for 900l.—being 90l. in respect of the call of 1s. and 810l. for the remaining 9s. uncalled on each of his shares.

The trustee accepted the proof as to 90l., but rejected it as to the 810l., which, however, he afterwards admitted, under order of Wright, J., at an abatement of 10 per cent. On the total thus admitted—namely, 819l.—a dividend of 1s. 6d. in the pound, amounting to 61l. 8s. 6d., was paid on January 29, 1904, to the company, which in the meantime had made a further call of 2s. per share.

On April 21, 1904, an extraordinary general meeting of the company was held, and a special resolution passed for winding-up, which was confirmed on May 18, and a liquidator appointed.

In *Rowe, In re; West Coast Gold Fields, ex parte* [1904],¹ a motion to amend the company's proof by valuing the security constituted by the lien, or alternatively to withdraw the proof and lodge a further proof as a secured creditor, was rejected by Bigham, J.

The company's assets were sufficient, after paying all liabilities, to admit of a return of at least 2s. per share to the shareholders.

The liquidator proceeded to settle the list of contributories, and, in the notice sent to the bankrupt's trustee, treated the 1,800 shares as paid up only to the extent of 10s. each with the addition of the dividend of 61l. 8s. 6d.

The summons asked for a declaration that the said shares ought for the purpose of any distribution of assets to be treated as fully paid, and that the applicant ought to be entered on the list of contributories as the holder on that footing.

Cassel, for the bankrupt's trustee.—In *McMahon, In re; Fuller v. McMahon* [1899],² where it was held that a company, even where it is a going concern, can prove against the insolvent estate of a shareholder for the estimated value of liability to future calls, the right so to prove was resisted on the very ground that to do so would make the shares fully paid, in contravention of section 25 of

(1) 73 L. J. K.B. 852; [1904] 2 K.B. 489.

(2) 69 L. J. Ch. 142; [1900] 1 Ch. 173.

WEST COAST GOLD FIELDS, IN RE.

the Companies Act, 1867. The judgment of Lord Chelmsford in *Stammers v. Elliott* [1868]³ shews that a debt owing to a testator's estate by a bankrupt residuary legatee is extinguished when the executor proves for it. In other cases proof has been held equivalent to payment—*Solomon, Ex parte; Aubusson, in re* [1821],⁴ and *Hornby, Ex parte; Tarleton, in re* [1819].⁵

There was no necessity for the company to prove. They might have forfeited the shares and proved for the call. They might have applied to the trustee under section 55, sub-section 4 of the Bankruptcy Act, 1883, and forced him to disclaim, or they might have valued their security by lien and proved for the balance. The principles of the bankruptcy law in this respect are stated generally by Jessel, M.R., in *West Riding &c. Co., Ex parte; Turner, in re* [1881],⁶ and *Williams on Bankruptcy* (8th ed.), p. 395. Having proved for the whole debt, they cannot make use of it for the purpose of reducing the amount coming to the common fund of the bankrupt's estate.

Astbury, K.C., and *P. M. Walters*, for the liquidator of the company.—The only point decided in *McMahon, In re*,² was that a company which is a going concern can prove for future calls. *Stammers v. Elliott*³ only shews that after proof there is no right of retainer. We are not seeking to use an extinguished debt for the purpose of reducing anything due to the bankrupt's estate. The case is like one where there is a surety. When the bankrupt's estate has paid all it can up to 10s. in the pound, the creditor comes upon the surety, because, though the bankrupt's estate is discharged, the creditor has not received full payment. There is no authority for the statement that proof is payment in the sense that the creditor has received payment. Payment to contributors in the company's liquidation is really a redistribution of their contributions. A contributory must discharge his liabilities before he can claim to share in the

distribution—*Overend, Gurney & Co., In re; Grissell's Case* [1866].⁷

Cassel, in reply.—*Grissell's Case*⁷ does not apply, because the contributory there was not a bankrupt. For all purposes—for example, set-off, retainer, &c.—between the bankrupt's estate and the creditor, the latter must be treated as having been paid in full. This creates no hardship on the company, because they can oblige the trustee to disclaim the shares.

BUCKLEY, J.—In *Grissell's Case*⁷ it was decided many years ago that, where a person is both a creditor of and a shareholder in a company, his shares being partly paid-up, he must satisfy all his obligations as shareholder and contributory by paying into the common fund all sums due from him in respect of calls before he can say, "As a creditor I am entitled to take something out of the common fund." There can be no set-off; the man must pay in before he can be heard to say he can take out. The case with which I have to deal is not that of a creditor who also holds shares, but simply that of a person who is a shareholder, and a shareholder only, and all that he is entitled to receive from the company is receivable not in respect of a debt, but in respect of a distributive share of the assets of the company in liquidation. I am asked to say that he is entitled to receive in distribution before he has discharged himself of his liability in contribution. The case is much stronger, as it seems to me, against the applicant than was *Grissell's Case*.⁷

It is said that these are his rights because he is a bankrupt. The material dates are these: He was adjudicated bankrupt in 1903, being the holder of shares on which 10s. had been paid, 1s. had been called, and 9s. was uncalled. In October, 1903, proof was admitted in the bankruptcy against the bankrupt's estate for the sum of 819l., being 90% for the 1s. per share on the 1,800 shares which had been called, and 729% for the uncalled liability, less a discount of 10 per cent. Subsequently (in May, 1904) the company went into liquidation. What

(3) 37 L. J. Ch. 353, 357; L. R. 3 Ch. 195, 199.

(4) 1 Glyn & J. 25.

(5) Buck. 351.

(6) 19 Ch. D. 105, 112.

(7) 35 L. J. Ch. 752; L. R. 1 Ch. 528.

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was the position of things at that time? The bankrupt's estate was entitled to the shares; they formed part of the estate in the bankruptcy, and they belonged to the trustee as trustee. The bankrupt's estate was liable for a sum of 819*l.*, and the trustee was liable for that as trustee. In point of fact, upon the proof he has paid 61*l.* 8*s.* 6*d.* for a dividend on the amount of the proof, so that on these 1,800 shares there has been paid 900*l.* (namely, 10*s.* a share) and 61*l.* 8*s.* 6*d.*, making together 961*l.* 8*s.* 6*d.* The trustee says that he ought to receive in distribution the same amount as if there had been paid 1,800*l.* on the shares. Is that right or is it wrong? In my opinion, it is wrong. The argument is that proof is equivalent to payment. To my mind, that is an axiomatic or epigrammatic way of stating something which, in the circumstances, is quite untrue for the material purposes of this case. Of course, proof is equivalent to payment in this sense, that the debtor can be pressed no further for that amount; he is discharged, but his estate is not discharged. The proof is the record of the fact that his estate is liable, and that from his estate you are entitled to receive, rateably with the other creditors, dividends until the whole amount has been paid. That is not payment at all for any purpose which is material here. The cardinal fact is that the amount proved for is not paid. What will be the rights of the company in the future? In respect of this proof, if there are further assets of the bankrupt—and only if there are further assets—there will be a right to receive back part of these moneys. Now what is the right decision under these circumstances? Why does *Grissell's Case*⁷ not apply? I do not want to use any terms that are misleading, but I shall not be misunderstood if I say that the trustee is the owner of the shares, and the trustee is the person who is liable to pay upon these shares. It is said that the principle of *Grissell's Case*⁷ does not apply to such a state of things as this. It seems to me that it does apply, and *a fortiori*, when, as here, the trustee is seeking to get distribution as a contributory when he has not complied with his liability to pay as a contributory.

Another ground on which counsel for the liquidator puts it, and which I think is also worthy of consideration, is this—that what you do in distribution of surplus assets is in substance to repay that which has been paid; that you are returning to the shareholders that which they have paid, and that, where one man has paid more than another, the first thing you do is to repay the man who has paid more until you bring him down to the level of the man who has paid less. Here the shareholder has only paid 961*l.*, instead of 1,800*l.*; you must pay the other contributories until you have brought them down to the same level. That would seem to me a proper mode of administration under these circumstances. The other view of it resolves itself into this—that the trustee would be entitled to take, by way of distribution, moneys now, which, of course, would be part of the bankrupt's estate, and then in respect of this proof the company would be entitled to rank against that sum with other creditors, and would thus get back some part of that which it had just paid into the estate. That is exactly what in *Grissell's Case*⁷ was held not to be the right mode of administration. The right view is that the person liable as contributory must discharge himself in that character before he can set up that, as a creditor, he is entitled to receive anything, and *a fortiori*, as it seems to me, before he can set up that, as a contributory, he is entitled to distribution. I therefore think that this summons fails, and I dismiss it, with costs.

Solicitors—Morley, Shirreff & Co., for trustee;
Dollman & Pritchard, for liquidator.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
 1905. } TAYLOR v. ALLHUSEN.
 March 1, 2. }

Appointment—Limited Power—Settlement—Construction—Donce of Power Appointing to Herself.

Under the terms of a settlement, and in a particular event, a lady had a power to appoint the settled trust funds by deed or will in favour of a grandchild or grandchildren of her paternal grandfather, and in default of any such appointment the trust funds were to be held in trust for all such grandchildren equally. The lady was thus an object of the power and also entitled to a share in default of appointment:—Held, that, upon the true construction of the power, the lady might appoint to herself as one of the grandchildren.

In May, 1890, the plaintiff, Isabel Taylor, then Isabel Allhusen, was entitled to stocks and securities of the value of 3,500*l.* standing in the name of her uncle, the defendant Wilton Allhusen, as trustee for her. At that time she was contemplating a marriage with her cousin, Percy Charles Hall. On May 31, 1890, the plaintiff executed a settlement, which was not expressed to be made in consideration of the intended marriage, but was in effect a voluntary settlement made by the plaintiff, of the sum of 3,500*l.*, and the defendant was the only other party and the sole trustee thereof. The settlement provided that the income of the trust fund should be paid to the plaintiff for her life, and after her death, in case she should by deed or will so appoint, to any husband who might survive her, for his life, and subject thereto the trust funds and the income thereof were to be held in trust for the children of the plaintiff as she should by deed or will appoint, and in default of appointment for all the children of the plaintiff who being a son or sons should attain twenty-one, or being daughters should attain that age or marry; and if there should be no child of the plaintiff who should attain that age or marry, then the trust funds and the income thereof were to be held "in trust for such persons and purposes and in such manner as the said Isabel Allhusen shall

by deed or will appoint, so only that every such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen, the paternal grandfather of the said Isabel Allhusen, who shall have attained or shall attain the age of twenty-one years, or being female, shall have been or be previously married, and in default of, and subject to any such appointment, upon trust for all such grandchildren of the said Christian Allhusen equally, share and share alike."

The plaintiff was married to Percy Charles Hall in the year 1890. He was one of the grandchildren of Christian Allhusen, and died in 1896. There was no issue of this marriage. In 1903 the plaintiff married her present husband, Major Francis Pitt Stewart Taylor, and there was one child of the marriage—namely, the infant defendant, Reginald Pitt Stewart Taylor, who was born in July, 1904.

By her statement of claim the plaintiff alleged that she executed the settlement in ignorance of the unusual nature of the limitations therein contained, and without understanding the purport thereof, and she claimed—first, cancellation of the settlement; or secondly, rectification in manner therein stated; or thirdly, alternatively that the construction of the settlement might be declared, and the trusts thereof executed, and that a new trustee or new trustees might be appointed.

At the trial the questions of cancellation and rectification were not pressed, and the only question argued was, upon the construction of the settlement, whether, assuming it could stand, the plaintiff could appoint the fund to herself under the power. A Mr. Cotton Cooke was willing to act as trustee of the settlement jointly with the defendant Wilton Allhusen.

Lawrence, K.C., and P. F. Wheeler, for the plaintiff.—The plaintiff, being herself one of the grandchildren of Christian Allhusen, and so an object of the power, can appoint to herself. She would undoubtedly take a share under the gift over in default of appointment,

TAYLOR v. ALLHUSEN.

and it is difficult to see why she should be excluded from taking under the appointment. If the clause in question had ended at the word "appoint," she could clearly have appointed to herself, as it would be the ordinary general power of appointment, and she is not excluded by the words which follow. There is no case precisely in point, but in *Farwell on Powers* (2nd ed.) there is a statement on page 492 that an appointment may be made to himself by the donee of a power, if an exclusive appointment is authorised, and this statement is made in connection with the case of *Sinclair's Estate, In re* [1867],¹ which is there mentioned by Farwell, J. The plaintiff can therefore make an appointment under the power to herself.

Stewart-Smith, K.C., and *Dighton Pollock*, for the trustee of the settlement.—The case of *Sinclair's Estate, In re*,¹ is not in point here: it was a construction of a particular will quite different from the present. There is no authority for the proposition contended for. The only other passage bearing at all upon it is that in *Sugden on Powers*, c. xi. s. 6, pl. 45, but that does not much help the plaintiff.

Wace, for the infant defendant, R. P. S. Taylor.—The object here was to introduce an alteration in the general power of appointment, and to limit it. It cannot, however, be said that the objects of the power are different from those who are to take in default of appointment.

KEKEWICH, J.—This point seems to me to be one of some importance, apart from its novelty; and having considered it since the Court rose yesterday, I have come to the conclusion that the plaintiff's contention ought to be upheld. The question is whether, assuming the settlement to stand, this lady, the plaintiff, can appoint to herself; and that depends entirely upon the construction of the particular instrument. There seems to be no authority directly bearing upon the point, and the books which have been cited, although useful, do not give one a conclusive guide. Mr. Justice Farwell, at p. 492 of *Farwell on Powers*, says, "If the intention is clearly expressed, there is no reason why

(1) 2 Ir. L. R. Eq. 45.

the donee should not appoint the whole to himself, if the power authorized an exclusive appointment." That is a clear summing-up of the law, and no doubt a correct summing-up, although it comes in a comment on the case of *Sinclair's Estate, In re*,¹ which turned entirely upon the construction of the particular instrument there before the Court, and is not, I think, valuable for the present purpose. The only other authority which was cited was *Sugden on Powers*, ch. xi. s. 6, pl. 45. There again Lord St. Leonards does not touch this particular point, and he does not lay down any general rule; but what he does say is certainly not inimical to the conclusion contended for by the plaintiff here.

Now this is a settlement which was not a marriage settlement, but a settlement on the lady for life and then on any husband who might survive her, for life, and then to the children in the ordinary way, with a power of appointment, and a gift over in default of appointment, among the children. No question arises about that now. The only question arises under the clause by which, in default of children taking a vested interest, the property is limited as she should appoint by deed or will, the class being narrowed by the description that they are to be the grandchildren of the late Christian Allhusen, of whom she was one, and it so happens that her first husband was also one of those grandchildren; and in default of the exercise of that power of appointment there is a trust for all "such grandchildren of the said Christian Allhusen, equally, share and share alike." I think it could not be argued that if the lady does not exercise the power of appointment—supposing that it comes into force—she would not herself be able to take a share under that gift in default of appointment. Nor has it been argued. In the case of *Lees v. Massey* [1861]² the point upon which the case was reported is from what time and at what date the next-of-kin were to be ascertained, but there was a very able argument on the question whether the lady herself in that case could take as one of the next-of-kin. There was a gift by

(2) 3 De G. F. & J. 113.

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will of all the testator's real estate to a daughter in fee-simple, subject to intervening limitations, and the will contained a proviso that if the daughter should die without lawful issue, the testator's wife surviving, then he bequeathed his said estate to his wife for life, and after her decease to his relations, share and share alike. The word "relations" is, of course, equivalent to next-of-kin. Now, it turned out that when the estate came to be disposed of under that ultimate gift it went to the daughter, and the daughter only, as the testator's next-of-kin, and the argument was that it was really inconsistent with the whole gift that she should take under the gift to the testator's "relations"; that it could not be that the daughter was to take that which was only to go to the next-of-kin in the event of her not being able to take—that is to say, the preceding limitations failing. However, that view found no favour with the Master of the Rolls or the Court of Appeal, and the decision, although it turned upon an entirely different point, resulted in giving the daughter, who was said to be excluded, the whole of the estate. Therefore I think I may fairly say that there is nothing inconsistent and contrary to the ordinary rules of construction in holding in the present case that this lady would herself take a share in default of appointment; and I think that is extremely valuable for the purposes of the construction of this settlement. The trust is "for such persons and purposes and in such manner as the said Elizabeth Allhusen shall by deed or will appoint, so only that every such appointment be made to or in favour of a grandchild or grandchildren of the late Christian Allhusen"; and then there is a gift over, in default of and subject to any such appointment, upon trust for those very grandchildren, of whom she was one. And if, remembering what I have just said, there is a gift really in default of appointment to her as regards part of the property, that seems to me to be an extremely strong argument in support of the view that she was not to be excluded from the general power of appointment which preceded. As she was to take in default of appointment, it is

difficult to say that she ought to be excluded from taking under the appointment.

But that is not the only point, although I think that is important. I was very much struck by the argument of plaintiff's counsel that if the clause in the settlement had stopped at the word "appoint"—that is to say, if it had read simply "in trust for such persons and purposes and in such manner as the plaintiff shall by deed or will appoint"—she might certainly have appointed to herself; and not only so, but it is the common form of general power of appointment. Why should you cut that down? It would be cut down, of course, if the language so provided, but to cut it down so as to exclude the lady herself from the general power of appointment, when there are no clear words to do it, and when that general power would certainly have enabled her to make the appointment in her favour, seems to me to be a straining of language which would be entirely wrong.

Therefore I hold that, upon the true construction of the instrument, the lady is entitled to appoint by deed or will to any of the grandchildren of Christian Allhusen, including herself. There will therefore be a declaration to that effect, and, the defendant being willing to continue a trustee, Mr. Cotton Cooke will be appointed a trustee of the settlement jointly with the defendant, and there will be consequential directions as to the transfer of the trust fund to the two trustees.

Solicitors—Badham & Comins;
Johnsons, Long & Co.

[Reported by G. Maean, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J.
 VAUGHAN WILLIAMS, L.J.
 STIRLING, L.J.
 1905.
 March 21, 22.

RAVENS-
 WORTH
 (EARL), In
 re; RAVENS-
 WORTH v.
 TINDALE.

*Will—Construction—Legacy—Servants
 —“One year’s wages.”*

A testator bequeathed one year’s wages to all servants who should be in his employment at his death, and should have been in his employment for five years previously thereto:—Held, that servants hired at a weekly wage paid monthly or fortnightly were not included in the bequest.

Blackwell v. Pennant (22 L. J. Ch. 155; 9 Hare, 551) followed.

Decision of JOYCE, J. (73 L. J. Ch. 847), affirmed.

Appeal from decision of Joyce, J.

By a codicil dated December 13, 1902, to his will dated February 27, 1894, Henry George, second Earl of Ravensworth, who died on July 22, 1903, bequeathed to his wife all balances standing to his credit at his bank, subject to the payment by her “to all servants who shall be in my employment at my death and shall have been in my employment for five years previously thereto of one year’s wages and of all death duties thereon in addition to any wages which may be accruing or owing to any of them and unpaid by me at my death.”

The executors took out a summons for the determination of the question, so far as material for the present report, whether woodmen, keepers, masons, and hinds hired at a weekly wage of from 20s. to 32s., paid monthly or fortnightly, with corresponding conditions as to notice to determine the employment, were entitled to the benefits of the above clause.

Joyce, J., held that they were not entitled to share in the benefits.

The defendants appealed.

Younger, K.C., and *G. Henderson*, for the appellants.—The Judge felt himself to be bound by certain authorities, but they are open to review in this Court—*Booth*

v. Dean [1833],¹ *Ogle v. Morgan* [1852],² *Blackwell v. Pennant* [1852],³ and *Breslin v. Waldron* [1855].⁴ *Thrupp v. Collett* [1858]⁵ shews that a gift of this kind is not confined to servants living in the house.

[They also referred to 2 *Key and Elphinstone’s Precedents in Conveyancing* (8th ed.), p. 728.]

Hughes, K.C., and *Borthwick*, for the executors, were not called upon.

LORD ALVERSTONE, C.J.—When I have the honour of being invited to preside in this Court, and am called upon to decide cases upon the construction of wills, I frequently find that I am prevented by some rule of construction from giving effect to that which appears to me to be the intention of the testator. But in this case I am not at all sure that I should not have come to the conclusion apart from the authorities that the contention of the appellants was right. I think that there is a distinction in substance between yearly and monthly or weekly wages in gifts of this description, and the learned Judge who decided this case certainly thought that there were clear authorities against the view of the appellants, and that he was bound by them. We are invited to overrule the decision of Sir George Turner in *Blackwell v. Pennant*,³ which is supported by the decision of the Irish Lord Chancellor in *Breslin v. Waldron*.⁴ I have given the best attention that I can to the argument of counsel for the appellants, but I cannot see anything in the reasoning of Sir George Turner which entitles us to say that he came to a wrong conclusion. He says: “Where a testator gives a year’s wages, he must, I think, be understood to mean, that he gives to those whom he has hired at yearly wages. The nature of the gift explains the persons for whom it was intended. To impute to the testator that he intended, by a year’s wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most

(1) 2 L. J. Ch. 162; 1 Myl. & K. 560.

(2) 1 De G. M. & G. 359.

(3) 22 L. J. Ch. 155; 9 Hare, 551.

(4) 4 Ir. R. Ch. 333.

(5) 26 Beav. 147.

RAVENSWORTH (EARL), IN RE, App.

unreasonable and strained construction of the words which he has used."

Counsel for the appellants asked us to say that the words "one year's wages" meant the aggregate amount of the wages during the fifty-two weeks of the year, but I am not sure that that is right. At any rate, I think it is impossible to say that *Blackwell v. Pennant*³ is not a direct authority against the appellants, and certainly the Irish Lord Chancellor did not dissent from it in *Breslin v. Waldron*.⁴

It was further contended that Sir George Turner's decision would have been different if the words which occurred in the Irish case, "the amount of one year's standing wages," had been used in the case before him, and that the intention was the same whether the words were a year's wages or the amount of a year's wages. I agree that it is perhaps desirable that all these authorities should be considered by the ultimate tribunal; but, be this as it may, it would be a strong thing for us to overrule a decision which has been accepted as settled law for over fifty years. In my opinion the reasoning of the Vice-Chancellor is to a certain extent supported by the earlier cases of *Booth v. Dean*¹ and *Ogle v. Morgan*,² although, no doubt, those cases might be more easily distinguished than *Blackwell v. Pennant*,³ but the view taken by Sir George Turner in his judgment was enunciated for the first time in 1852; but, whatever may be the opinion of the House of Lords, I think we must say that the authorities by which Mr. Justice Joyce felt himself to be bound in this case ought not to be overruled, at any rate in this Court. The appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. Vice-Chancellor Turner in his judgment in *Blackwell v. Pennant*³ says: "To impute to the testator that he intended, by a year's wages, the aggregate of the wages of fifty-two weeks, would, I think, be a most unreasonable and strained construction of the words which he has used." I entirely agree with that passage. It seems to me that it governs this case; and I wish to say, speaking for myself, that if there had been no such decision as that of Vice-Chancellor Turner in *Blackwell*

v. Pennant,³ I think that I should myself have arrived at the same conclusion, and I only hope that I should have been able to express it in such terse and clear language as he did.

STIRLING, L.J.—I agree. I think that we cannot reverse the decision of Mr. Justice Joyce in this case without at the same time overruling the decision of Vice-Chancellor Turner in *Blackwell v. Pennant*³; and, having regard to the high authority of that learned Judge, and the long period during which the decision has stood unimpeached, I think that we ought not to overrule it. Still, speaking for myself, I must say, with great respect, that, if the case had been free from decision, I am not satisfied that I should have decided it in the same way.

Appeal dismissed.

Solicitors — Pennington & Son, agents for Clayton & Gibson, Newcastle-upon-Tyne, for all parties.

[Reported by A. J. Hall, Esq., Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.)

STIRLING, L.J.)

1905.

March 10, 30.

SWAIN, *In re*;
MONCKTON
v. HANDS.

Charity—Conditional Gift—Perpetuity.

An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain; while, on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent.

Where, subject to a prior life interest, a testator's residuary real and personal estate is by the will devoted to charity as from the testator's death, a direction to

SWAIN, IN RE, App.

postpone the payment of the charitable gift until the formation of a reserve fund, directed without any limit of time to be accumulated out of income as an increment to the charitable fund, is not a condition precedent to the charitable gift coming into effect so as to render the gift void as a perpetuity.

Martin v. Maugham (13 L. J. Ch. 392; 14 Sim. 230) and *Chamberlayne v. Brockett* (42 L. J. Ch. 368; L. R. 8 Ch. 206) followed and applied.

Appeal by the Attorney-General against a decision of Buckley, J., which by consent was heard by two Judges of the Court of Appeal. The following statement of the facts is taken from the judgment of the Appeal Court.

Robert Swain, by will dated May 17, 1897, appointed Hubert Monckton, the

plain

and executor, and proceeded to give small pecuniary legacies and a specific legacy and two annuities of 20l. each, and he directed these annuities to be the first charge on his property.

He

then

devised

and bequeathed all the residue, and remainder of his real

personal estate upon the following

trusts:

First, to place on deposit in the

Maidstone Branch of the London and

County Bank the balance (if any, after

payment of his debts, funeral and testa-

mentary expenses) of any money stand-

ing to his credit at the Hackney Branch

of the same bank "to form a reserve

fund for the purposes hereinafter men-

tioned and also to pay into the said

reserve fund any interest allowed by

the Bank on such deposit account."

Secondly, to pay to his niece Elizabeth

Price the balance of the income arising

from his real and personal estate (after

payment of outgoings and expenses) for

and during her life; "And after the

decease of the said Elizabeth Price upon

trust to pay the balance of the income

arising from my said real and personal

estate (after payment into the said reserve

fund every quarter of a year ten per cent.

from the gross income arising from the

residue of my real and personal estate

and also all outgoings and expenses which

may be payable or which my trustees may

think fit to deduct or pay thereout) by equal payments to the three following annuitants," who were to be inhabitants of Maidstone possessing special qualifications defined by the testator. The will then proceeded as follows: "I further direct that the said annuities shall not become payable until the said reserve fund shall amount to 400l. I further direct that the said reserve fund may if the said trustee thinks fit be invested in any British Government Stock permitted to trustees and shall only be used in case of dire need such as loss of rent, depreciation of property, payment of duties or any other special circumstances, but if any portion of the said fund be expended such fund shall be raised again to the said sum of 400l., it being my wish and intention that such fund shall always stand at 400l. I further direct that if the said reserve fund (less any payment or deductions my said trustee may make thereout) shall after the hereinbefore mentioned annuities are payable exceed the amount of 400l., then I empower my said trustee at his sole discretion to use the overplus either to increase the amounts of the three aforesaid annuities or create another annuity."

The testator died on May 27, 1900, and his niece, the tenant for life, died on March 17, 1904. The only available residuary estate of the testator consisted of real estate yielding a small rental, which had up to the present time been exhausted by the payments to the two annuitants of 20l. each, and to the tenant for life, and no reserve fund had yet been formed.

The questions raised on an originating summons by the trustee against the two annuitants of 20l. each and the Attorney-General were—first, whether the charitable gifts of the annuities failed by reason of the testator's direction that the annuities should not come into operation until after the reserve fund amounted to 400l., which might be at a date beyond the limits prescribed by the rule against perpetuities; and secondly, whether the testator had effectually devoted the reserve fund to charitable purposes.

The heir-at-law had not been found, and was represented by the trustee of the will.

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Buckley, J., decided that the gift in favour of the charitable annuitants mentioned in the will was not to take effect until the reserve fund reached the sum of 400*l.*, an event which might not happen within the limits allowed by law, and that the gift therefore was void for perpetuity and wholly failed.

The Attorney-General appealed.

R. J. Parker, for the Attorney-General.—On the true construction of the will, subject to the prior life estate, there is a complete trust in favour of the charitable annuitants. The reserve fund was only created for the benefit of the charity; and the immediate enjoyment is postponed, not to defeat, but to give effect to the charity. The case therefore falls within the first proposition stated by Earl Selborne in *Chamberlayne v. Brockett* [1872]¹; and see *Martin v. Maugham* [1844].² The principle of *Saunders v. Vautier* [1841]³ applies—*Wharton v. Masterman* [1895]⁴; and the Court, if necessary, will direct a *cy-près* scheme to give effect to the entire disposition.

Buckmaster, K.C., and *Gatey*, for the respondents.—There is no dispute as to the principles which must govern the decision of the Court, but only as to their application, as to which the view taken by Buckley, J., was right. If there is an immediate gift to a charity, the Court will no doubt give effect to it by a *cy-près* scheme, if necessary; but if the gift is postponed till the happening of an event which may be too remote, the whole gift fails. The effect of this will is to postpone the gift to the charity until the 400*l.* reserve fund is accumulated. Moreover, there is no gift of that fund to the charity. It is to be invested and only used in case of absolute necessity, such as a depreciation in value of the property or other special circumstances.

R. J. Parker, in reply.—The 400*l.* reserve fund is devoted to charitable purposes.

Cur. adv. vult.

March 30.—*STIRLING, L.J.*, read the following judgment of the Court: The question in this case depends on what is the true construction of the will dated May 17, 1897, of Robert Swain, of which the material provisions are the following: [His Lordship read the will as above set out, and observed that all the personal estate of the testator (including the balance standing to his credit at the Hackney branch of the London and County Bank) was insufficient for payment of his debts, funeral and testamentary expenses, and consequently nothing was available from that source for the formation of the contemplated reserve fund, and continued:] It was admitted in argument that the annuities were charitable in their nature, but it was said that these dispositions failed because the testator had directed that the annuities should not come into operation until after the reserve fund amounted to 400*l.*, which might be at a date beyond the limits prescribed by the rule against perpetuities, and further that the testator had not devoted the reserve fund to charitable purposes. We propose to deal first with the latter contention, for if it is well founded it disposes of the case. Now the reserve fund was to be derived from two sources—first, the balance at the Hackney branch of the London and County Bank, which failed, as I have already stated; secondly, an annual sum of 10 per cent. on the gross income of his residuary real and personal estate. This annual sum was to be placed on deposit with the Maidstone branch of the same bank, and any interest allowed by the bank was to go to increase the reserve fund. The reserve fund was to accumulate until it reached 400*l.*; whenever it exceeded that amount (as it must necessarily do if the testator's residuary estate continued to yield income) then, in my opinion, the surplus was to be applied either in increasing the three annuities specified in the will or creating an additional annuity. The terms of the will, though not very happily expressed, appear to me to impose on the trustee the duty of applying the surplus in one or other of those ways, and limit his discretion only to a choice between them. That surplus, therefore, appears to me to

(1) 42 L. J. Ch. 368; L. R. 8 Ch. 206.

(2) 13 L. J. Ch. 392; 14 Sim. 230.

(3) 10 L. J. Ch. 354; Cr. & Ph. 240.

(4) 64 L. J. Ch. 369; [1895] A.C. 186.

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be given to the charitable purpose intended by the testator. But what is the destiny of the reserve fund to the extent of 400*l.*? In my opinion it was to constitute a fund to which recourse might be had in case the *corpus* of his residuary estate should fail from unforeseen circumstances, such as loss of rent, depreciation of property, or unexpected claims for duty, to yield sufficient to pay the annuities intended by the testator. It was to be "a reserve fund," by which I understand a fund kept in reserve by way of provision against accidental losses of the *corpus* of the testator's estate, and consequently a fund intended to insure the beneficial working of the charity intended to be founded by the testator. I think, therefore, that it was devoted to a charitable purpose no less than the *corpus* of the testator's residuary estate.

This being so, I return to the first point—namely, whether the charitable dispositions are bad by reason of their infringing the rule against perpetuities. The law on this subject is laid down in *Chamberlayne v. Brockett*,¹ and is to the following effect: An immediate gift to charity is valid although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain; while on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent.

The question is under which branch of the rule the present case falls. Mr. Justice Buckley has held that it is governed by the latter branch. With the greatest respect, I am unable to agree. I think that, subject to the life estate given to Elizabeth Price, the residuary real and personal estate was devoted to charity as from the testator's death; and that the direction to postpone the payment of the annuities until the reserve fund reached 400*l.* was not a condition precedent to the charitable gift coming into effect, but was a direction as to the particular application of the charitable

fund, and was intended to secure the working of the charity in the most beneficial manner. The case of *Martin v. Maugham*² seems to be an authority for so treating the present case. I think, therefore, that the appeal ought to be allowed.

Appeal allowed.

Solicitors — Treasury Solicitor, for appellant; Shirley Worthington Woolmer, for respondents.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.]

JOYCE, J. }
1905. } PLEDGE & SONS v. POMFRET.
March 3, 9. }

Pleading — Particulars — Claim to Ownership without Setting out Title — Embarrassing Statement of Claim — Order XIX. rules 4 and 21.

The plaintiffs, being owners of a mill, claimed to be owners of a watercourse, alleging that by a deed of 1805 their predecessor in title became possessed of the mill and watercourse, and that the watercourse had ever since belonged to the mill. The defendants, before delivering their defence, applied for further and better particulars on the ground that the plaintiffs ought to set out their title, and that the statement of claim was embarrassing:— Held, that no further particulars were necessary for pleading, and that the statement of claim was not embarrassing.

The plaintiffs, as owners of a mill called the "Lord's Mill," and as appurtenant thereto, claimed to be entitled for an estate of inheritance in fee-simple in possession to the soil or bed of a watercourse called the "Lord's River."

The defendants applied for particulars of the way in which the plaintiffs were entitled to the soil or bed of the watercourse, and an order for such particulars was obtained.

Instead of complying with such order and furnishing particulars, the plaintiffs delivered an amended statement of claim,

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paragraphs 3, 4, and 5 of which were, so far as material, as follows:

3. The plaintiffs are owners in fee-simple in possession of the soil or bed of an artificial cut or watercourse commonly known as the "Lord's River."

4. The fee-simple of the Lord's River was by indentures of lease and release dated February 22 and 23, 1805, the release being made between &c. duly assured, together with the Lord's Mill and other hereditaments, by the then owners thereof, in fee-simple to John Hutton, the predecessor in title of the plaintiffs, and passed under a general conveyance, contained in the said indenture, of watercourses belonging to the Lord's Mill. The Lord's River, in fact, was, at the date of the said indenture, and has always since been, and is now, a watercourse belonging to the Lord's Mill.

5. Alternatively, the title of the plaintiffs to the fee-simple of the Lord's River is based on continuous possession by the plaintiffs and their predecessors in title for a period of time sufficient under the Statutes of Limitation to confer upon the plaintiffs the absolute property in the Lord's River.

The defendants thereupon applied in chambers for further and better particulars of the plaintiffs' title, but the application was dismissed on the ground that the defendants could plead to the statement of claim as amended.

The defendants now moved to discharge the order made in chambers, and asked for further and better particulars, or, in the alternative, that the words "predecessor in title" and "predecessors in title" might be struck out of the claim as embarrassing.

Hughes, K.C., and *J. H. Gregson*, for the motion.—The plaintiffs' claim is embarrassing. They are bound to disclose their title and give the facts upon which they rely and which the defendants will have to meet. The plaintiffs cannot by merely stating a grant to their predecessor in title avoid setting out their title—Order XIX. rules 4 and 21, *Philipps v. Philipps* [1878],¹ *Davis v. James* [1884],²

(1) 48 L. J. Q.B. 135; 4 Q.B. D. 127.

(2) 53 L. J. Ch. 523; 26 Ch. D. 778.

Palmer v. Palmer [1892]³—where the plaintiff was ordered to give particulars of how he claimed to be heir—and *Harris v. Jenkins* [1882].⁴ In all the cases cited the application was made before defence and not for the purposes of trial.

Younger, K.C., and *Dighton Pollock*, for the plaintiffs.—In all the cases cited the only question was as to the heirship and descent of the plaintiff, and in every case the plaintiff was out of possession. In *Philipps v. Philipps*¹ the plaintiff claimed under several different titles. In most of the cases cited the particulars were asked for, not for pleading, but for the purposes of trial, and they were only ordered for the purposes of trial. You cannot get particulars of an unnecessary allegation. The Court will not encourage interrogatories in the guise of particulars. In *Philipps v. Philipps*¹ Cotton, L.J., declined to say whether it was necessary to state in detail all the line of descent, and said that what particulars are to be stated must depend on the facts in each case.

Hughes, K.C., replied.

Cur. adv. vult.

March 9.—*JOYCE, J.*—The plaintiffs are the owners and occupiers of a mill which bears the title of the "Lord's Mill," and the subject-matter of the dispute between the parties is the ownership of an artificial watercourse which conveys the water to the mill, and the absolute ownership of this is claimed by the plaintiffs as part of the mill property. There can be no doubt whatever that they are entitled to some rights in it, but whether they are entitled to as much as they claim is another question.

The original statement of claim alleged that the plaintiffs, as owners of the mill property, and as appurtenant to the said mill, or otherwise, were entitled for an estate of inheritance in fee-simple in possession to the soil or bed of this stream or watercourse known as the "Lord's River." The defendants on that obtained an order for particulars of the way, whether by prescription or grant, or if by any other way by what other way, in which the soil or bed of the Lord's River

(3) 61 L. J. Q.B. 236; [1892] 1 Q.B. 819.

(4) 52 L. J. Ch. 437; 22 Ch. D. 481.

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and the rights in paragraph 3 of the statement of claim mentioned were appurtenant to the Lord's Mill, and if they were so appurtenant by grant or instrument in writing, particulars of such grant or instrument, and also particulars of the other ways in which the plaintiffs are entitled to the said soil or bed and such rights as alleged, and so on. There were also some other particulars ordered. The particulars were not given in the form of particulars, but the plaintiffs amended their statement of claim, and by the amended statement they alleged that the fee-simple of the Lord's River was by certain indentures of lease and release, which are stated, assured with the mill and other hereditaments by the then owners thereof—that is, the owners of the mill—in fee-simple to one John Hutton, the predecessor in title of the plaintiffs, and that the Lord's River passed under a general conveyance contained in the indenture of watercourses belonging to the Lord's Mill, and that the Lord's River in fact was at the date of the said indenture, and has ever since been and is now, a watercourse belonging to the Lord's Mill. Though it did not strike me so at first, I find there is some authority for the proposition that the conveyance of the watercourse would pass the right to the soil of the banks. I do not say it is so, but that is a matter for future discussion. It is not so absurd as I was at first disposed to think. Then they say, alternatively, the title of the plaintiffs to the fee-simple of the Lord's River is based on continuous possession by the plaintiffs and their predecessors in title for a period of time sufficient within the Statute of Limitations. It is formally admitted by the plaintiffs that their claim to the Lord's River is made in the way stated in paragraphs 4 and 5 of the amended statement of claim—that is to say, they claim by continuous possession; and they also claim to be entitled under the grant specifically mentioned to their predecessor in title, and they deduce a title from that predecessor.

Upon that an application was made in chambers, and is now renewed in Court, for further and better particulars of the ways in which the plaintiffs are entitled

to the soil or bed of the Lord's River; and that unless such particulars be delivered proceedings be stayed. In the alternative they ask that the words "predecessor in title" may be struck out as embarrassing, instead of striking out the whole paragraph. But that does not matter. The alternative is to strike out the statement of claim as embarrassing and to strike out those paragraphs or parts of them. Now as to the first part of the application, which is for further and better particulars under the order, that order for particulars has been complied with by stating the ways in which the plaintiffs claim; in fact, I am not sure that it is seriously disputed. But the main argument was on the alternative part of the application for relief on the ground that the amended statement of claim was embarrassing. How is it embarrassing? What is really suggested is this—that the plaintiffs should set forth, I do not say an abstract in so many words, but an abstract of some sort or other shewing the deduction of their title through John Hutton, to whom the grant, whatever the true construction of it may be, was made in 1805. The defendants contend for this, not really because they do not know what case they have to meet, because I consider they do know what case they have to meet; but it is suggested that they may be able to pick a hole in the title deduced from the grantee under that deed. I reserved my judgment simply because the point was pressed so strongly by defendants' counsel that the claim was embarrassing. I cannot see how it is embarrassing. The plaintiffs have undoubtedly got the mill—there is no question about that; and they have, it is clear, some rights in the river. I think it is just possible that at a later stage of the case, before trial, some further particulars may be ordered, but I am of opinion that no further particulars are necessary for pleading, and that the amended statement of claim is not embarrassing as it stands.

Certain cases were cited to me by defendants' counsel, and especially the case of *Harris v. Jenkins*⁴ before Mr. Justice Fry. In that case there was a claim to a private right of way, but it was not stated

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in any way how it originated or how the plaintiff got it, and the plaintiff was ordered to amend by stating whether he claimed by grant or prescription. That case, however, does not, I think, touch the present application. Again, in *Philipps v. Philipps*,¹ and also in *Davis v. James*,² which Mr. Justice Cave said was absolutely identical with *Philipps v. Philipps*,¹ there was a claim by a plaintiff, who had never been in possession, against somebody who was undoubtedly in possession, without the slightest suggestion how the claim was to be made out. So in *Davis v. James*² the plaintiff claimed to be entitled to a reversion on a lease, he not being the original grantor of the lease, without the slightest suggestion as to how he got the reversion. Then there is the case of *Palmer v. Palmer*,³ where the plaintiff was ordered to give particulars of how he claimed to be heir-at-law; but that case, to my mind, merely recognises the case of *Evelyn v. Evelyn* [1880],⁵ before Vice-Chancellor Malins, which was argued for two days before him very strenuously. That was a case where, in an action for the recovery of land of which the plaintiff had never been in possession, and the plaintiff's case depended upon the heirship of A, and the heirship was stated simply without any facts shewing how A became heir, and the defendants applied to strike out the statement of heirship as embarrassing, Vice-Chancellor Malins refused the application with costs, and said: "I ought to say, with regard to the case of *Philipps v. Philipps*,¹ that that case is totally different. . . . The plaintiff claimed under a person who died in 1513, and a person who died in 1697, and another who died in 1823. The fourth paragraph [of the claim] was—'The plaintiff says that under and by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, the plaintiff is entitled to the possession of the said premises and hereditaments claimed herein in the plaintiff's writs as such heir-male, heir-at-law, and residuary devisee, or as being the person entitled to the baronetcy now held by the plaintiff.' It was necessary there to state how he became entitled;

(5) 28 W. R. 531.

there was nothing to give the slightest clue to what he was going to prove. I read all the observations of Lord Justice Bramwell and Lord Justice Cotton as having application to that particular case. I do not find a word which leads me to conclude that either of the learned Judges would have thought it necessary in such a case as this that any further particulars should be stated." Lord Justice Cotton himself states in *Philipps v. Philipps*¹: "We cannot possibly tell what facts are material to be stated, unless we really know what the case of the plaintiff is—which, as he has carefully kept all the facts and particulars out of the pleading, we cannot even guess at. So, as a conclusion, I decline to pledge myself to any opinion as to whether or no it is necessary to state in detail all the line of descent, how he makes out his heirship, and various other matters. It may be that it is only necessary for him to say that he claims as heir of so and so, being the descendant of one of his daughters, or as being the descendant of one of his ancestors in the ascending line. What particulars are to be stated must depend on the facts of each case."

In the present case, in my opinion, the statement of claim is not embarrassing. It is perfectly plain to the defendants what case they have to meet, and no doubt at the trial the plaintiff will have to shew deeds and prove his title unless he succeeds on the claim by possession. It is perfectly plain what the point in dispute will be, and therefore I must refuse the application with costs in any event.

Solicitors—Hores, Pattison & Bathurst, for motion; Warren, Murton & Miller, agents for Hallett, Creery & Co., Ashford, Kent, for plaintiffs.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.]

FARWELL, J. }
 1905. } ASHFORTH'S TRUSTS, *In re*;
 Feb. 24. } ASHFORTH v. SIBLEY.
 March 10. }

Will — Devise — Limitations — Unborn Persons — Successive Life Estates — Contingent Interest in Remainder to Survivor — Legal Contingent Remainder — Perpetuity — Determination of Settlement by Beneficiaries.

Legal contingent remainders are subject not only to the rule that an estate for life to an unborn person cannot be followed by an estate to the child of such unborn person, but also, equally with contingent equitable limitations of real estate and all contingent limitations of personality, to the rule against perpetuities.

A testatrix devised her real estate to her trustees and their heirs upon trust to pay the rents and profits unto her three children and the survivors and survivor of them during their lives and the life of the survivor, and after the death of the survivor upon trust to pay and divide the rents and profits as soon as conveniently could be after Lady Day and Michaelmas Day in each year unto and equally amongst all such of the children born in her lifetime or within twenty-one years after her death of her said three children who should be living on the Lady Day or Michaelmas Day preceding such payment and division; and after the death of all such grandchildren except one she devised her said real estate to such surviving grandchild and the heirs of his or her body in tail, with remainder over. Of the testatrix's three children, all of whom survived her, two died without issue, and the third died leaving three children, the plaintiffs, who desired, in the events which had happened, to determine the settlement. Upon a summons for the determination of the question whether any of the above trusts or limitations were void for remoteness,—Held, that the contingent estates tail in remainder were void inasmuch as they would not become indefeasibly vested in any person necessarily ascertainable within the limits prescribed by the rule against perpetuities, and that therefore the plaintiffs could not by combining to release or destroy the right of survivorship render themselves presently entitled to the property

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in fee-simple, because, the contingent interests being void, there was no present estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing would be left but the three life estates of the grandchildren.

Held also, that as the rule against perpetuities is applicable to legal contingent remainders, the fact that the limitation in question was a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren did not avail the plaintiffs.

Adjourned summons.

By her will dated February 21, 1863, Martha Sarah Ashforth, the above-named testatrix, devised her freehold farm therein mentioned and all her real estate to her trustees and their heirs upon trust to receive the rents, issues, and profits thereof, and divide the same as soon as they conveniently could after Lady Day and Michaelmas Day in each year into three equal parts, and, subject to the payment thereof of an annuity of 26*l.* to Eliza Robinson for life, to pay the same as therein mentioned to her three children John Morris Ashforth, George Morris Ashforth, and Martha Morris Ashforth and the survivors and survivor of them during their lives and the life of the survivor, and the will then proceeded as follows: "And from and immediately after the decease of the longest liver of my said three children John M. Ashforth, George M. Ashforth, and Martha M. Ashforth I direct my said trustees for the time being subject nevertheless to the payment of the said annuity to Miss Eliza Robinson if she should be then living to pay and divide the said rents and profits of the said farm half yearly as soon as conveniently can be after the days hereinbefore appointed unto and equally amongst all such of the children born in my lifetime or within 21 years after my death of the said John M. Ashforth George M. Ashforth and Martha M. Ashforth who shall be living on the Lady Day or Michaelmas Day preceding such payment and division And after the death of all such children of the said John M. Ashforth George M. Ashforth and Martha M. Ashforth except one I devise my said

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farm and all my said real estate to such surviving child and the heirs of his or her body in tail with remainder to the right heir of John Morris son of my grandfather Thomas Morris."

The testatrix died on July 7, 1864.

George M. Ashforth died in 1870, leaving three daughters, the present plaintiffs, surviving him.

Martha M. Ashforth died without issue in 1877 and John M. Ashforth died without issue in 1897. The annuitant Eliza Robinson was also dead.

The defendants Sibley and Eldridge were the trustees of the testatrix's will, and the other defendants were the trustees and devisees under the will of John M. Ashforth, the heir-at-law of the testatrix.

The three daughters of George M. Ashforth desired, in the events which had happened, to sell the real estate and divide the proceeds between them if they should be found entitled to do so, and accordingly took out the present summons for the determination of the following questions—first, whether the trusts by the testatrix's said will declared concerning the said farm and all her real estate and the rents and profits thereof to take effect after the death of the longest liver of the testatrix's said three children were valid and effectual, or whether the same or any and which of them were void for remoteness or otherwise to any and what extent; and secondly, whether upon the true construction of the said will, and having regard to the declaration to be made on the first question, the plaintiffs were entitled to call for a conveyance of the fee-simple of the said premises.

J. G. Wood (Upjohn, K.C., with him), for the plaintiffs.—This is an equitable gift to a class well ascertainable within the limits prescribed by the rule against perpetuities, and is good. The well-settled rule is that property may be given to an unborn person for life, or to several unborn persons successively for life, with remainders over, so long as those remainders become indefeasibly vested in persons ascertained, or necessarily ascertainable, within the limits prescribed by the rule against perpetuities—*Hargreaves, In re; Midgley v. Tatley*

[1890].¹ In the present case this rule has not been transgressed. One of the three plaintiffs must necessarily be the survivor of the class and become entitled to the remainder in tail. They can therefore all combine now, and by releasing or destroying the right of survivorship make themselves entitled to the property immediately. In *Gooch v. Gooch* [1853]² Lord Cranworth, with reference to that case, said: "At the determination therefore of the minority trusts the persons to take were four persons then in esse, to take as tenants for their respective lives. That is clearly, in my opinion, a good trust, and so thought the Master of the Rolls. But then what is to become of the share of each after his death. I think it would have been a perfectly good trust if it had been a trust for the four with benefit of survivorship among them; because, applying the same test as before, the four together with the party who had the fee, the heir at law it would be in this case if the limitation over is bad, could then convey the fee." In *London and South-Western Railway v. Gomm* [1882]³ Sir G. Jessel, M.R., cites the following passage from *Lewis on Perpetuities*, p. 164: "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." These passages support the plaintiff's contention that this limitation does not tend to a perpetuity, but that as the person in whom the remainder is vested is ascertainable *in presenti* the three plaintiffs can now combine to make themselves absolutely entitled to the property.

Further, this is a legal contingent remainder supported by a particular estate

(1) 59 L. J. Ch. 384; 43 Ch. D. 401.

(2) 22 L. J. Ch. 1089, 1091; 3 De G. M. & G. 366, 383.

(3) 51 L. J. Ch. 530, 531; 20 Ch. D. 562, 581.

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vested in trustees during the lives of the plaintiffs and the survivor of them—*Adams v. Adams* [1845]⁴ and *Cooke v. Blake* [1847]⁵—and such a remainder is not affected by any doctrine of remoteness, other than the rule that life estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons. The remarks of Kay, J., in *Frost, In re; Frost v. Frost* [1889]⁶ on the application of the rule against perpetuities to the case of a contingent remainder were a *dictum* and not essential to the decision. He refers to a passage in [Fearn on Contingent Remainders in support of his remarks, but in that passage the author was pointing to the common-law rule against perpetuities, and not to the rule against perpetuities applicable to equitable interests, to which latter rule Kay, J., was referring in his judgment, and the passage therefore does not help the learned Judge. A legal contingent remainder must stand or fall by its own rules, and judged by those rules the legal contingent remainder under this present limitation is good.

Jenkins, K.C., and *G. Henderson*, for the defendants representing the heir-at-law.—The decision in *Hargreaves, In re*,¹ is good law, and fatal to the plaintiffs' first contention. The limitation in tail is too remote, as the person to take under it cannot necessarily be ascertained within the limits allowed by the rule against perpetuities. The observations in *Gooch v. Gooch*² on which the plaintiffs rely are not consistent with the decisions in *Hargreaves, In re*,¹ which overruled *Avern v. Lloyd* [1868],⁷ a case which otherwise would have been in favour of the plaintiffs' contention. This limitation is not distinguishable in principle from the gift in *Garland v. Brown* [1864],⁸ where, after a gift to the surviving children of the testator's surviving child for life in equal shares, the remainder to the survivor of those children in fee was held void for remoteness.

With regard to this gift, viewed as a

legal contingent remainder, it is not possible, within the period allowed by law, to predicate who is the survivor of the three plaintiffs. The rule against perpetuities is just as applicable to legal contingent remainders as it is to contingent equitable limitations.

J. G. Wood replied.

D. W. Carr, for the trustees of the testatrix's will.

Cur. adv. vult.

March 10.—*FARWELL, J.*, after reading the material parts of the will and stating the facts above set out, continued: The question for decision is whether the limitation in tail is or is not too remote. Property may be given to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities—*Hargreaves, In re*,¹ and *Evans v. Walker* [1876].⁹ Counsel for the plaintiffs did not dispute this, but argued that, inasmuch as one of the three plaintiffs must necessarily be the survivor, they could combine to release or destroy the right of survivorship and take the property at once. But this assumes the existence of a present estate after the life estates, which will remain when the obnoxious contingency is destroyed, and there is none such. The only estates of inheritance are contingent interests in remainder. The Court has first to construe the will, and is driven to conclude that these interests are void for perpetuity. There is therefore no estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing is left but the three life estates. The fallacy lies in the lack of appropriate definition. No release or destruction of the contingent interest would be of any avail. What is required is a dealing by way of conveyance of all the three contingent interests, and this is impossible, because they have been declared void, and three void contingent remainders will not make one good vested remainder. Counsel for the plaintiffs

(4) 14 L. J. Q.B. 171; 6 Q.B. 860.

(5) 17 L. J. Ex. 370; 1 Ex. 220.

(6) 59 L. J. Ch. 118; 43 Ch. D. 246.

(7) 37 L. J. Ch. 489; L. R. 5 Eq. 383.

(8) 10 L. T. 292.

(9) 3 Ch. D. 211.

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relied on a passage in *Lewis on Perpetuities* (p. 164): "a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." It is to my mind plain that the learned author in speaking of destructibility is referring to remainders after an estate tail; but in any case the passage does not help counsel for the plaintiffs, because the validity of the estate that he wishes to create must depend on the conveyance of the ultimate remainders. The persons entitled subject to that limitation are entitled for life only. Counsel for the plaintiffs also pressed on me a dictum of Lord Cranworth's in *Gooch v. Gooch*.² I think that, if the whole of the passage is read, it is plain that the Lord Chancellor was really thinking of a joint tenancy, and not of a gift to three with a contingent limitation to the survivor of them. But, however that may be, it is only a dictum; and the reasons given are not easy to reconcile with the judgments of the Court of Appeal in *Hargreaves, In re*,¹ and *London and South-Western Railway v. Gomm*.³ The case before me is really undistinguishable from *Garland v. Brown*,⁴ before Vice-Chancellor Wood, where there was a gift to the surviving children of the testator's surviving child for life in equal shares as tenants in common, with remainder to the survivor of those children in fee, and the remainder in fee was held void for remoteness.

Then it is said that this is a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren and of the survivor of them, and this was not disputed. But the plaintiffs argue further that such a remainder is not affected by any doctrine of remoteness, except the rule that estates cannot be limited to unborn persons for life with remainders to the issue of such unborn persons.

I might have contented myself with following Mr. Justice Kay's decision in *Frost, In re*,⁶ but it is said that this was only the second or alternative reason for his judgment, and I have accordingly considered the point for myself. It is very difficult to say when the conception of perpetuity in its modern meaning first appeared in our Courts. There is no doubt that the common law regarded all attempts to restrict the free alienation of property with extreme disfavour, as is stated in Mr. Butler's note to *Coke on Littleton* (342b). Although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible, and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: "The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders." There was also the rule that an estate by purchase cannot be limited to the unborn child of an unborn child—*Whitby v. Mitchell* [1890].¹⁰ With all respect to Mr. Justice Kay, I do not think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility—see *Gray on Perpetuities*, p. 86, and *Williams on Real Property* (6th ed.), p. 245. The phrase seems due to Lord Coke's unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness—see *Blamford v. Blamford* [1616],¹¹ cited in *Gray* at p. 86: "Coke moves another matter in this case on Popham's opinion, Co. I., Rector de Chedington, that a possibility on a possibility is not good, for here in our case is a possibility on a possibility . . . yet it seems that it is good, for,

(10) 59 L. J. Ch. 485; 44 Ch. D. 85.

(11) 3 Bulst. 98; 1 Rolle, 318, 321.

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if Popham's opinion should be law, it would shake the common assurances of the land but I agree that in divers cases there shall not be possibility upon a possibility, and he puts the diversities put in *Lampet's Case* 10 Co. 50 b." It seems probable that contingent remainders could not anciently have been created (see *Williams on Seisin*, p. 190), and that down to the time of the Commonwealth the usual mode of settlement on marriage was by giving vested estates tail to living persons, and not estates tail to unborn children (*ib.* 189). Although, therefore, there was a general principle that alienation should not be restricted by the creation of estates beyond a particular estate for life with a remainder in fee or in tail, I can find no trace of any statement of the present rule in terms in any of the old books. But the general principle was well established, and as the ingenuity of real property lawyers invented new devices for rendering land inalienable for as long a time as possible, it became necessary to mould the expression of the old law so as to meet new emergencies. Thus in *Cadell v. Palmer* [1833]¹² the House of Lords settled the question of the extent to which executory limitations and shifting uses, which had become possible under the Statute of Uses, could be lawfully carried, and they did this, not by creating any new law, for that would have been legislation, not decision, but by applying the limits of the old law to the new circumstances. The Judges who advised the House supported their opinion by numerous authorities, and I would refer in particular to the quotation from Lord Kenyon's judgment in *Long v. Blackall* [1797]¹³: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the Courts have said that the estate shall not be unalienable by executory devises for a longer term than is allowed by the limitations of a common law conveyance." Here, then, is an authoritative statement, in terms of precision, of the rule of law which had existed for centuries, but had not been theretofore defined, and had been applied

from time to time as occasion arose by Judges who, without formulating the precise limits of the rule, held (as Lord Nottingham said in *Norfolk (Duke's) Case* [1681]¹⁴): "If it tends to a perpetuity, there needs no more to be said, for the law has so long laboured against perpetuities, that it is an undeniable reason against any settlement, if it can be proved to tend to a perpetuity." The rule, however, was only to be applied to cases where it was really necessary in order to defeat remoteness, and accordingly Lord St. Leonards in *Cole v. Sewell* [1843]¹⁵ points out that it has no application to remainders limited to arise after an estate tail, because they are destructible by barring such estate tail, and are no more open to objection than the estate tail itself; and this is the meaning of the reference to destructibility in the passage that I read above from *Lewis on Perpetuity*, p. 164. But this reason has no application to contingent remainders not so limited and destructible; nor do I think that Lord St. Leonards so intended—see *Sugden's Law of Property*, pp. 116–121, and Lord Brougham's speech in *Cole v. Sewell* [1848]¹⁶ in the House of Lords, where he puts this ground plainly as the reason for his observations. It would be very strange indeed that Lord St. Leonards should have referred to the "sacred rule" enunciated in *Purefoy v. Rogers* [1670]¹⁷—that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder—a rule which probably owes its origin to the chance of destruction by the failure of the particular estate incident to that one and not to the other—and should at the same time have affirmed that the rule against perpetuities had no application to such contingent remainders, although they might exceed the limits allowed for executory limitations, because they could not exceed the limits of perpetuity, for the proposition is self-contradictory. Assume that the doctrine of the destructibility of contingent

(14) 3 Ch. Cas. 1, 31.

(15) 4 Dr. & W. 1.

(16) 2 H.L. C. 186, 234.

(17) 2 Saund. 380, 388, note 9.

(12) 1 Cl. & F. 372.

(13) 7 Term Rep. 100, 102.

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remainders by failure of the particular estate is due to the desire of the Courts to avoid remoteness (as Mr. Butler suggests): it does not follow that such remainders should be free from all other bonds. Liability to destruction for a particular cause at or before a given period is not incompatible with, or any ground for immunity from, destruction at the same period for a cause common to all other interests, executory, equitable, or otherwise, which may lead to remoteness. It is plain, moreover, that the Courts have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular estate, it was held that the rule must apply to them. In *Finch, In re; Abbiss v. Burney* [1881],¹⁸ the gift was to trustees on trust for A for life, and after his death on trust to convey to such son of his as should first attain twenty-five. Sir George Jessel, M.R., said: "where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think this appeal should be allowed." In *Hollis Hospital Trustees and Hague, In re* [1899],¹⁹ the late Mr. Justice Byrne held that the rule against perpetuity applied to a common-law condition. He says: "the Courts have first to find what is the common law—that is, the principle embodied in what is called the common law—and to apply it to new and ever-varying states of fact and circumstances. . . . New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation." In *Chudleigh's Case*

[1595]²⁰ (the Case of Perpetuities) the Court defeated an attempt to make the Statute of Uses serve as the means of protecting contingent remainders from destruction, lest lands should remain too long in settlement. In *Finch, In re; Abbiss v. Burney*,¹⁸ the Court of Appeal defeated an attempt by vesting all the property in trustees. The present attempt is made by vesting a legal estate *pur autre vie* in trustees and limiting the contingent remainders as a legal use. In my opinion the Court is equally bound to defeat this; nor can I find any rule of law, or decision, or principle to the contrary. The opinion of the late Mr. Challis (*Real Property* (2nd ed.), pp. 174-177) is, I think, sufficiently displaced by Mr. Justice Byrne's judgment in *Hollis Hospital Trustees and Hague, In re*,¹⁹ and that of the late Mr. Joshua Williams by *Gray on Perpetuity*, pp. 283-298; and the conclusion at which I have arrived is supported by (in addition to the text-writers cited in that case and in *Frost, In re*⁶) an argument in the first edition of *Jarman on Wills*, vol. 2, p. 727, and repeated in some of the later editions by Mr. Serjeant Stephens' note in his *Commentaries* (8th ed.), vol. 1, p. 554, and by Mr. Gray's excellent treatise on perpetuities. The rule against perpetuities applies to all contingent equitable limitations of real estate and all contingent limitations of personalty, including leaseholds. It would certainly be undesirable to add another to the anomalies that adorn our law, as I should succeed in doing if I held that the rule did not apply to legal contingent remainders. I therefore answer the first question by saying that the limitation in question is void for remoteness, and the second question in the negative.

Solicitors—Bird & Eldridges; G. A. B. Carr.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

(18) 50 L. J. Ch. 348; 17 Ch. D. 211.

(19) 68 L. J. Ch. 673, 679; [1899] 2 Ch. 540, 552.

(20) 1 Co. Rep. 120a, 130.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

1905.

March 31.

AMBLER,

In re;

WOODHEAD

v. AMBLER.

Administration—Insolvent Estate—Executor's Right of Retainer—Husband and Wife—Right of Wife to Retain as Executrix Money Lent to Husband for Purposes of Business—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.

Section 3 of the Married Women's Property Act, 1882, which deals with loans by a wife to her husband, does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, the right of a woman who is executrix of her late husband to retain out of assets of his estate come to her hands the amount of a loan made by her out of her separate estate to her husband for the purposes of his business is not taken away by the joint operation of that section and section 10 of the Judicature Act, 1875, in cases where the estate is insolvent.

Leng, In re; Tarn v. Emmerson (64 L. J. Ch. 468, 471, 472; [1895] 1 Ch. 652, 657, 660), and May, In re; Crawford v. May (60 L. J. Ch. 34; 45 Ch. D. 499), followed.

Appeal from a decision of Farwell, J., upon a question arising in the administration of the estate of James Ambler, who carried on business as a worsted-spinner. By his will dated March 8, 1894, James Ambler, who died on June 5, 1901, appointed his wife Emma Jane Ambler, and his son John Ambler, to be executors and trustees thereof, and they proved the will on July 20, 1901. The estate was insolvent. On July 18, 1901, proceedings were taken by creditors of the testator, by originating summons, for the administration of the estate, and on July 30 an order was made for accounts and enquiries.

At the time of his death the testator was indebted to his wife in the sum of 6,674*l.* 8*s.* 3*d.*, money lent to him by his wife out of her separate estate for the

purposes of his business, and interest. She retained this sum out of the personal estate of the testator come to her hands as executrix in respect of her debt, and that was allowed to her by the Master by his certificate dated May 11, 1904. Certain creditors of the testator, who had liberty under an order dated August 9, 1901, to attend the proceedings in the action, took out a summons to vary the certificate in this respect.

Farwell, J., declined to make any order on the summons.

The creditors appealed.

Neville, K.C., and *E. S. Ford*, for the appellants.—Farwell, J., felt himself bound by the decision of North, J., in *May, In re; Cranford v. May* [1890],¹ that the widow's common-law right of retainer as executrix was not affected by section 3 of the Married Women's Property Act, 1882, and section 10 of the Judicature Act, 1875. In coming to that conclusion North, J., was influenced by the decision in *Neville, In re; Lee v. Nuttall* [1879]²; but that case was before the Married Women's Property Act, and the decision of the Court of Appeal in *Leng, In re; Tarn v. Emmerson* [1895],³ does not quite support *May, In re*.⁴

The executor's right of retainer depends upon equality. He cannot retain his debt as against creditors of a higher degree—*Talbot v. Frere* [1878]⁴ and *Hankey, In re; Smith v. Hankey* [1899].⁵

Under section 3 of the Married Women's Property Act, 1882, money lent by a wife to her husband for the purpose of his business is to be treated as assets of the husband's estate in case of his bankruptcy under reservation of the right of the wife to claim as a creditor after the claims of other creditors for value have been satisfied. Under section 10 of the Judicature Act, 1875, the same rules are to prevail in the administration of insolvent estates as to debts and liabilities provable as may be for the time being in force under the law of

(1) 60 L. J. Ch. 34; 45 Ch. D. 499.

(2) 48 L. J. Ch. 616; 12 Ch. D. 61.

(3) 64 L. J. Ch. 468; [1895] 1 Ch. 652.

(4) 9 Ch. D. 568.

(5) 68 L. J. Ch. 242; [1899] 1 Ch. 541.

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bankruptcy with respect to the estates of persons adjudged bankrupt. The joint effect of these two sections is to introduce into the administration of insolvent estates a new inequality; and though insolvency in itself does not take away the right of retainer, in the case of a widow executrix section 3 of the Act of 1882 alters the condition of the assets over which the right exists. There is really no debt till the other creditors have been satisfied, and as the equality is taken away the right of retainer goes. That view of the effect of the two sections is borne out by the decision in *Leng, In re*,³ and by *Genese, In re; District Bank of London, ex parte* [1885].⁶ *Maggi, In re; Winehouse v. Winehouse* [1882],⁷ which appears to be to the contrary, was disapproved of in *Leng, In re*,³ and in *Whitaker, In re; Whitaker v. Palmer* [1900],⁸ and must be taken to have been overruled.

[VAUGHAN WILLIAMS, L.J.—Could an executor with an equitable debt exercise the right of retainer?] [He referred to *Sander v. Heathfield* [1874].⁹

The right is a common-law legal right—*Baker, In re; Nichols v. Baker* [1890].¹⁰

[ROMER, L.J.—Under the old law had a widow a right of retainer?—*Lush on Husband and Wife* (2nd ed.), pp. 400, 401; *Slanning v. Style* [1734],¹¹ and *Wells, Ex parte; Whitmore, in re* [1842].¹²

She may have had; but section 3 of the Act of 1882, while giving the wife certain specific rights, also puts a limit on them. It puts her claim in an inferior position to the claims of other creditors, and that must put a restriction upon her right of retainer. If not, a large part of the protection given by the section to the creditors would be taken away. It would not be fair that a wife should voluntarily put money into her husband's business, and then defeat the rights of other

creditors—see *per Rigby, L.J.*, in *Clark, In re; Schulze, ex parte* [1898].¹³

[VAUGHAN WILLIAMS, L.J.—A statute-barred debt could not be proved in bankruptcy, but an executor can retain in respect of one. Is that right taken away by section 10 of the Judicature Act, 1875?]

That is not quite the same point. It was decided in *Leng, In re*,³ that the effect of section 10 was to make section 3 of the Act of 1882 applicable in the administration of insolvent estates in Chancery, and that is sufficient for the appellants.

Upjohn, K.C., and *Ashton Cross*, for the respondents, were not called upon.

VAUGHAN WILLIAMS, L.J.—I think that it would not be right for us in this case to depart from what has, to my mind, been already decided by the Court of Appeal. The point in question was originally decided by Mr. Justice North in *May, In re*.¹ In that case a widow, who was the administratrix of her late husband, whose estate was insolvent, claimed to retain out of the assets coming to her hands as administratrix the amount of a loan which she had made to him out of her separate estate for the purpose of his business. Mr. Justice North allowed that claim. He said: "Now, what the widow claims to do is this: she is the legal personal representative of the deceased; she has got into her hands assets to a larger amount than the debt which is due to her; she is not seeking to prove for her debt, but is seeking to retain it out of the assets in her hands. That right she seeks to assert cannot be denied, unless she is precluded by the two sections to which I have referred. But a right of retainer is not affected by the Judicature Act at all, as was decided in the case of *Lee v. Nuttall*.²" That case was before the Married Women's Property Act. He proceeds: "It is said that the point decided there was that an executor or administrator was not a secured creditor by reason of his having a right to retain. I do not think that was the only question decided. The decision

(18) 67 L. J. Q.B. 759, 761; [1898] 2 Q.B. 380, 384.

(6) 55 L. J. Q.B. 118; 16 Q.B. D. 700.

(7) 51 L. J. Ch. 560; 20 Ch. D. 545.

(8) 70 L. J. Ch. 6; [1901] 1 Ch. 9.

(9) 44 L. J. Ch. 113; L. R. 19 Eq. 21.

(10) 59 L. J. Ch. 661; 44 Ch. D. 262.

(11) 3 P. Wms. 334, 337.

(12) 2 Mont. D. & D. 504.

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went to the extent that the section did not apply to a right to retain. Lord Justice James said: 'The sole object of the section, as it appears to me, was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realise his security afterwards, and to put him on the same footing as in bankruptcy, where he was only entitled to prove for the balance after realizing or valuing his security. The section was never intended to apply to retainer by an executor.'

Undoubtedly that passage, which was cited by Mr. Justice North from the judgment of Lord Justice James, is open to this observation, that the earlier part of it, which I have just read, is not quite consistent with the decision in *Maggi, In re*⁷; but Lord Justice James does say, independently of his observation as to the sole object of the section, that the section was never intended to apply to retainer by an executor.

The question that we have to decide here is whether the section is intended to apply to retainer by an executrix. That question was discussed by the Court of Appeal in *Leng, In re*.⁸ That case turned upon the combined effect of section 10 of the Judicature Act, 1875, and section 3 of the Married Women's Property Act, 1882, the question being as to rights of proof of the widow in competition with other creditors, and the Court arrived at the conclusion that there was no right of proof. Lord Lindley says¹⁴: "This conclusion"—that is, the conclusion that there was no right of proof—"is not inconsistent with *May, In re*,¹ which was not a case of proof, but of retainer by the wife as her husband's administratrix. The Legislature has not yet thought proper to alter the law of retainer, and section 3 of the Married Women's Property Act is not addressed to that subject." Then, when Lord Justice A. L. Smith comes to deal with that same point he says¹⁵: "In the first place, I should say that I know of no case which deals with the conjoint opera-

tion of section 10 of the Act of 1875 and section 3 of the Act of 1882 with the exception of *May, In re*,¹ which was not a case, as the learned Judge himself pointed out, of the widow seeking to prove, but of the right of retainer by the widow, to which section 3 of the Act of 1882 did not apply."

Under those circumstances I do not think that we ought in this Court to say that the conjoint operation of those two sections—section 10 of the Judicature Act, 1875, and section 3 of the Married Women's Property Act, 1882—does affect or alter the right of retainer.

ROMER, L.J. — It is admitted, with regard to the legal point that we have to decide, that up to the passing of the Married Women's Property Act, 1882, there was the right of retainer by the executrix, the widow, in such a case as we have to deal with. The sole point is therefore whether section 3 of the Married Women's Property Act, 1882, took away that right. Section 3 of the Act of 1882 was certainly not on the face of it dealing with the question of the right of retainer at all—it was dealing with the question of proof; and after section 3 was passed the right of retainer might well have existed consistently with due effect being given to the provisions of section 3.

As was pointed out by my Lord in the course of the argument, the only question is whether we can infer, either necessarily or clearly, that the Legislature by section 3 intended to take away the right of retainer which was then existent. Lord Justice Lindley in *Leng, In re*,⁸ said, with regard to that very point, that the Legislature had not thought proper yet to alter the law of retainer, and that section 3 of the Married Women's Property Act, 1882, was not addressed to that subject. Lord Justice A. L. Smith in his judgment says in effect the same thing; and Lord Halsbury concurred in the judgments which had been delivered by Lord Justice Lindley and by Lord Justice A. L. Smith.

All I can say with regard to this appeal is that I am not prepared to differ from those statements as to the effect of section 3 of the Act of 1882, and under

(14) 64 L. J. Ch., at p. 471; [1895] 1 Ch., at p. 657.

(15) 64 L. J. Ch., at p. 472; [1895] 1 Ch., at p. 660.

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those circumstances I think that this appeal must be dismissed.

STIRLING, L.J.—I have come to the same conclusion; but simply because I defer to the statement of the law made by the members of this Court in *Leng*, *In re*.³

Appeal dismissed.

Solicitors — Johnson, Weatherall & Sturt, agents for Wade, Billbrough, Tetley & Co., Bradford, for appellants; Helliwell, Harby & Evershed, agents for Jubbs, Booth & Helliwell, Halifax, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }
1905.
March 20, 27. }

HUMPHREYS v.
MORTEN.

Landlord and Tenant—Lease—Forfeiture—Relief—Parties Necessary to Application—Original Lessee—Original Assignee—Costs—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210—Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1.

Although as a general rule upon an application by under-lessees for relief against forfeiture of the head-lease the Court will require the original lessee to be made a party to the proceedings, yet this will be dispensed with where good reason is shewn for not making him a party.

Where, therefore, in an action by mortgagees by sub-demise of an under-lease for relief against forfeiture of the lease for non-payment of rent it appeared that the original lessee became bankrupt in 1877, that his trustee assigned the lease, and that the assignee subsequently disappeared and had not been heard of for twenty-six years, the Court dispensed with the necessity of making either the original lessee or assignee parties to the action.

Hare v. Elms (62 L. J. K.B. 187; [1893] 1 Q.B. 604) discussed.

Where in such an action the right of the applicants to relief is contested by the lessor, the order as to costs made in Howard v.

Fanshawe (64 L. J. Ch. 666; [1895] 2 Ch. 581) should be followed—namely, that the applicants must pay the costs of obtaining the relief except so far as they have been increased by the resistance to the claim by the lessor.

Newbolt v. Bingham (72 L. T. 852) distinguished.

Action by mortgagees by sub-demise of an under-lease for relief against the forfeiture of the original lease.

By a lease dated May 1, 1872, certain premises at Harrow were demised by G. Smith and G. Walter to F. Dimsdale for the term of ninety-nine years from June 24, 1870. The lease contained a proviso for re-entry on non-payment of rent for twenty-one days.

In 1877 Dimsdale became bankrupt and one Browne was appointed the trustee of his estate.

By a deed dated March 26, 1878, the premises were assigned by Browne to J. H. Barsby for the residue of the term granted by the lease.

By a mortgage dated June 23, 1879, Barsby demised the premises by way of mortgage to J. Myerscough and A. H. Martin for the residue of the term granted by the lease except the last day thereof.

By various assignments, and ultimately by a deed dated March 1, 1899, the premises comprised in the lease were demised to G. Burch for the residue of the then unexpired term of ninety-nine years except the last day thereof.

By a mortgage dated March 1, 1899, the premises were demised by way of mortgage by Burch to the trustees of the Loyal Amicable Lodge, No. 3557 (a branch of the North London District) of the Independent Order of Odd Fellows, Manchester Unity, Friendly Society, registered under the Friendly Societies Act, 1875, for all the residue of the original term less three days.

Burch let the premises to one S. E. Smith at an annual rent, and he continued in possession until November 16, 1904.

The reversion expectant on the term granted by the lease became unknown to the plaintiffs, the present trustees of the

HUMPHREYS v. MORTEN.

Loyal Amicable Lodge, and some time ago, vested in one W. Black, now deceased. One Colin Hunter and the defendant J. G. Morten were his executors. The defendant Burch omitted to pay to Black or his executors the ground-rent reserved under the lease which accrued due on December 25, 1902, and all rent subsequently becoming due.

On July 16, 1903, Hunter and the defendant Morten, as executors of Black, commenced an action against the defendant Burch to recover possession of the premises by reason of the forfeiture incurred by him under the proviso for re-entry for non-payment of rent, and on November 23, 1903, in default of appearance to the action, recovered judgment in the action.

Hunter died on September 24, 1904.

On November 16, 1904, possession of the premises was delivered to the sheriff (acting under a writ of *habeas possessionem*) by S. E. Smith, who by arrangement with the defendant Morten immediately thereafter entered again upon the premises and became tenant thereof to the defendant Morten upon an annual tenancy.

On November 17, 1904, the plaintiffs were informed that the writ of possession had been executed, which was the first time that they heard or knew anything of the recovery of possession by the defendant Morten.

The defendant Burch gave a charge over the premises subject to the plaintiffs' mortgage to one W. H. Thomas, and his representatives were made defendants to this present action; but they did not defend, and under the circumstances the facts with regard to their charge were immaterial for the purposes of this report.

On December 8, 1904, the plaintiffs issued their writ in the present action claiming a declaration that, upon payment by them of the rent which from September 29, 1902, would have accrued due upon the lease, and the costs of the action, and all other costs payable by the defendant Morten and Hunter, or the defendant Morten, in respect of the forfeiture and re-letting of the premises, and the costs of the defendant Morten of this action, or such of them as the Court should

see fit, the plaintiffs were entitled to have granted to them by the defendant Morten a lease of the premises (the counterpart to be executed by the plaintiffs) for all the term granted by the lease, or for such term as to the Court should seem fit, containing similar covenants on the part of the lessor and lessees to the covenants contained in the lease with respect to the premises.

The defendant Morten, by his defence, submitted that the plaintiffs were not entitled to any relief in the action on various grounds—*inter alia* because the defendant had recovered and was now in possession of the premises comprised in the lease, and was not proceeding by action or otherwise to enforce any right of re-entry or forfeiture, and because Barsby, or other the person in whom the term of ninety-nine years was vested, was not a party to the action, and because the defendant had recovered possession of the premises and had re-let the premises to S. E. Smith for one year from Christmas, 1904, and thereby altered his position in respect thereto.

Neither Dimsdale, the original lessee, nor Barsby, his assignee, was made a party to the action. Dimsdale had become bankrupt in 1877. Barsby was at one time a soldier, and afterwards had no settled occupation. He had disappeared some twenty-six years ago, and had not subsequently been heard of.

Johnston Edwards, for the plaintiffs.—The action lies under the equitable jurisdiction of the Court under section 210 of the Common Law Procedure Act, 1852, not under section 14 of the Conveyancing and Law of Property Act, 1881—*Rogers v. Rice* [1892].¹

It is said against the plaintiffs that relief cannot be granted as Barsby has not been made a party to the action, and *Hare v. Elms* [1893]² is relied upon. That case does not, however, lay down a hard-and-fast rule that the original lessee or assignee must necessarily be brought before the Court on an application for relief. That case was commented on in

(1) 61 L. J. Ch. 573; [1892] 2 Ch. 170.

(2) 62 L. J. Q.B. 187; [1893] 1 Q.B. 604.

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Gray v. Bonsall [1904],³ and the Court is asked to adopt the view of Mathew, L.J., in that case—that the Court has a discretion as to whether it will require the original lessee to be brought before the Court. See also *per* Stirling, J., in *Howard v. Fanshawe* [1895]⁴ and *Woodfall on Landlord and Tenant* (16th ed.), p. 839. The plaintiffs do not ask to disturb Smith in his tenancy.

Eve, K.C., and *Jason Smith*, for the defendant Morten.—This is not an application for relief under the Conveyancing Act, 1881 or 1892, and therefore it is necessary to look at the Acts under which the relief is sought. Under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, an action for relief cannot be maintained in the absence of the original lessee or assignee—*Hare v. Elms*,⁵ which was approved of in *Gray v. Bonsall*.³ The principle of *Hare v. Elms*⁵ applies to the present case.

[SWINFEN EADY, J., referred to *Doe d. Whitfield v. Roe* [1811].⁶]

That case decided that a mortgagee of a lease had the same title to relief against an ejectment for non-payment of rent, and upon the same terms, as the lessee against whom the recovery was had. Formerly the Court of Chancery had no power to relieve against a forfeiture except where it involved a money penalty. The Conveyancing and Law of Property Act, 1881, does not apply to a case like the present, where judgment and execution in an ejectment have been obtained. That Act repealed 22 & 23 Vict. c. 35, the effect of which was to restore the landlord to the position he occupied before the passing of the latter Act. In *Gragory v. Wilson* [1852]⁶ the Court refused to grant relief.

S. R. Earle, for the executors of Thomas.

W. A. Peck, for Burch.

Johnston Edwards replied.

SWINFEN EADY, J.—The plaintiffs in this action are mortgagees of a leasehold

(3) 73 L. J. K.B. 515; [1904] 1 K.B. 601.

(4) 64 L. J. Ch. 666, 670; [1895] 2 Ch. 581, 589.

(5) 3 Taunt. 402.

(6) 22 L. J. Ch. 159; 9 Hare, 683.

house. The defendant Morten, who alone has appeared on the trial of the action, has recovered judgment in an action for the recovery of land for non-payment of ground-rent payable under the lease. The action was brought in July, 1903, judgment for possession was given in November, 1903, but the writ for possession was not executed until November, 1904. It was not until November, 1904, that the matter came to the knowledge of the mortgagees, and almost immediately after they issued their writ in the present action claiming relief.

It is to be observed that the only ground on which the landlord brought the action was for non-payment of rent. No other breach entitling the landlord to re-enter other than non-payment of rent was proved.

The plaintiffs having come within due time and sought relief on payment of the rent, if that were all it would be a matter of course to grant it. According to the long-established practice of the Court of Chancery, the power to re-enter was regarded as a security to enforce payment of the rent, and the practice was on payment of the rent to grant relief. The Court looked at the substance of the transaction, and if the plaintiffs came within due time it would be a matter of course to grant them relief on payment of the rent.

The defendants in the present case have objected to relief being given on the ground of the absence of the original lessee and assignee. It was said that, having regard to the decision in *Hare v. Elms*,⁵ the absence of the original lessee and assignee precluded relief being given. Now it was pointed out by Mr. Justice Day in that case that where lessees or others are claiming relief "They must bring the proper parties before the Court, or give some good excuse for not having done so"; and Mr. Justice Collins in concurring, said, "I am therefore of opinion that the relief asked for should not be given in the absence of the first lessee; and, no reason having been given by the applicants for not making him a party to the proceedings, this application should be refused." The application was refused on the ground that, as the renewal of the

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forfeited lease would re-impose a liability on the lessee, the lease ought not to be renewed in his absence and without giving him the opportunity of being heard.

In my opinion the circumstances of the present case are such that a sufficient reason is given for not making the original lessee or assignee a party. It appears that the original lessee long since became a bankrupt, and that the lease was assigned by his trustee in bankruptcy. There is therefore no necessity to make him a party. The assignee, on the other hand, was for a time a soldier, and after that had no business, and has disappeared for some twenty-six years, and none of his relatives know where he is. In these circumstances I think that the plaintiffs have shewn sufficient reasons for not making him a party to the action. [His Lordship then dealt with other objections raised by the defendant Morten to relief being granted, and held that they failed. He continued:] The plaintiffs are therefore entitled to the relief claimed, subject only to the question of costs, on which I will hear the parties.

Johnston Edwards, for the plaintiffs.—This is in reality an undefended action. The same order as to costs ought to be made as was made in *Howard v. Fanshawe*.⁴

Eve, K.C., for the defendant Morten.—The case is like *Newbolt v. Bingham* [1895].⁷ Relief ought only to be granted on the terms of the plaintiffs paying the whole of the costs of the action.

Johnston Edwards, in reply.—That case does not apply, because relief there was only given on the appeal upon the plaintiffs submitting to the condition of relief, which they had refused to do in the Court below.

SWINFEN EADY, J.—I must follow the rule in *Howard v. Fanshawe*.⁴ The plaintiffs must pay the costs of the action, except so far as they have been increased by the defendant Morten's disputing the plaintiffs' right to relief. The defendant Morten must pay these increased costs, and there will be the usual set-off. The

(7) 72 L. T. 852.

plaintiffs are clearly bound to pay the costs of obtaining relief—*Croft v. London and County Banking Co.* [1885]⁸—but not the costs as increased by the resistance to that relief.

*Newbolt v. Bingham*⁷ was a different case. There the plaintiffs coming for relief had refused in the Court of first instance to concede the necessary condition of relief—namely, to give security for doing the repairs. Lord Justice A. L. Smith said: "I only wish to say that I think that the appellant has come up to the Court of Appeal with an entirely new case. I have no doubt that, if the mortgagee had asked for it, he could have got relief from the Judge at chambers on the same terms as he gets it here." No such considerations arise here, and I therefore follow *Howard v. Fanshawe*.⁴

Solicitors—Joseph Pearce; Morten, Cutler & Co.

[Reported by W. Feimey Cook, Esq
Barriater-at-Law.

[IN THE COURT OF APPEAL]

VAUGHAN WILLIAMS, L.J. } ORMEROD,
STIRLING, L.J. } GRIERSON & Co.
1905. } v. ST. GEORGE'S
March 2. } IRONWORKS.

Discovery—Production of Documents—Right of Inspecting Party to Make Copies—Rules of the Supreme Court, 1883, Order XXXI. rule 14; Order LXV. rule 27, sub-rule 18.

Under the usual order for production and inspection of documents, the inspecting party is entitled to make copies for himself in the same way as he was entitled to do under the old practice in the Court of Chancery. His right in this respect is not taken away or qualified by sub-rule 18 of rule 27 of Order LXV., which relates to costs only.

Appeal against a decision of Joyce, J.

By an order dated February 17, 1903, and made in the usual form, the defendants were ordered to make discovery of documents and to produce at the office of their solicitor in London such documents, and

(8) 54 L. J. Q.B. 277; 14 Q.B. D. 347.

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the plaintiffs, their solicitors and agents, were "to be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom." By another order dated June 8, 1904, it was ordered that the plaintiffs be at liberty to attend with Sir Eustace Piers, the duly appointed agent of one of the plaintiffs, at the office of the defendants' solicitor in London to inspect the documents disclosed by the defendants "and to take copies and abstracts thereof and extracts therefrom."

The defendants' solicitors insisted that under these orders they were themselves entitled in the first instance to make the copies and extracts required by the plaintiffs at a charge of fourpence per folio. In consequence the plaintiffs took out a summons, asking that, the defendants by their solicitor refusing to allow the plaintiffs' solicitors to take copies and abstracts and extracts from the documents disclosed by them, the defendants might be ordered forthwith to bring the same into Court, on which, on February 8, 1905, Joyce, J., in chambers made the order now appealed from—namely, that unless the defendants forthwith undertook to allow the applicants, their solicitors and agents, to copy the documents ordered to be produced as they pleased, the defendants should within ten days from the service thereof produce and leave the documents at the Central Office of the Royal Courts of Justice. On making the order Joyce, J., delivered the following written judgment: "The order for affidavit and production, &c., is in the time-honoured form in use before the Judicature Act and since continued. That form of order in my opinion authorised the person inspecting to take or make (for to my mind there is not for the present purpose any difference in the meaning of these two words) copies or extracts. See *Pratt v. Pratt* [1882],¹ and the observations of Lord Lindley in *Mutter v. Eastern and Midlands Railway* [1888].² The only question is whether the Rules of the Supreme Court, Order LXV. 27 (18),³

directly or indirectly, alter the effect of such an order. I have not been able to ascertain how or when this rule originated. But in my opinion all it does is to provide what the charge is to be when the inspecting party formally (by writing) requires a copy or extract to be made for him by the other party. I do not see how the supposed rule contended for by the respondents to this summons could practically be worked. How is the line to be drawn between what the inspecting party may copy and what he may not? The result is that the respondents must either undertake to allow the applicants to copy as they please or the documents must be brought into Court, which is the strict course, production at the office of the solicitor being in truth an indulgence permitted for the convenience and with the assent of the parties or one of them—*Brown v. Sewell* [1880].⁴ I give leave to appeal, it being a most important point, and I do not require expense to be incurred of any further argument before me either in chambers or in Court. Costs to be costs in action."

The defendants appealed.

Dankwerts, K.C., and *Charles Bathurst*, for the appellants.—The old practice relating to the production of documents is stated by Wood, V.C., in *Bonnardet v. Taylor* [1861]⁵ as follows: "The common order gives the plaintiffs power to go themselves and make copies and extracts, though the usual practice is to take the copies from the solicitors of the defendants"—and see *Brown v. Sewell*,⁴ *Prestney v. Colchester Corporation* [1883],⁶ *Pratt v. Pratt*,¹ *Bray on Discovery* (ed.

another party, or extracts therefrom, under rules of Court or any special order, the party entitled to take the copy or extract is to pay the solicitor of the party producing the document for such copy or extract as he may, by writing, require, at the rate of 4d. per folio; and if the solicitor of the party producing the document refuses or neglects to supply the same, the solicitor requiring the copy or extract is to be at liberty to make it, and the solicitor for the party producing is not to be entitled to any fee in respect thereof."

(1) 51 L. J. Ch. 838; W. N. (1882), 151.

(2) 57 L. J. Ch. 615, 620; 38 Ch. D. 92, 105.

(3) Order LXV. rule 27, sub-rule 18: "As totaking copies of documents in possession of

(4) 16 Ch. D. 517, 518.

(5) 30 L. J. Ch. 523; 1 J. & H. 383.

(6) 52 L. J. Ch. 877; 24 Ch. D. 376.

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1885), p. 174, *Daniell's Chancery Practice* (7th ed.), vol. ii. pp. 1574, 1575, *Kerr on Discovery*, p. 74; *Seton* (6th ed.), vol. i. p. 80; *Prentice v. Phillips* [1843],⁷ and *Republic of Peru v. Weguelin* [1872].⁸ What Wood, V.C., described as the usual practice has been made the practice of the Court under Order LXV. rule 27, sub-rule 18, which first appeared as an additional rule of August 12, 1875, and was intended to make uniform what was in fact the general practice among solicitors. That sub-rule contemplates the solicitor of the producing party making the copy in the first instance, and only entitles the inspecting party to make the copy for himself in case the producing party's solicitor refuses or neglects to supply one. There is a distinction in the language of the sub-rule between "take" and "make" which bears out this contention. The general rule that a right to inspect a document confers a right to make a copy or extract is negatived by the express language of sub-rule 18—*Mutter v. Eastern and Midlands Railway*,⁹ *Balaghat Gold Mining Co., In re* [1901],⁹ and *Bevan v. Webb* [1901].¹⁰

Cassell, for the respondents, was not called upon.

VAUGHAN WILLIAMS, L.J.—On February 17, 1903, an order for discovery in the common form was made in this action, and after the usual order for the production of documents came these words: "and the applicants their solicitors and agents are to be at liberty to inspect and peruse the documents so produced and to take copies and abstracts thereof and extracts therefrom, as the applicants shall be advised"; and subsequently, on February 8, 1905, the order was made from which this appeal is brought. [His Lordship read it, and continued:] I cannot put the matter better, or in a shorter way, than it was put by Mr. Justice Joyce in his judgment. Speaking of Order LXV. rule 27, sub-rule 18, the learned Judge said, "In my opinion all it does is to provide what the charge is to be when the inspecting party formally (by writing) requires a

copy or extract to be made for him by the other party."

I do not think that counsel for the appellants contended that under the practice of the Court of Chancery before the Judicature Act an order in the form of the order made in the present case would not have entitled the person who obtained it to make copies himself of the documents produced if he chose to do so. But it is said that this effect of the old form of order has been taken away by the words of Order LXV. rule 27, sub-rule 18. It is said, and I think rightly said, that the word "take" in that rule is used in the sense of obtaining a copy from the other party; and it is said that that rule was intended to take away the old right of the person who obtained the order for production to make copies himself of the documents produced for inspection. I cannot accede to that view. It seems to me manifest that the expression "take copies" is frequently used in legal documents to cover the case of a copy being made by the party who is inspecting, as distinguished from the case of his obtaining a copy from the other party. The case of *Mutter v. Eastern and Midlands Railway*⁹ is a striking instance of the use of the word "take" in that sense, for in the judgment of Mr. Justice Chitty I find the following passage: "there is no prohibition on the shareholder, during the time that he makes his inspection, making notes of that which he inspects. As was said, he might, if he could, commit the whole register to memory. That of course would be a difficult thing to do. But there is nothing in the Act which prevents his making a note, and if he may make a note, I do not see why he may not make a complete note of any particular part: in other words, why he may not make an extract, and from that it seems to follow that he may make a reasonable use of the inspection and *take* a copy. . . . I think that when a man is inspecting, he may make *bona fide* use of his inspection, and it follows from his right to inspect that he can make copies." It is plain that Mr. Justice Chitty is there speaking of what the party inspecting may do himself, and that he contemplates his "making" a copy himself, though he describes it by the word "take"; and

(7) 2 Hare, 152.

(8) 41 L. J. C.P. 144; L. R. 7 C.P. 352.

(9) 70 L. J. K.B. 866; [1901] 2 K.B. 665.

(10) 70 L. J. Ch. 536; [1901] 2 Ch. 59.

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Lord Justice Lindley employs the word "take" in the same sense.

Then it was said that, although the right to inspect documents will, generally speaking, imply a right to make copies of the documents, because generally the whole object of inspection would be defeated if you could not make copies of the documents, yet that general right may be negatived; and for that purpose *Balaghat Gold Mining Co., In re*,⁹ was cited. It was said that because in that case, in which the right of inspecting the register of members of a company was given by section 32 of the Companies Act, 1862, the Court held that the only right was that which was expressly given by the Act, and that there was no right to take extracts or make copies of the entries in the register, we ought to say here that as sub-rule 18 of rule 27 of Order LXV. enables the person inspecting to obtain copies in a particular way, the inference is negatived that he has a right to make copies himself. In that case reliance was placed on *Mutter v. Eastern and Midlands Railway*,² in which the right to inspect and peruse the register of debenture-stockholders of a company was given by section 28 of the Companies Clauses Act, 1863. It is true that in both those cases the right to inspect was a statutory right, and that you must look at the statute to see whether a right to make copies was also given. But the distinction between the two cases was pointed out by Sir A. L. Smith, M.R., in *The Balaghat Gold-Mining Co., In re*,⁹ where he said, "I quite agree with what fell from Lindley L.J. and other members of this Court in *Mutter v. Eastern and Midlands Railway*,³ but that case was not decided upon this statute"—that is, the Companies Act, 1862—"but upon the Companies Clauses Acts. There is no case that binds us, but the matter came before Mr. Justice North in *Boord v. African Consolidated Land and Trading Co.* [1897],¹¹ and that learned Judge, mainly, as I think, on a consideration of cases not arising under this statute, came to the conclusion that the right to inspect carries with it the right to take copies. I cannot bring myself to agree with that

(11) 67 L. J. Ch. 451; [1898] 1 Ch. 596.

view. It seems to me that the statute fenced the right of the person inspecting, with regard to copies, by saying that he may require a copy of any portion of the register. That is not language to describe taking a copy, and, further, there is another restriction that he is to pay sixpence per hundred words for such portions of the register as he requires to be copied. In my opinion, it is not the true construction of the statute, on which alone the right to copies of the register depends, to say that the person inspecting is entitled to take a copy and to take it without paying anything. In *Mutter v. Eastern and Midlands Railway*,² Lindley L.J. finishes his judgment by stating the ground on which he came to the conclusion at which he arrived. He says: 'Upon the ground, therefore, that in this case the right to take a copy cannot be denied without rendering the right to inspect practically useless, I am of opinion that the order appealed from' which permitted the applicant to take copies 'was correct.' That does not apply to this case, because the person who inspects can get such copies as he requires by paying for them."

In my judgment neither of those cases assists us in the present case. When once you have arrived at the conclusion that the work "take" may cover the case of a person making copies for himself, the only question to be decided is whether there is anything in the Acts or the Rules which tends to shew that the only right now is to obtain copies of the documents from the other litigant on payment of the charge mentioned. I can find nothing in the Acts or the Rules which leads me to that conclusion. It is said that the making of copies by the person inspecting might cause great inconvenience in the office of the solicitor where the documents are produced. I do not think that is a sufficient reason for saying that the settled practice has been altered, and that there is now no right to make copies. In my opinion, Mr. Justice Joyce was perfectly right in making the order which he made. The defendants were in default in refusing to allow copies of the documents to be made. If the contention of the defendants is right, the practical result would

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be, as was pointed out by Vice-Chancellor Wood in *Bonnardet v. Taylor*,⁵ that "if the plaintiffs are to be contented with taking copies from the defendants' solicitors, they must bespeak copies of the whole" of the documents when they may really require only to make copies of parts.

STIRLING, L.J.—I am of the same opinion, and I agree with the reasoning of Mr. Justice Joyce. The real question is, What is the meaning of the order which was made by Mr. Justice Joyce on February 17, 1903? That order is the common order for production of documents, and it is in the form 18 in Appendix K to the Rules of the Supreme Court, and it is the form which was in use in the Court of Chancery prior to the Judicature Act. There is no dispute as to what was the meaning of such an order when it was made before the Judicature Act. The effect of it was thus explained by Vice-Chancellor Wood in *Bonnardet v. Taylor*⁵: "The common order gives the plaintiffs power to go themselves and make copies and extracts, though the usual practice is to take the copies from the solicitors of the defendants." There can, I apprehend, be no question about the meaning of the order at that time, or that the word "take" in it included "make." The second order made by Mr. Justice Joyce on June 8, 1904, was practically in the same form, and, if it had been made before the Judicature Act, there can be no question that the word "take" would have included "make." Is there, then, any reason to suppose that the meaning of the order has been altered by anything contained in the Rules under the Judicature Act. Order XXXI. rule 14, gives power to the Court or a Judge at any time during the pending of any cause or matter to order the production by any party thereto upon oath of such of the documents in his possession or power relating to any matter in question in such cause or action as the Court or Judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

By those two orders of February 17, 1903, and June 8, 1904, the Court did

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direct the production of documents by the defendants, and also to a certain extent directed how the documents, when produced, were to be dealt with. Rule 15 of Order XXXI. deals with a more limited class of documents. It deals with the production for inspection of documents which are referred to in the pleadings or in affidavits, and it provides that every party shall be entitled to give notice to the other party to permit him "to take copies" of such documents. It is not disputed that the word "take" there includes "make." Then we come to sub-rule 18 of rule 27 of Order LXV. That order deals with "Costs," and rule 27 deals with "Special Allowances and General Regulations." [His Lordship read sub-rule 18.] It is said that the effect of that sub-rule is to deprive the litigant of the right which before the Judicature Acts he would have had under an order made in this form—the right of making copies himself of the documents produced. In my judgment that right is a valuable one to a litigant. It might save expense to a poor man, and might be valuable in other ways. It would hamper litigants if they were deprived of that right. Is that the true effect of sub-rule 18? In my opinion it is not. I think that if it had been intended to deprive litigants of that right it would have been done by express words. It appears to me that sub-rule 18 was intended only to deal with costs—to regulate the terms on which a litigant is to be supplied with copies of documents by his opponent. That is the view which was taken by Mr. Justice Joyce, and I agree with him. It is said that this practice would be inconvenient, and that it is not often resorted to. I agree that the practice is not often resorted to; and it is always in the power of the Court to frame the order in such a way as to diminish the inconvenience as much as possible.

Appeal dismissed

Solicitors—Robert Kent, for appellants;
Lewis & Lewis, for respondents.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
1905. } COULL'S SETTLED
April 7, 14. } ESTATES, *In re*.

Settled Land—Compound Settlement—Separate Instruments—Trusts by Reference—Appointment of Trustees for Purposes of Act—Discharge of Incumbrance on One Estate by Mortgage of Both—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. 1 and 8—Settled Land Act, 1890 (53 & 54 Vict. c. 69), ss. 11 and 16.

Where it is necessary to appoint trustees for the purposes of the Settled Land Acts, and the settlement consists of two instruments forming one compound settlement, the trustees must be appointed of the compound settlement and not of either one or other of the separate instruments.

Semble, a power of sale does not constitute trustees for the purposes of the Acts unless it is a general power—that is, a power exercisable at any time and for any purpose, and not a power exercisable on a contingency and for a particular purpose.

By his will dated July 21, 1870, Robert Coull, after appointing certain persons trustees without power of sale, for the purposes thereafter expressed, devised all his real estate to certain uses which failed, and subject thereto to the testator's niece, Isabella Forster, since deceased, for life, and after her decease to the use of her sons and their respective issue male, but so that the sons with their respective issue should take severally and successively according to their respective seniorities, and so that every such son begotten in the testator's lifetime should take an estate for life with remainder to his first and other sons severally and successively according to their respective seniorities in tail male. And as to the term of seven hundred years limited to the trustees, the same was so limited upon certain trusts for securing the payment of certain annuities.

The testator died on April 16, 1875, and in the events which had happened W. D. Forster Coull, the eldest son of Isabella Forster, was now tenant for life of the settled estates, and the person now presumptively entitled to the first estate

tail in remainder was J. L. Forster Coull, an infant.

By a conveyance dated August 16, 1904, in consideration of 7,800*l.* certain freehold hereditaments hereafter called "the newly acquired property" were conveyed to the use of W. D. F. Coull in fee-simple.

By indenture of August 17, 1904, the newly acquired property was mortgaged to the North-Eastern Banking Co. for 7,000*l.*

By an indenture of settlement of December 5, 1904, the newly acquired property was conveyed, subject to the above-mentioned mortgage and to the costs, charges, and expenses incurred by the settlor in relation to the conveyance, mortgage, and settlement of the newly acquired property, to the uses and upon the trusts of the above-stated will. It also contained a proviso that the trustees should have full power by sale or mortgage of the hereditaments and premises thereby granted, or any part or parts thereof, to raise the amount of the costs, charges, and expenses incurred by the settlor in relation to the purchase of the hereditaments and premises, and for that purpose to revoke all or any of the uses or trusts applicable to the said hereditaments or premises thereunder, and to appoint or limit the same for any term or terms of years or in fee-simple as they or he should in their or his absolute discretion think fit.

This originating summons was taken out by the tenant for life asking that trustees might be appointed for the purposes of the Settled Land Acts, and that they might be directed to raise and pay the mortgage debt and costs aforesaid by a mortgage of the entire settled property.

P. O. Lawrence, K.C., and J. M. Stone, for the tenant for life.—We ask that the incumbrance on the newly acquired property may be raised by a mortgage of the entire settled property. *Mundy's Settled Estates, In re* [1891],¹ and *Byng's Settled Estates, In re* [1892],² were the converse of the present case. There capital money under the second settlement was applied

(1) 60 L. J. Ch. 273; [1891] 1 Ch. 399.

(2) 61 L. J. Ch. 511; [1892] 2 Ch. 219.

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towards improvements on land in the first settlement. But in *Monson's (Baron) Settled Estates, In re* [1898],³ the same principle was held to apply where the money was raised out of the settlement which was the earlier in date. This can be done under sub-section 1 of section 11 of the Act of 1890.

The principal question, however, in this case is a technical point as to the appointment of trustees for the purposes of the Acts—that is, whether they ought to be appointed of the compound settlement or of one or other of the separate instruments. It appears that in *Stafford's (Lord) Settlement and Will, In re; Gerard v. Stafford* [1904],⁴ Byrne, J., did appoint trustees of the compound settlement, though no reasons are given for the decision, and the case is not reported on that point. In neither *Mundy's Settled Estates, In re*,¹ *Byng's Settled Estates, In re*,² nor *Monson's (Baron) Settled Estates, In re*,³ were any trustees appointed. In *Mundy's Settled Estates, In re*,¹ there were two instruments, one referring to the other, as in the present case; and in that case Kay, L.J., refers to the difficulty arising from there being two sets of trustees. The only question here is whether to appoint one set of trustees or two sets; and we ask, on the authority of Byrne, J.'s decision, that one set of trustees be appointed of the compound settlement.

Austen-Cartmell, for the tenant in tail in remainder.—The only difficulty is whether the transaction is not colourable. If it is not, then it is for the Court to say on the evidence whether it is prudent. It cannot in all cases be necessary to appoint trustees of a compound settlement.

[KEKEWICH, J.—Can you take money out of the original settlement in order to pay off a mortgage in the second settlement? The Act speaks of “discharging an incumbrance on the settled land.” What is the settled land? How do you bring the two settlements together?]

When once you get a compound settlement, there is one settlement for all purposes for ever thereafter. The settled land in the present case is the land held

upon the trusts of the will and settlement. In the cases cited three Judges used the term “compound settlement” where the circumstances were the same as here.

J. Fischer Williams, for the trustees of the settlement.—The trustees of the settlement of December 5, 1904, are trustees for the purposes of the Act. They have full power of sale to raise certain costs, with power of revocation and new appointment. They come, therefore, within the wording of sub-section 8 of section 2 of the Act of 1882.

[*P. O. Lawrence, K.C.*—A power of sale for a limited purpose does not constitute trustees for the purposes of the Act—*Morgan's Settled Estates, In re* [1883].⁵ The case of *Brown, In re; Dixon v. Brown* [1886],⁶ cited in *Wolstenholme*, does not support the statement.]

If they are trustees of the settlement, they are, by section 16 of the Act of 1890, also trustees of the will. This case is almost exactly like *Monson's (Baron) Settled Estates, In re*.³

It is not necessary to appoint trustees of the compound settlement, and to do so would cause difficulties and confusion among conveyancers. The effect would be to put on the title of one property the title of another property, and to make the land subject to two titles, one of which does not affect the trustees at all.

Curr. adv. vult.

April 14.—KEKEWICH, J.—The applicant is tenant for life under the will of Robert Coull dated July 21, 1870, which devised considerable residential property in Northumberland. This will I shall hereinafter refer to as “the main settlement.” He is also tenant for life under a deed of December 5, 1904, comprising a small property situate in the midst of the other larger property, and a desirable accretion to it. The applicant bought this property himself for 7,800*l.*, and mortgaged it for 7,000*l.*, part of the purchase-money, he providing the balance, and he settled the equity of redemption by this deed of December 5, 1904, whereby it was conveyed to the uses of

(3) 67 L. J. Ch. 176; [1898] 1 Ch. 427.

(4) 73 L. J. Ch. 560; [1904] 2 Ch. 72.

(5) 53 L. J. Ch. 85; 24 Ch. D. 114.

(6) 55 L. J. Ch. 556; 32 Ch. D. 597.

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the main settlement. I propose herein-after to refer to this deed as "the subsidiary settlement." The avowed object of it was to enable the 7,000*l.* and the amount expended on costs, charges, and expenses incurred in the acquisition of the accretion, to be raised by a mortgage of the entire settled property; and to this there can be no objection, provided of course that the money can be properly raised in prudence and in law. There is no doubt about the prudence, of which there is convincing evidence, and the only question is whether it can be properly done in law, and how. There are no trustees of the main settlement within the meaning of the Settled Land Acts; and I think, as will appear in the sequel, that there are no trustees of the subsidiary settlement within those Acts. A mortgage therefore being impossible without the appointment of trustees, the question is whether it will suffice to appoint trustees of either one or other of the settlements, or whether there ought to be appointed trustees of the settlement compounded of the two. The phrase "compound settlement" is not to be found in the Settled Land Acts, but has been conveniently invented to describe what is there distinctly mentioned and contemplated. The Act of 1882, s. 2, sub-s. 1, provides as follows: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires." Can it be said that either the main settlement or the subsidiary settlement is the settlement with which the Court is dealing in the present case? It is proposed to mortgage not merely the property comprised in the main settlement, not merely the property comprised in the subsidiary settlement, but the entire property

settled by the conjoint operation of both—that is, the property originally settled plus that subsequently settled by reference to the other. This is a distinct settlement contemplated by the enactment quoted, and conveniently styled a compound settlement. It seems to me that, regarding the question merely as one depending on the construction of that enactment, there must be appointed trustees of the compound settlement to whom notice may be given pursuant to section 45, sub-section 1, and that, unless trustees are appointed of the compound settlement, there will be none to whom notice can properly and adequately be given pursuant to that section.

But there are some authorities to be regarded, and they present difficulties. I will turn first to the case of *Stafford's (Lord) Settlement and Will, In re; Gerard v. Stafford*,⁴ reported only before Mr. Justice Warrington. It is to be regretted that the previous hearing before Mr. Justice Byrne has not also been reported, for his judgment is instructive and important. In the absence of a report I must refer to that judgment, of which a copy is before me, somewhat fully. The will of Lord Stafford settled certain chattels, one of which, a valuable picture, had been sold for a large sum by leave of the Court. The order giving that leave will be mentioned below. An application was then made in the matter of the will, and in the matter of a settlement dated January 26, 1874, asking that the trustees of the deed of settlement might be appointed trustees of the settlement of the heirlooms created by the will, and of the deed of settlement for all the purposes of the Settled Land Acts, and that the trustees of the will might be directed to transfer to the trustees to be appointed the proceeds of the sale of the picture, and that the trustees so appointed might be directed to apply the said proceeds in discharge of incumbrances affecting the inheritance of the land comprised in the deed of settlement. It will be observed that the summons expressly asked for the appointment of trustees of the two instruments as one, treating them as combined for that purpose.

There is a great similarity, in fact,

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between that case and this, because the applicant was tenant for life under two separate settlements, one of which corresponded to the main settlement here, and the other to the subsidiary settlement. By the first (the settlement of 1874) a residential property was devised to the applicant for life with remainders over, and by the second (Lord Stafford's will) chattels were bequeathed upon trust to permit the same to be used and enjoyed by the person who by virtue of or under the limitations of the settlement of 1874 was for the time being entitled to the lands thereby settled. The case first came before Mr. Justice Buckley, who on July 9, 1902, made an order approving a conditional contract entered into by the trustees of the will for the sale of a picture, and, after expressing the opinion of the Judge that the trustees of the will were the proper persons to receive the purchase-money, ordered them thereout to pay 150*l.* for a copy of the picture, and also certain costs. He did not deal further with the application, and it is agreed on all hands that he did not decide that it was a case of compound settlement. The question whether it was so or not was not mooted before him. But when the summons came before Mr. Justice Byrne on the further application for the appointment of trustees, he was called upon to decide that question, and he deemed himself driven to say that the settlement was a compound one, consisting of the two instruments mentioned in the title of the summons, which was also the title of Mr. Justice Buckley's order. He says, "By a slip or inadvertence the trustees of the will were not appointed trustees of the combined settlement, and I cannot doubt that had the point been mentioned to the Judge he would have appointed them to be such trustees." After referring to difficulties occasioned by the order for payment of the proceeds of sale to the trustees of the will and for their disposal of part thereof, he says, "but on the whole I think I can read the order as merely making the trustees of the will the first recipients for administrative purposes before payment to the trustees of the settlement notwithstanding the direction for payment

of the 150*l.*, being the cost of making a copy of the picture sold, which *prima facie* ought under section 37, sub-section 2, to be made by the trustees of the settlement, the money not being paid into Court." Mr. Justice Byrne then discussed the question who were the proper persons to be appointed trustees of the settlement—that is, trustees of the compound settlement—and gave special reasons for the conclusion that in that particular case it was right to appoint the trustees of the will, notwithstanding that ordinary rules would have led to the appointment of the trustees of the deed of 1874. It is impossible to find a more distinct decision than in such a case as is now before the Court an appointment of trustees of the compound settlement must be made before the application of capital money arising under the subsidiary settlement to purposes with which the main settlement is also concerned can be sanctioned. I understand the learned Judge to have based his conclusion on consideration of section 2, sub-section 1, and section 45, sub-section 1, and to have decided that the settlement with which he was dealing was neither the will nor the deed, but a third distinct settlement—namely, the compound settlement. The value of his judgment on this point is enhanced by the difficulties which he entertained by reason of Mr. Justice Buckley's order being made without reference to the question whether it was essential to appoint trustees of the compound settlement, and, indeed, was so expressed as, on one construction, to point to there being no such necessity.

The case came before the Court again, this time before Mr. Justice Warrington, and on that hearing it is fully reported. That learned Judge had only to consider whether part of the proceeds of sale of the picture might under altered circumstances, which need not be here mentioned, be properly applied in discharge of a mortgage on land settled by the deed of 1874, and he ultimately decided that this might be done. But first he refers to the hearing before Mr. Justice Byrne and his order, which had not been drawn up, and he says this: "In the first instance the matter came before Mr.

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Justice Byrne, upon an application for the appointment of trustees of what is described in the summons as the settlement of the heirlooms created by the will and settlement. That part of the application has been disposed of by Mr. Justice Byrne, and I must take it that the order now to be pronounced will contain a direction that three persons, who are in fact the trustees of Lord Stafford's will, 'be appointed trustees of the compound settlement of the heirlooms and of the proceeds of sale of such of them as have been sold created by the above mentioned settlement and will for all the purposes of the above mentioned Acts.' I proceed upon the basis of that order having been made." Reference to the report will shew that the directions given by Mr. Justice Warrington did in fact strictly proceed on that basis, and that his order is workable only as containing directions to the trustees of the compound settlement. It is nevertheless impossible to treat Mr. Justice Warrington as having decided that there was a compound settlement or that it was necessary to appoint trustees of it, for he of course started on the basis of Mr. Justice Byrne's order and acted on it. The most that can be said is that he accepted Mr. Justice Byrne's conclusions as satisfactory to his own mind, and that I have reason to believe is the fact.

But there are some other authorities which require notice, and I will deal with them in chronological order. The first is *Mundy's Settled Estates, In re.*¹ There lands were settled by deed in 1872, and then by will other lands and personal estate were settled to and upon the uses and trusts of the deed by reference. It was proposed to apply some of the personal estate in the improvement of the lands comprised in the original settlement, and this was sanctioned. The real question was whether the personal estate could properly be treated as capital money for the purposes of the original settlement, and it was held that it was to be so treated. But for that purpose it was necessary to consider whether the two instruments together constituted one settlement; and although Mr. Justice North thought

otherwise, I read the judgments in the Court of Appeal as deciding that they so held. The phrase "compound settlement" does not occur, and I doubt whether the question whether it was necessary to appoint trustees of the one settlement was present to the mind of any one of the Judges who heard the case. I observe that it was not suggested in argument. There were separate trustees of the original settlement and will, and it seems to have been throughout considered that the trustees of the original settlement were the proper persons to apply the money if the proposed application thereof was sanctioned. The case is no authority on the point now under discussion.

The next case is *Byng's Settled Estates, In re.*² There again the question arose whether a will and a deed settling land to the uses of the will were one settlement; and Mr. Justice North, following *Mundy's Settled Estates, In re.*¹ held that they were. He says, "it seems to me that, for the purpose of laying out capital money in improvements, the limitations of the two instruments taken together do form what I may call one compound settlement." He therefore had distinctly before him the notion of a settlement which was not the will nor the deed, but something distinct and compounded of both. But the necessity of appointing trustees of that distinct settlement was not mooted. This probably was because the same persons were trustees of both instruments, and probably, therefore, it did not occur to any one that there might be a legal, though there was no practical, difficulty.

Mr. Justice Romer had to deal with a similar case in *Monson's (Baron) Settled Estates, In re.*³ There an equity of redemption in one estate had been settled by reference to the limitations of another estate contained in a separate deed, and the learned Judge held that moneys required to discharge the incumbrance might be raised by a mortgage on both estates. He refers to *Mundy's Settled Estates, In re.*¹ and *Byng's Settled Estates, In re.*² and in connection with the latter uses the phrase "compound settlement"; but again the distinction between that settlement and the two of which it was compounded was not noticed, and the

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necessity of appointing trustees of it was not suggested. It appears from the report that by virtue of two orders of the Court the same persons were trustees for the purposes of the Settled Land Acts of both instruments, so that no practical difficulty was apprehended.

The result is that, while I have three cases, and there may have been many more, in which the question whether trustees of the compound settlement ought to be appointed might have been raised, but was not raised, I find in no one of them any indication of opinion that such an appointment is not necessary. Whereas, on the other hand, I have the fully considered opinion of Mr. Justice Byrne that it is necessary, and that was acted on by Mr. Justice Warrington. I am told that if I adopt that opinion it will introduce confusion among conveyancers. I hope not, and am sure that if confusion there be they will promptly disperse it. Indeed, I venture to think that confusion is more likely to result from a different conclusion. I assume that the application of the money which the Court has in other cases sanctioned without the appointment of trustees of a compound settlement has been properly made, and that all has gone well notwithstanding that one precaution which I deem necessary has not been observed. The provisions of the Conveyancing Act, 1881, s. 70, sub-s. 1, would, as is noticed by Mr. Justice Byrne, assist this. But the point having been now raised, a decision is necessary, and I must decide it as seems to me to be right.

In view of the above decision it is unnecessary to consider the point urged by counsel for the trustees; but it is one of some practical importance, and, having formed a distinct opinion on it, I think it may be useful for me to express that opinion. It will be remembered that what I have styled the subsidiary settlement was really a settlement of an equity of redemption. It contains a proviso that the trustees shall have full power by sale or mortgage of the hereditaments thereby granted, or any part thereof, to raise the amount of the costs, charges, and expenses incurred by the settlor in rela-

tion to the purchase of the hereditaments, and for that purpose to revoke all or any of the uses or trusts applicable to the said hereditaments, and to appoint or limit the same for any term or terms of years or in fee-simple as they shall think fit. It was argued that this was a power of sale within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 8, and that therefore the trustees of that settlement were trustees of it within the meaning of the Settled Land Acts. It was further argued that if they are trustees within the meaning of the Acts of the subsidiary settlement, they therefore are also trustees of the main settlement by reason of section 16, sub-section 1 of the Settled Land Act, 1890. I doubt this conclusion, but will say no more about it, because I do not think that there are trustees of the subsidiary settlement within the meaning of the Acts. In a note in Mr. Wolstenholme's book to part 5, section 2, sub-section 8, the learned author says: "It is conceived that executors with power to sell for payment of debts are not, but that persons with a general power of sale are, trustees within this section. The power must be general." This, in my judgment, is correct. It may be difficult to state why the Legislature provided that trustees with power of sale, and no other persons, should be trustees for the purposes of the Act, especially as any principle that has occurred to me as likely to be the foundation of the enactment has been rather infringed by the amendments introduced by the Act of 1890, s. 16; but I think a general power and not a limited power—that is, a power exercisable at any time and for any purpose, and not a power exercisable on a contingency and for a particular purpose—must have been intended.

There is, so far as I am aware, no authority on the point; but I was referred to *Morgan, In re*,⁵ where the will contained a proviso that the trustees might sell and convey all or any of the settled lands in consideration of annual ground-rents or fee-farm rents to be reserved out of or charged and secured out of the hereditaments, and there was no other power of sale. Mr. Justice North held that the person entitled to the income

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was a tenant for life within the meaning of the Act, and appointed trustees for the purposes of the Act. This, of course, he could not have done if the trustees of the will had been already trustees for the purposes of the Act by reason of the proviso above mentioned. It was not suggested that they were.

I will therefore appoint trustees of the compound settlement for the purposes of the Settled Land Acts, and authorise them to raise by mortgage of the entire property what is required to discharge the incumbrance on the lands comprised in the subsidiary settlement, together with the costs of this application, and to apply the amount raised accordingly. But this must be conditional upon the applicant releasing the power of revocation contained in the subsidiary settlement, which I understand he is willing to do.

Solicitors—Crossman, Prichard, Crossman & Block, agents for Brumell & Sample, Morpeth, for all parties.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

LORD ALVERSTONE, C.J. } ATT.-GEN. v.
VAUGHAN WILLIAMS, L.J. } METROPOLI-
STIRLING, L.J. } TAN ELECTRIC
1905. } SUPPLY CO.
March 22.

Electric Lighting—County of London—
—“Areas of supply”—Undertakers—
Prohibition against Supplying beyond
“area of supply”—Limited Liability
Company—Restriction on General
Trading Powers—Metropolitan Electric
Lighting Act, 1889 (52 & 53 Vict. c. cxcvi.),
s. 5—Metropolitan Electric Supply Com-
pany Act, 1898 (61 & 62 Vict. c. ccxxv.).

A limited company incorporated under the Companies Acts, 1862 to 1886, and having for its objects the production and supply generally of electric, magnetic, or other force for lighting and other purposes, undertook to supply certain statutory “areas of supply,” within the administrative county of London, with electric energy, under special powers conferred upon it by

Act of Parliament, and by Provisional Orders confirmed by Act of Parliament, all of which contained a prohibition against the undertakers supplying energy, or erecting or laying down any electric lines or works beyond their statutory areas of supply, without the authority of Parliament or the licence of the Board of Trade:—Held, that the prohibition did not operate merely in connection with and relation to the particular area in question, but was of universal application, so that the company could be restrained from carrying on its business and supplying energy in any other place whatsoever, however far removed from its areas of supply, and although such business was carried on and supply furnished quite independently of any of the company's special statutory powers.

Decision of FARWELL, J. (*ante*, p. 145; [1905] 1 Ch. 24), affirmed.

Appeal from decision of Farwell, J.

The action was by the Attorney-General at the relation of the Willesden Urban District Council, and by the council, for an injunction to restrain the defendants from contravening the provisions prohibiting them from supplying energy beyond their area of supply as defined in the Act of Parliament, and the Orders confirmed by Act of Parliament, under which their statutory undertakings were held.

The facts are fully stated in the report of the case in the Court below, and the material provisions of the Acts of Parliament are set out there.

The relators were authorised by an Order and a confirmatory Act of Parliament to supply electrical energy within their district, and by a subsequent Act they were empowered to supply energy to any company owning a railway within the district for use therein.

The defendants were a limited company incorporated in 1887 under the Companies Acts, 1862 to 1886, and their objects were (*inter alia*) the producing, transmitting, storing, and using electric, magnetic, or other force for lighting and other purposes. They were authorised by the Metropolitan Electric Lighting Act, 1889 (52 & 53 Vict. c. cxcvi.), and by certain Electric Lighting Orders and

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Acts of Parliament confirming them, to erect and maintain electric lines and works, and to supply electric energy within certain districts in the Metropolis, defined respectively as "the area of supply." The Metropolitan Electric Lighting Act, 1889, contained in section 5¹ certain prohibitions, and the several Provisional Orders contained respectively similar prohibitions.

The demand for the supply of electric current within the areas supplied, and authorised to be supplied, by the defendant company afterwards increased very rapidly, and the company found it practically impossible to provide adequate station accommodation within their areas of supply to meet the demand, and they acquired land at Acton and Willesden and constructed a large generating station and works thereon; and by the Metropolitan Electric Supply Company Act, 1898 (61 & 62 Vict. c. ccxxxv.), the preamble to which contained a recital to the effect just stated, and that it would be for the convenience of those who used the electric current in the several areas of supply that the company should be empowered to supply from the said generating station and works electric current to their distributing stations within their several areas of supply, and to lay down certain cables and wires for that purpose, the company obtained power to use the lands at Acton and Willesden as a generating station, and to establish works thereon for that purpose, and for other purposes incidental to or connected with their undertaking or business. And by the Metropolitan Electric Supply Company Act, 1901 (1 Edw. 7. c. ccxxviii.), they obtained power to lay down cables and wires for that purpose.

(1) Metropolitan Electric Lighting Act, 1889, s. 5: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply otherwise than under the authority of Parliament or under a licence granted by the Board of Trade under the principal Act: Provided that where the undertakers were on May 20, 1889, supplying or under any binding agreement to supply energy to any premises beyond the area of supply they may continue to supply or supply energy to such premises until September 29, 1890."

The Act of 1898, in sections 12 and 13, expressly stated that nothing therein was to be deemed to release the defendant company from the liabilities and conditions imposed upon them by two of their Provisional Orders—the Order of 1890 for Paddington and the Order of 1889 for West London.

In December, 1903, the defendant company commenced to supply electric energy to the London and North-Western Railway Co. on their premises adjoining the defendants' Willesden works and within the urban district of Willesden, and they had since continued such supply. That supply did not involve the crossing of any public or private roads or any interference with the rights of any person or corporation.

The relators objected that this supply was a violation of the prohibitions contained in the defendant company's Acts and Orders and was illegal, and consequently this action was instituted.

Farwell, J., held that the defendant company were acting in contravention of the statutory provisions, and he granted the injunction asked for.

The defendant company appealed.

Cripps, K.C., Jenkins, K.C., and Sargant, for the appellants, referred to *Finchley Electric Light Co. v. Finchley Urban Council* [1903].²

[LORD ALVERSTONE, C.J., referred to *Gas Light and Coke Co. v. South Metropolitan Gas Co.* [1889].³]

Upjohn, K.C., and *J. W. Greig*, for the respondents, were not called upon.

LORD ALVERSTONE, C.J.—This case has been very ably argued, and every possible point which could be of assistance to us has been argued before us, but I am unable to see, speaking for myself, any fault in the reasoning of Mr. Justice Farwell's judgment, and I shall add but little to it. What I propose to do is to state the general grounds upon which I concur in that line of reasoning. These Electric Supply Acts for the Metropolis cannot in my opinion be considered quite independently of the general legislation

(2) 72 L. J. Ch. 297; [1903] 1 Ch. 437.

(3) 62 L. J. Ch. 123.

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with regard to the matter. I agree with counsel for the appellants that all the considerations that would apply, if we were dealing with an order made under the Electric Lighting Act, 1882, do not arise in this case, because that which the defendants are doing in the present case is not in exercise of any statutory power at all. They say that the defendants are a company under the Act of 1862, acting within their memorandum of association, and there is no prohibition in the Act of 1889 or the Provisional Orders of 1889 and 1890, when properly construed, to prevent their doing what they are doing. I am unable to take that view. I am unable to put any other construction upon section 5 of the Act of 1889 than that which Mr. Justice Farwell put upon it.

I agree with counsel for the appellants that the main object and scheme of these Orders under the legislation of 1889 was the provision of lighting for the Metropolis by districts. I think that the reason which induced the Legislature to provide that there should be only two companies in certain districts, and to make certain provisions with regard to the non-acquisition by one company of works in another district within the Administrative County of London except with the authority of an Act of Parliament, was that they recognised that as being the best scheme for the Metropolis. Where I am unable to follow counsels' argument is where they say that for the purpose of this legislation we may disregard entirely what I may call the outlying areas. The outlying areas must be coterminous to a very large extent with all of the districts the subject of this legislation, and unless there is something which plainly indicates to us that we are not to apply the plain language of the Act of Parliament to what is being done in an outlying area, we must take the words in their natural sense. The prohibition is contained in section 5 of the Act of 1889, and it is contained in the same terms in the three Orders for Mid London, West London, and Paddington. I rather gather that there are other Orders with regard to other districts of London which contain a similar clause.

Counsel have spoken of it as being a common form: "The undertakers shall not at any time after the passing of this Act supply energy or (except for the purposes of this Act) erect or lay down any electric lines or works beyond the area of supply, otherwise than under the authority of Parliament." It seems to me that *prima facie* that means this—given this statutory district and the rights which are going to be given in regard to this statutory district, one of the terms of the bargain is that the undertakers are not to supply electricity beyond that area except under the authority of Parliament. It is said that we may limit the word "undertakers," as meaning the people who are exercising the powers within the statutory district. I think that that would be a very strained construction to apply to this particular Act and these particular Orders, because section 3 of the Act states that the "undertakers" for the purpose of this Act are the Metropolitan Electric Supply Co., Lim.; and when we remember that they had no statutory powers before, and they were only then getting statutory powers, in my opinion the "undertakers" spoken of in section 5 are not intended to be a body to be created in future, or a body which may be carrying on this particular undertaking, but the people who are named and who have come to Parliament and asked for privileges. Then I am unable to answer my learned brother Farwell's reasoning that the proviso in section 5 is really unnecessary if the contention is correct that the section is only to apply to the districts in the Administrative County of London. It is perfectly true, as was pressed upon us, that it might very likely be wanted in the case of encroaching upon other districts; but at the same time it seems to me that if it was intended to leave the power of the undertakers free to supply electricity outside by agreement we should not have found the words given here "where the undertakers," who were a non-statutory company, "were on May 20, 1889, supplying or under any binding agreement to supply energy to any premises beyond the area of supply."

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I repeat as part of my judgment an observation which I made during the argument. I can well understand the Legislature wishing to have districts self-contained or largely self-contained with their own generating stations and systems which would or might some day be the subject of purchase by the local authorities, systems which would not be in competition with the adjoining districts of the Metropolis; and I can well understand that the Legislature also thought it desirable that the companies supplying those districts should not set up a non-statutory trade by agreement, outside the area or district which they were authorised to supply. There seems to me to be more than one reason why it may have been thought prudent to limit the powers of the companies in that respect. I am unable to construe the words "shall not supply energy beyond the area of supply otherwise than under the authority of Parliament" otherwise than as including a prohibition against the supply by these undertakers without Parliamentary sanction. I think to a certain extent that view is confirmed by the words "(except for the purposes of this Act) erect or lay down." I think that that shews that if for the mere purpose of supplying the district they might go outside then they could lay down electric lines or wires, though not supply the energy. Whether right or wrong, for reasons which Mr. Justice Farwell has given, and which I have ventured briefly to indorse by the few words I have used, I come to the conclusion that under the statutory bargain of which this company took the benefit in the year 1889 they took the limited rights, not the monopoly rights, in certain London districts, with the condition that they should not supply outside. I ought perhaps to say that I have no evidence before me that the outside local authorities were or were not heard with reference to it, and therefore I do not in any way base my judgment upon it.

That being so, I have only now to consider the Act of 1898. We have been pressed by counsel to hold that section 2 of that Act enables the company to establish generating works at Willesden for the general purposes of their business,

and to supply from the generating station by agreement outside the area. I think that the preamble to the Act affords a strong argument to shew that the case for enlarging their works from the necessities of their general business was not made before Parliament. I have a strong view from the preamble that the motive of this Act was the necessity of generating electricity in order to supply the district areas, and I cannot read the clause as negating by implication the express prohibition which, as I have said, I think exists by virtue of sections 4, 5, and 6 of the original Act of 1889 and of the Orders. Sections 12 and 13 of the Act of 1898 certainly do not assist the appellants. The Willesden local authority got certain powers under the Electric Lighting Act, 1882; and when we remember that the appellants did not get any statutory powers to supply Willesden, and that the Willesden Urban District Council were opposing it, and that there is a clause inserted for their protection, if I have taken the right view about the Act of 1889, I think they were entitled to rely upon the prohibition of supply therein contained. That being so, section 16 is not only necessary, but confirms my view. It is necessary for the company to be allowed to use the cables for the transmission of electric energy from the works at Willesden to the several distribution stations in all the four areas. It empowers the company "to use the generating station on the said lands for the purpose of supplying electric current within the several areas or districts over which the company have now powers of supply." I cannot read that as an unnecessary section. I cannot, if I may adopt the view expressed by Lord Justice Stirling during the argument, think that the language of section 2 is so large that no express power was necessary. If it was intended that the prohibition should be got rid of, and that this company should be free by agreement to supply electricity in the Willesden area, they being a statutory company under limited powers, we should have found different language. I may, of course, not be taking the correct view, but I have throughout this argument felt

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with regard to these Orders for the Metropolis, the Metropolis being surrounded by other local authorities, that one could not properly grasp the position without considering the rights conferred by the general Act of 1882. It is not at all to my mind inconsistent with those rights or that view that the Legislature may have intended to limit the right of supply outside this district; and, finding these express words, I am forced to apply the natural meaning to them, and am unable to put the limited meaning upon them which has been pressed upon me. I do not refer in terms to section 3 of the Act of 1889 beyond saying that, in my opinion, it does not deal with the right of supply at all. It merely deals with the position of persons who became assignees of the undertakers, and with the rights and obligations of the Metropolitan Electric Supply Co. themselves, if they thought fit to purchase or acquire or join with some company within the Administrative County of London. Section 3 does not assist in the construction of section 5, and, for the reasons which I have endeavoured to express, I agree with Mr. Justice Farwell, and think that this appeal should be dismissed, with costs.

VAUGHAN WILLIAMS, L.J.—I agree. After the full manner in which my Lord has dealt with this case I only propose to say a word or two, and I do not know that I should say anything if it were not that it seems to me that this case is very important, and may affect not only this company, but very likely other electric light companies.

I may say, speaking for myself, that this seems to me a very difficult Act of Parliament to construe, and I have been a good deal impressed by the arguments that have been addressed to us upon the lines that the Act of 1889 and the Board of Trade Orders were only intended to deal with places within the limits of the Metropolis. But, notwithstanding the feeling that there is a good deal in that contention, I am not prepared to depart from the plain meaning of the words of section 5 of the Act of 1889. The true effect of the argument of counsel for the appellants is that they invite us to intro-

duce into the section after the words "the undertakers shall not" the words "within the Administrative County of London." I am not prepared to do that. I give full consideration to the doubt I had in my mind as to whether the Act of 1889 and the Provisional Orders confirmed by the Act of Parliament are not limited to the Metropolis, but I think that when one looks at section 5 and looks at the proviso, the proviso goes a long way to exclude the contention that we ought to read section 5 as if it had no application except within the Administrative County of London.

Coming to the Act of 1898, the Act which is relied upon by the appellants as giving them authority to do that which they have now been restrained from doing, I do not purpose to repeat the observations either of my Lord or of Mr. Justice Farwell. I agree, for the reasons that they have given, that that contention cannot be supported. But, according to my view of the Act of 1898, not only does it not support the contention of the appellants, but the preamble of the Act and the provisions of section 16 both shew that the Legislature, when they passed the Act, passed it upon the basis and assumption that the Act of 1889 was not to be limited either in effect or in construction to the Metropolis. Under those circumstances, I think that the view which Mr. Justice Farwell has set forth ought to be adopted.

STIRLING, L.J.—I am of the same opinion, and I cannot add anything usefully to what has been said by my Lord and by Lord Justice Vaughan Williams and Mr. Justice Farwell.

Appeal dismissed.

Solicitors—Barlow & Barlow, for appellants;
W. G. Greig, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905. } JACKSON AND HADEN'S
March 29. } CONTRACT, *In re*.

Vendor and Purchaser—Title—Condition for Rescission—Objection as to Title—No Title to Part—Error in Particulars—Compensation.

A condition in a contract for sale, giving the vendor the right to rescind in case the purchaser should insist on any objection or requisition "as to title or evidence of title" which the vendor should be unable or should decline to remove or comply with, does not admit of rescission where the vendor has no title to a part of the property.

Principle of Bowman v. Hyland (47 L. J. Ch. 581; 8 Ch. D. 588) applied.

Mawson v. Fletcher (40 L. J. Ch. 131; L. R. 6 Ch. 91) distinguished.

A sale of freeholds, without reservation of mines and minerals (to which the vendor has no title), gives a right to compensation where the contract provides for compensation in case of error, misstatement, or omission in the particulars.

Summons by a purchaser under the Vendor and Purchaser Act, 1874.

On October 25, 1904, a private contract was made for the sale and purchase of "all that messuage or dwelling-house with the yard, stable, coach-house, garden, and appurtenances thereto belonging (including the wall on the eastern side of the premises and the hedge on the northern side of the premises) situate and being at Dawley Brook, Kingswinford, in the county of Stafford, and known as Yew Tree Villa, and now in the occupation of Harold John Haden" (who was the purchaser).

The price was 510*l.*, and the purchaser paid 51*l.* as a deposit. The area of the property was very small.

There was no exception of the mines and minerals, but on examining the abstract the purchaser discovered that in a former conveyance, forming part of the title, the mines and minerals had been reserved. He accordingly made a requisition calling for a title to be separately deduced.

The vendors replied that they had no title to the mines and minerals, and had

not contracted to sell them, and they alleged that it was customary in the district to sell the surface apart from the mines and minerals, and that this must have been within the knowledge of the purchaser.

Such a mode of sale was in fact frequently used in the neighbourhood, but the custom was not universal, nor had the purchaser any knowledge of it.

The present contract was made under the common-form conditions (so far as the same should be applicable to a sale by private treaty) of the Birmingham Law Society. They contained the following: "13. . . . If the purchaser shall insist on any objection or requisition as to title or evidence of title which the vendor shall be unable, or on the ground of expense shall decline, to remove or comply with, then notwithstanding any intermediate or pending negotiation, or any litigation which the purchaser may have commenced, or any attempt to remove or comply with such objection or requisition, the vendor shall be at liberty, by notice in writing signed by him or his solicitor and delivered to the purchaser or his solicitor, to rescind the contract. . . . Upon such rescission the purchaser shall be entitled to receive back his deposit money but without interest costs or other compensation, except costs of suit allowed by the Court in any litigation.

"14. Any error misstatement or omission in the particulars shall not annul the sale, but if pointed out before the completion of the purchase, and not otherwise, shall form the subject of compensation, which shall be allowed by the vendor or purchaser as the case may require. The amount of such compensation in case of dispute shall be settled by the auctioneer, whose decision shall be final."

The purchaser insisted on his requisition, but offered to take the property without the mines and minerals "at a proportionately and greatly reduced price," or to allow the vendors to rescind on payment of suitable damages.

The vendors thereupon gave notice to rescind the contract under condition 13, and returned the deposit. The purchaser took out this summons for a declaration that, notwithstanding the events which

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had happened, he was entitled under condition 14 to insist on the completion of the contract, with compensation in respect of the mines and minerals.

Asbury, K.C., and *Whitmore Richards*, for the purchaser.—The description of the property clearly included the mines and minerals—1 *Dart's Vendors and Purchasers* (7th ed.), pp. 124, 125, and *Lewis v. Branthwaite* [1831].¹

This is an error in the particulars entitling the purchaser to compensation under condition 14. There may be matters giving rise to compensation, though not to objection or requisition—*Jackson and Oakshott, In re* [1880],² *per Hall, V.C.* There could be no objection or requisition as to title to these mines, for no abstract was delivered. A condition allowing a vendor, if unable to remove an objection as to title, to rescind the contract, cannot be taken advantage of by a vendor who has no title—1 *Dart's Vendors and Purchasers* (7th ed.), p. 178, *Bowman v. Hyland* [1878],³ and the observations of Mellish, L.J., during argument in *Mawson v. Fletcher* [1870],⁴ and of Lindley, L.J., in *Deighton and Harris' Contract, In re* [1898].⁵ Such a condition must have something to operate on. It is inserted for the protection of the vendor against unreasonable requisitions causing unnecessary trouble and expense—*Monckton and Gilzean, In re* [1884],⁶ *per Bacon, V.C.*—and ought not to be arbitrarily or capriciously used—*Starr-Bowkett Society and Sibun's Contract, In re* [1889],⁷ *per Cotton, L.J.* Condition 13 in the present case seems to have been very carefully drawn, and is limited to objections and requisitions as to title—more limited than the clauses usually found in the precedent books, or those in *Mawson v. Fletcher*,⁴ *Dames and Wood, In re* [1885],⁸ or *Terry and White's Contract, In re* [1886],⁹ which

had reference to objections or requisitions on any subject. Condition 14 is the one applicable to the case, and not condition 13, which latter is intended to be strictly construed.

[They also referred to *Nelthorpe v. Holgate* [1844]¹⁰ and *Powell v. Powell* [1875].¹¹]

Mark Romer, for the vendors.—I rely on *Mawson v. Fletcher*.⁴ The decision in *Bowman v. Hyland*³ was said by North, J., in *Heppenstall v. Hose* [1884]¹² to apply only where a vendor shews no title to any part of the property. In *Terry and White's Contract, In re*,⁹ a requisition with regard to a deficiency of $1\frac{1}{2}$ out of 5 acres was treated as a valid ground for rescission. *Deighton and Harris' Contract, In re*,⁵ shews that in an honest case there is *prima facie* a right to rescind under such a condition. The fact that a misdescription may give rise to compensation does not prove it to be no ground for rescission—*Ashburner v. Sewell* [1891].¹³ There is no allegation that mines or minerals of any value exist under the property, which comprises only a yard and small garden, or that the purchaser would have been in any way prejudiced by not acquiring them. The deed by which they were reserved contains covenants amply protecting him in case of any letting down of the surface. There is therefore no reason why the vendors should be compelled to part with their property at less than the contract price.

No reply was called for.

BUCKLEY, J.—By a contract dated October 25, 1904, the vendors agreed to sell certain property by a description which is conceded to include the mines and minerals. They had in fact no title to the mines and minerals, and knew that they had none. No *mala fides* is attributed to them. The practice of severing the mines and minerals appears to have been a common one in the district, but of this the purchaser was not aware.

By the 13th condition of sale the vendors were to be at liberty to rescind

(1) 9 L. J. (O.S.) K.B. 263; 2 B. & Ad. 437.

(2) 49 L. J. Ch. 523, 525; 14 Ch. D. 851, 854.

(3) 47 L. J. Ch. 581; 8 Ch. D. 588.

(4) 40 L. J. Ch. 131; L. R. 6 Ch. 91, 93.

(5) 67 L. J. Ch. 240, 242; [1898] 1 Ch. 458, 462.

(6) 54 L. J. Ch. 257, 259; 27 Ch. D. 555, 563.

(7) 58 L. J. Ch. 651, 652; 42 Ch. D. 375, 387.

(8) 54 L. J. Ch. 771; 29 Ch. D. 626.

(9) 55 L. J. Ch. 345; 32 Ch. D. 14.

(10) 1 Coll. C.C. 203.

(11) 44 L. J. Ch. 311; L. R. 19 Eq. 422.

(12) 51 L. T. 589, 590.

(13) 60 L. J. Ch. 784; [1891] 3 Ch. 405.

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the contract if the purchaser should insist on an objection or requisition as to title or evidence of title which the vendors should be unable or should decline to remove or comply with; and by the 14th condition provision was made for compensation in case of any error, misstatement, or omission in the particulars. The vendors, as it turned out, had no title to part of what they had contracted to sell—namely, the mines and minerals; and the first question is whether the 13th condition enables them to rescind the contract.

To my mind there is an essential difference between the two things—an objection to a vendor's title as insufficient, and an objection that he has no title at all. You cannot have an objection to a title which does not exist. In such a case your objection is that there is no title, and to this the term "objection to title" does not apply. That was decided by Vice-Chancellor Hall in *Bowman v. Hyland*.³ The headnote is as follows: "A condition in a contract for sale that, if the purchaser shall make any objection or requisition which the vendor shall be unwilling on the ground of expense or otherwise to comply with, the vendor may annul the sale, does not enable a vendor to rescind the contract in a case where he fails to shew any title whatever." Does the same principle apply where there is absence of title as to part of the property? I think it does, and I refer to the interlocutory remark of Lord Justice Mellish in *Mawson v. Fletcher*⁴: "It may be conceded to you"—that is, the purchaser—"that, if there was a clear case of defect of title to part, you would be entitled to specific performance with compensation; but it is not so, and we cannot now make a decree for specific performance with compensation, inasmuch as there must first be an inquiry whether the vendors have a title; that inquiry will probably be long and expensive, and be the very thing which the vendors wish to avoid." That case, on which counsel for the vendors principally relied, proceeded on this ground—that the vendors insisted they had a title to the minerals, which the purchaser denied. The question was, Have the vendors a title or not? But

to a case where no such question arises because *ex concessis* the vendors have not a title *Mawson v. Fletcher*⁴ does not apply. Here every one knew at an early stage that there was no title, and that the vendors meant to sell without the minerals because they had no title to them. *Mawson v. Fletcher*,⁴ therefore, does not apply, except that Lord Justice Mellish's observation is in favour of the purchaser. The third case is *Deighton and Harris' Contract, In re*,⁵ where Lord Justice Lindley said, "This . . . is a case of vendor and purchaser, and it is one in which the vendor is not in the position of a man who agrees to sell property to which he has no title at all"; and then he referred to *Bowman v. Hyland*,³ which he distinguished, and the headnote summarises the decision as follows: "The ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, not where he has none."

I think myself that that is a perfectly sound principle. You cannot say you take objection to something which is non-existent. The objection here is not to some defect in the title, but to the fact that there is no title, and therefore the 13th condition does not apply. Then does the 14th condition apply? Has there been "any error misstatement or omission in the particulars"? I think there has. The description given is one which would include mines and minerals, and there were none. The purchaser expressed his willingness to complete his contract on a proper title being shewn, or to complete without the mines and minerals at a proportionately reduced price, or to allow the vendors to rescind on payment of suitable damages. The vendors did not accept his terms. In my opinion he is entitled to insist on completion with compensation, and I make the order in terms of the summons.

Solicitors—A. E. Bale, agent for Harwards & Co., Stourbridge and Birmingham, for purchaser; Robbins, Billing & Co., agents for William Waldron, Brierley Hill, Staffordshire, for vendors.

[Reported by R. Hill, Esq.,
Barrister-at-Law.

BUCKLEY, J. } SOUTHERN BRAZILIAN RIO
1905. } GRANDE DO SUL
April 13, 15. } RAILWAY, *In re.*

Company—Winding-up—Sale of Undertaking—Borrowing Powers—"Irredeemable" Debenture Stock—Ultra Vires—Right to Redeem—Explaining Memorandum by Articles.

Where the memorandum of association of a railway company, incorporated under the Companies Acts, 1862 to 1882, and not governed by the Companies Clauses Acts, enables it to borrow money by the issue of debenture stock, and the articles of association provide that the board may issue such stock as redeemable or irredeemable, debenture stock issued as irredeemable is nevertheless redeemable at par on the winding up of the company.

Articles of association can be read for the purpose of explaining the memorandum in respect of a matter which need not appear in the latter—for example, the borrowing of money by a railway company—but not for the purpose of shewing that borrowing means the granting of perpetual annuities, for that is not borrowing, nor is it a purpose subsidiary to the general objects of such a company.

Summons in a winding-up, issued on an agreed statement of facts by a holder of irredeemable debenture stock of a company.

The company was incorporated in 1882 under the Companies Acts, 1862 to 1882, as a company limited by shares, for the purpose of acquiring by transfer the benefit of a concession granted to a French company by the Imperial Government of Brazil, in 1873, for the making and working of a railway in that country, and was also entitled, under decrees of the same Government, to a guarantee of interest, on capital moneys expended, at 7 per cent. per annum for thirty years.

Among the further objects stated in clause 3 of the memorandum of association were the following :

"(7) To borrow money by the issue of any mortgages, debentures, debenture stock, bonds or obligations of the company either at par premium or discount, and also to borrow money on the security

of unpaid calls of the company or by such other means and upon such other securities as the company may from time to time determine, and to exchange or convert from time to time any such securities."

"(10) To make and enter into contracts or agreements for the purpose of carrying out any of the objects of the company."

"(11) To lease mortgage exchange transfer pledge sell surrender or otherwise deal with and dispose of all or any part of the undertaking or business of the company, and any concessions decrees grants privileges patents brevets d'inventions contracts agreements railways or other works shares interests rights or other property of the company."

Article 17 of the company's articles of association (so far as material) was as follows :

"The Board may . . . create and issue for the purposes of the company, debenture stock, bonds or debentures, to be secured upon the undertaking, revenues and property of the company for the time being, or any part thereof, and such debenture stock, bonds or debentures shall bear interest at such rates not exceeding 6 per cent., be irredeemable or redeemable in such manner and at such times and either above or below par, and be issued or otherwise dealt with upon such terms and conditions as the Board shall determine. Provided always that the annual sum payable by the company for the interest and sinking fund, if any, in respect of such debenture stock, bonds or debentures . . . shall not exceed the sum of" &c.

In exercise of the powers so conferred upon them, the directors, on June 29, 1883, passed resolutions creating irredeemable debenture stock to the nominal amount of 295,150*l.*, bearing interest at the rate of 6 per cent. per annum, and forming part of an aggregate amount which, together with certain other obligations, was to be a first charge on the main line of the railway, with its rolling-stock and the Government guarantee of interest thereon, but was to constitute a floating charge only until default in payment by the company of any sum payable

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thereunder. There was no mention of repayment in any event.

The applicant was the holder of 2,000*l.* of the said debenture stock, which he had purchased in the market at 100½ per cent. in 1904. There was no trust deed. The certificate was in the following form :

"This is to certify that of
is the Registered Proprietor of £
of 6 per cent. Debenture Stock of the
Southern Brazilian Rio Grande Do Sul
Railway Company Limited created by
Resolutions of the Board of Directors in
exercise of the powers conferred upon the
Board by the 17th Article of Association
and entitled to the privileges and subject
to the terms and conditions in the Reso-
lutions creating and regulating the same
contained."

The Federal Government of Brazil was entitled, under a decree of the late Imperial Government, to purchase the main line of the railway at the end of thirty years from its completion. Before that period expired the Government made an offer to purchase the whole of the company's railways and assets in Brazil for 650,000*l.*, payable in bonds, and at extraordinary general meetings of the company, held on January 17 and February 6, 1905, a special resolution was duly passed and confirmed to the effect that the offer was advantageous and should if possible be accepted, and that the company should be wound up voluntarily, the present respondents being appointed liquidators.

As part of the consideration for the purchase, the Government undertook at its own expense to pay, redeem, or otherwise satisfy, *inter alia*, the said debenture stock issued by the company and outstanding on the day fixed for completion ; and by a scheme of arrangement which was prepared and approved by a meeting of the shareholders convened under the Joint Stock Companies Arrangement Act, 1870, and the Companies Act, 1900, and was sanctioned by the Court on March 22, 1905, it was provided, *inter alia*, that the liquidators should not transfer or permit to be transferred to the Government the railway and undertaking of the company in Brazil unless and until the Government should have fully and effectually paid, redeemed, or otherwise satisfied all

liability of the company in respect of, *inter alia*, the said debenture stock.

No meetings of creditors of the company were held, and the scheme did not bind the debenture-stockholders, but on February 24, 1905, a circular letter had been sent to them, including the applicant, informing them of the resolution for winding-up and appointing liquidators, and of the intention to seek the sanction of the Court to the scheme, and proposing to pay off the debenture stock at par on April 17 in cash with interest at 6 per cent. to April 15. It was added that instead of cash the Brazilian Government was prepared, at the option of the debenture-stockholders, to issue bonds in payment of the stock at the price of 83*l.* per 100*l.* bond.

The applicant was not among those who exercised this option, and he issued the present summons against the liquidators in the following terms : "That it may be determined whether the liquidators are entitled as they claim to pay off at par the said sum of 2,000*l.* debenture stock, or whether, having regard to the resolutions passed by the board of directors on June 29, 1883, pursuant to which the said stock was issued and the certificate for such stock sealed by the company in favour of the applicant, he is entitled as he claims to have some, and if so what, sum paid to him out of the assets of the said company over and above the par value of his said stock and the interest for the same, as a term of the redemption of such stock or by way of compensation for the loss which would otherwise be caused to him by the payment off of his said stock contrary to the terms of issue."

Buckmaster, K.C., and *Harman*, for the applicant.—Assuming that the company had power to issue irredeemable debenture stock, a holder of one of these certificates is entitled in any liquidation to something more than the face-value of his stock, because what he holds is equivalent to a perpetual annuity at 6 per cent. on the stock, and the company has no power to redeem. The question then will be, what price must they pay if the security be taken over or given up?

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[BUCKLEY, J.—You cannot ask me to fix a price for redemption if the company cannot redeem at all.]

That is the difficulty. Irredeemable stock cannot be redeemed, but it will be argued on the other side that there was no power to issue such stock—that article 17 is *ultra vires*. We cannot claim any powers under the Companies Clauses Acts, but clause 3, sub-clause 7 of the memorandum is wide enough for the purpose. It gives power to borrow money in any way. It is none the less borrowing because the money is not necessarily repayable. The word “borrow” has acquired a special colloquial meaning and includes “raise.” It is thus the Government is said to “borrow” money on Consols, which are never repayable. This company has no powers under the Companies Clauses Acts; still it is a railway company, and the raising of money for the necessities of the business by the issue of irredeemable debenture stock is incident to all railway companies. It is not like a loaning company. The power to borrow is purely ancillary to the main purposes of the company, and therefore the articles can be read to explain the memorandum, though they cannot extend it, being merely the machinery by which the directors are to carry out the purposes of the company. The permanent nature of a railway company is also a point to be borne in mind.

The character of irredeemable debenture stock was discussed by James, L.J., in *Attree v. Howe* [1878],¹ and also by Romer, L.J., in *Jarrah Timber and Wood-paving Corporation v. Samuel* [1903],² and by Lord Lindley in the same case in the House of Lords. The *quere* at the end of the head-note in the latter case, as to the power of a limited company to issue irredeemable debenture stock, does not appear to be borne out by the judgments, except perhaps that of Romer, L.J.

[*Haldane, K.C.*, referred to the judgment of Cozens-Hardy, L.J.]

That does not appear to carry it any further. If the company can create an

annuity in perpetuity there is no doubt it can secure it by the creation of a charge. The granting of an annuity is not an object of the company, but a means of carrying out its objects, and therefore does not depend on the memorandum. That being the case, the articles can be read to supplement the memorandum as to that upon which it is silent—*Harrison v. Mexican Railway* [1875],³ *South Durham Brewery Co., In re* [1885],⁴ and *Buckley on the Companies Acts* (8th ed.), p. 18. This is a matter of great importance, in view of the enormous amount of capital invested in stocks of this nature.

[BUCKLEY, J.—Your summons asks for payment.]

It will be sufficient for my purpose if I get a declaration that the liquidators are not entitled to pay me off, omitting the words “at par” which follow in the summons.

Haldane, K.C., and *Coles* (originally instructed on behalf of the Brazilian Government), for the liquidators.—There are two questions in this case—what are the powers of the company, and what was the nature of the transaction? As to the first, it is embarrassing to liken this to the case of an English railway, which is an undertaking of a perpetual nature. The concessions were terminable at the end of thirty years, and when they came to an end the substratum for an annuity would be gone. What is authorized by clause 3, sub-clause 7 of the memorandum of association is borrowing and nothing else, but the sale of a perpetual annuity is a very different thing. This distinction was formerly made use of to evade the Usury Acts, which prohibited borrowing except at certain rates. Article 17 goes no further, for its powers are to be exercised for the purposes of the company—that is, of borrowing. In the proviso interest on the stock is mentioned and not money to provide for an annuity. The provision that the stock might be irredeemable relates equally to debentures, to which, in the sense sought to be attached to it, it would be inapplicable. The terms “pay off” and “renew” are inconsistent with anything but borrowing. The whole

(1) 47 L. J. Ch. 863, 866; 9 Ch. D. 337, 349.

(2) 72 L. J. Ch. 262, 266, 268; [1903] 2 Ch. 1, 10, 15.

(3) 44 L. J. Ch. 403; L. R. 19 Eq. 358.

(4) 55 L. J. Ch. 179; 31 Ch. D. 261.

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scheme of the article shews that borrowing was intended, and that the draughtsman thought he could authorise an irredeemable borrowing. But the doctrine that the equity of redemption cannot be clogged is as much in force now as it was in the time of Lord Hardwicke—*Samuel v. Jarrah Timber and Wood-paving Corporation* [1904],⁵ *Noakes & Co. v. Rice* [1901],⁶ and *Saniley v. Wilde* [1899].⁷

As to the second point, there is nothing in the resolutions to shew an intention of creating a perpetual annuity even if there were power to do so. The interest referred to is interest on the aggregate of the capital amount of debentures and debenture stock, and it was this aggregate which was to be a first charge on the property, whether it should consist of debentures or debenture stock. What is that but a borrowing? It may be the draughtsman thought he could make a stipulation against redemption so long as the company was a going concern, leaving the security to become enforceable on liquidation—*Wallace v. Automatic Machines Co.* [1894],⁸ *per* Lindley, L.J. The question is whether this is a mortgage or not.

Younger, K.C., and *Bischoff*, also for the liquidators.—Unless the applicant can rely on the articles to extend the memorandum, the latter gives only a power to borrow, and this involves the obligation at some time to repay. Debenture stock under [the Companies] Acts never involves repayment, but debenture stock under the Companies Acts is a totally different thing. It differs from debentures only in the same way that stock of a company under those Acts differs from shares, as being capable of consolidation or of subdivision for the purpose of transfer, and in both obligations payment is enforceable on a liquidation. Therefore there is in this memorandum what is perfectly plain and clear—an express power of borrowing for the purposes of the company. Article 17 enables the directors to exercise this power, but does not confer

any new power. The use of the word “irredeemable” at first seems to create a difficulty, but that word does not mean “perpetual”; it is rather used in contradistinction to those debentures which contain provisions enabling the company to redeem. It only means that while the company is a going concern, and not in liquidation, and there is no crystallisation of the rights of the stockholders, the company has no right to require them to take their money. The usual conditions as to paying off debenture stock are given in *Palmer's Company Precedents* (9th ed.), pt. 3, pp. 7 and 8.

There is nothing in the resolutions consistent with anything but borrowing or with the notion that what was intended to be done was perpetual. It is unthinkable that if the obligation of the company was merely to pay 6 per cent. the aggregate amount of the stock should be constituted a charge. The charge must be for that which it is the company's obligation to pay—namely, the amount of the stock—and if this is charged on the undertaking it must be liable to be repaid. Neither the memorandum nor the articles confer any power to grant perpetual annuities or to give security for them; the power they confer is to create debenture stock which may be irredeemable, and that, at the outside, means not to be redeemed at the option of the company while a going concern. Directly the company went into liquidation, however, it was as if the word “irredeemable” were not there. Even if this be held a perpetual annuity, the company by its liquidation and sale has intimated that it is not in a position to fulfil its contracts, and therefore the applicant can only recover damages for the breach, and may get more or less than the 2,000%.

Buckmaster, K.C., in reply.—There is a confusion of language in saying that the company can issue irredeemable debenture stock, but not grant perpetual annuities, for the latter is merely the legal mode of expressing the former. No company of this kind has power to grant perpetual annuities, but the powers of railway companies under the Companies Acts enable them to issue irredeemable debenture stock; and this, the Courts have said

(5) 73 L. J. Ch. 526, 529; [1904] A.C. 323, 330.

(6) 71 L. J. Ch. 139; [1902] A.C. 24.

(7) 68 L. J. Ch. 681; [1899] 2 Ch. 474.

(8) 63 L. J. Ch. 598, 600; [1894] 2 Ch. 547, 553.

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in the cases mentioned, means the creation of a perpetual annuity. It is not necessary to read the word "irredeemable" in article 17 as applying to the debentures; it must be taken to apply to such of the things mentioned as are capable of being irredeemable—namely, debenture stock and bonds. It is a mistake to say the capital value of the annuity is made a charge on the undertaking, and therefore is repayable. The same might be said of debenture stock under the Companies Clauses Acts. In *Wallace v. Automatic Machines Co.*⁸ it was the right of the debenture-holder, not that of the company, that was in question. If the contention on the other side be right, a company can at any time get rid of its debenture stock, which may stand at a very high price, by the simple process of going into liquidation and with the view of borrowing again at a lower rate of interest. This cannot be right. The applicant is entitled to keep his security.

Cur. adv. vult.

April 15.—BUCKLEY, J., read the following judgment: The applicant is the holder of 2,000*l.* debenture stock of the Southern Brazilian Rio Grande do Sul Railway Co., being stock which the board of that company have purported to create as irredeemable debenture stock. By a resolution confirmed on February 6, 1905, the company has gone into voluntary liquidation. It has agreed to sell its railway and undertaking to the Federal Government of the United States of Brazil, and a scheme of arrangement for that purpose has been sanctioned by an order of March 22, 1905. The scheme binds the contributories only. It does not affect the creditors. The applicant has the same rights as if the scheme had not been sanctioned. By this summons he asks determination of the question whether the liquidators are entitled, as they claim, to pay off the 2,000*l.* debenture stock at par, or whether the applicant is entitled, as he claims, to have some and what sum paid to him above the par value as a term of the redemption of his stock, or by way of compensation for the loss caused to him by paying

off his stock contrary to the terms of issue.

Two contentions have been put forward as to the nature of this stock. The one is that it is irredeemable under all circumstances and that the applicant is entitled simply to a perpetual annuity. The other is that it is irredeemable only in the sense that the company is not, at its option, entitled to redeem it except under circumstances, and that the winding-up is a circumstance under which the stock ceases to be irredeemable. If the applicant is the holder of a perpetual annuity, the question is whether the company had power to grant such an annuity. Clause 3, sub-clause 7 of the memorandum of association authorises the company "to borrow money by the issue of any mortgages, debentures, debenture stock, bonds, or obligations of the company." The applicant argues that "debenture stock" there bears the meaning attributed to it in the Companies Clauses Acts—that it means a perpetual annuity. He seeks to evolve this meaning from the fact that this is a railway company, and that railway companies—meaning by that expression companies under the Companies Clauses Acts—issue debenture stock which is perpetual. I think the argument unsound. This is not a railway company governed by the Companies Clauses Acts. Then he contends further that a company such as a railway company, which necessarily has a permanent undertaking in the sense that the permanent way is useless except for the purposes of a railway undertaking, may more readily be supposed to be taking power to issue perpetual debenture stock than a company of a less permanent character. The same argument would apply, say, to a telegraph cable company, and to others which might be suggested. The permanence of the undertaking does not, I think, throw light upon the nature of the instrument which the company is taking power to issue, and, if it did, I must add that the concession held by this company is only for a term of years, and that the Government is entitled to cut short even that term by purchasing after the expiration of the first thirty years from the completion of the railway. Such a company can scarcely

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contemplate the issue of debenture stock extending beyond the term of its own commercial life. The words of the memorandum are "to borrow money by the issue of "debenture stock. Borrowing necessarily implies repayment at some time and under some circumstances. The applicant seeks to read the clause as if it were to borrow "or raise " money by the issue of debenture stock. Those are not the words. The memorandum of association uses language which, I think, necessarily confines the issue of debenture stock to debenture stock issued in respect of a borrowing involving the obligation at some time to repay. The granting of a perpetual annuity is therefore in my opinion not within the memorandum of association.

But next it is argued that article 17 specifically mentions irredeemable debenture stock, and that the memorandum and articles of association may for some purposes be read together, and that in this matter the construction of the memorandum can be assisted by the articles. Upon this my first observation is that article 17 is not expressed as creating any power, but as defining the authority which may exercise for the company an existing power. The words are "the board may create and issue." Further, the purposes for which the articles can be read to explain or supplement the memorandum do not extend to explaining or supplementing the memorandum in respect of a matter which, under the Companies Act, 1862, must be contained in the memorandum of association. An authority to borrow is not properly an object of the company at all, and need not be found in the memorandum of association. The articles may therefore, I think, be referred to for the purpose of explaining the manner in which a company is by its memorandum authorised to borrow. But the granting of perpetual annuities is not borrowing, and is not a purpose subsidiary to the general objects of a commercial or trading undertaking. The granting of annuities for lives could not be authorised by words in articles of association seeking to explain a clause in the memorandum relating to the borrowing of money. The granting of

perpetual annuities stands in like case. I am therefore not entitled to read article 17 for the purpose of saying that clause 3, sub-clause 7 of the memorandum must be construed to mean something which is not borrowing. I can read the articles in order to explain the sort of borrowing which the memorandum contemplated. But I cannot read the articles for the purpose of saying that the memorandum did not mean borrowing, but meant the granting of perpetual annuities. For these reasons I think that the granting of perpetual annuities by this company is *ultra vires*; and, if this be so, it results that the applicant's right, if this be a perpetual annuity, cannot be greater than to have the return of the money paid to the company upon the stock.

But, secondly, it is said that article 17 and the resolutions of June 29, 1883, may be read as expressing a certain contract of borrowing—namely, a borrowing upon the terms that the company, while it is a going concern, shall not be at liberty to call upon the debenture-stockholder to accept the repayment of his loan, but shall pay him 6 per cent. upon it. For this purpose it is pointed out that article 17 speaks of the debenture stock, bonds, and debentures alike as capable of being irredeemable, and speaks of the annual sum payable by the company as interest, and that the resolutions provide that the aggregate amount of the debenture stock shall be a charge and shall, until default by the company, constitute a floating charge only. From this it is argued that this was a borrowing on the terms that the company should have no option to repay so long as there was an undertaking to answer the annual sum. If this second contention be right, then I think it follows that this applicant, who asks by his summons a determination of what is the proper amount to pay for redemption, is not entitled to receive more than the amount which, upon this view, was borrowed—namely, the 2,000*l.* paid upon the stock.

In either view it appears to me that the applicant is entitled to no more than the interest to date and the par value of his stock. The right declaration upon the summons, I think, is that the applicant

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is not entitled to receive out of the assets of the company any sum over and above the par value of his stock and the interest upon the same.

Solicitors—Withers & Withers, for applicant;
Dawes & Sons and Bischoff & Co., for
liquidators.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

COZENS-HARDY, L.J.

1904.

Nov. 28.

CARROLL v.
GRAHAM.

*Appeal—Costs—Construction of Will—
Trustees—Right to Appear.*

According to the established practice in an appeal upon the construction of a will, trustees served with notice of appeal are entitled to appear by counsel and to be paid their costs of appearance; but the Taxing Master in taxing the costs should allow a moderate fee only in the case of trustees not required to take any active part in argument.

Semble, per VAUGHAN WILLIAMS, L.J., there is no reason why trustees who are neutral should appear in such an appeal by separate counsel.

Action to administer the estate of William Carroll, who died in 1851. An administration decree was made in 1867. The plaintiffs, who were administrators *de bonis non* of a deceased beneficiary interested in the testator's residuary estate, had obtained an order to carry on the proceedings, and presented a petition for ascertaining the title of certain claimants to the fund in Court, which depended upon the construction of the will. The petition was heard by Swinfen Eady, J., and he having given his decision upon the construction of the will, an unsuccessful claimant appealed.

Eve, K.C., and Vaughan Hawkins, for the appellant.

Mark Romer, for the respondents, in whose favour Swinfen Eady, J., decided, was not called upon.

Their LORDSHIPS dismissed the appeal with costs.

Popham, who appeared for the plaintiffs who had been served with notice of the appeal, asked that his costs of appearance should be provided for according to the usual practice in the case of trustees and other persons in a fiduciary position.

VAUGHAN WILLIAMS, L.J.—I protest each time when such an application is made on behalf of trustees, but my protest seems unavailing.

ROMER, L.J.—The practice is settled, I am afraid, and it is too late to alter it. But what my Lord means is that trustees ought not to appear upon an appeal unless they think it likely that they may be called upon to assist the Court. I have no doubt that the Taxing Master will have regard to the position of the trustees in the present case in taxing the costs. Beyond that we cannot go. The trustees were not expected to argue, and therefore I do not suppose the fee is excessive.

COZENS-HARDY, L.J.—I agree with what has been said by Lord Justice Romer.

VAUGHAN WILLIAMS, L.J.—I do not think that mere neutrality should be supported by separate counsel. If the trustees personally have anything to say in the matter, well and good—then let them be represented by separate counsel. But I cannot understand why trustees who are absolutely neutral should appear here by separate counsel.

Solicitors—Farrer & Co., for appellant;
Cunliffe & Davenport, for respondents.

[Reported by A. J. Spencer, Esq.,
Barrister-at-Law.]

WARRINGTON, J. }
 1905. } ROBINSON PRINTING CO.
 April 3, 4, 14. } v. "CHIC," LIM.

Company—Debenture—Receiver for Debenture-holders—Powers—Charge on Assets in Priority to Debentures—Pledging Credit of Debenture-holders—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 24, sub-s. 8.

A receiver was appointed by debenture-holders under a power conferred by the debentures. The receiver was authorised by the terms of the debentures (inter alia) to take possession of the property charged by the debentures; to carry on or concur in carrying on the business of the company; and to make any arrangement or compromise which he should think expedient in the interests of the debenture-holders:—Held, that, for the purpose of carrying on the business of the company, the receiver might, first, create a valid charge on property comprised in the debentures to have priority over the charge of the debenture-holders; and secondly, pledge the personal credit of the debenture-holders.

The defendant company were proprietors of a paper called *Chic*. The company had issued debentures to the amount of 4,700*l.*, and they were, in May, 1904, all held by the defendants O'Malley and Fuller; the defendant Mustart subsequently acquired some. O'Malley was the managing director of the company. The debentures were all in the same form, and contained a charge on the undertaking of the company and on all its property, present and future, including its uncalled capital for the time being. The conditions indorsed contained the following material provisions: "(6) The principal moneys hereby secured shall immediately become payable—(a) if the company makes default for a period of six calendar months in the payment of any interest hereby secured, and the registered holder hereof before such interest is paid by notice in writing to the company calls in such principal moneys; or (b) if an order is made or an effective resolution passed for the winding-up of the company. (7) At any time after the principal moneys hereby secured

become payable, the registered holder of this deed may, with the consent in writing of the holders of the majority in value of the outstanding debentures, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment shall be as effective as if all the holders of debentures had concurred in such appointment. And a receiver so appointed shall have power—(1) to take possession of the property charged by the debentures; (2) to carry on or concur in carrying on the business of the company; (3) to sell or concur in selling any of the property charged by the debentures; (4) to make any arrangement or compromise which he shall think expedient in the interests of the debenture-holders. And all moneys received by such receiver shall, after providing for the matters specified in the first three paragraphs of sub-section 8 of section 24 of the Conveyancing and Law of Property Act, 1881,¹ and for the purposes aforesaid be applied in or towards satisfaction *pari passu* of the debentures." There was no further reference to, and no incorporation of, any of the provisions of section 24. The principal moneys having become payable, the defendants O'Malley and Fuller, on May 21, 1904, appointed one Ramsay Colles to be receiver on behalf of the debenture-holders.

The plaintiffs were printers, and in May, 1904, were printing *Chic* for the defendant company upon the terms expressed in a letter of March 5, 1904. After his appointment as receiver, Colles took possession of the undertaking and accounts of the company, and proceeded

(1) The first three paragraphs of sub-section 8 of section 24 of the Conveyancing and Law of Property Act, 1881, are as follows: "The receiver shall apply all money received by him as follows (namely): (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee."

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to carry on the business, and the plaintiffs continued to print the paper. On July 26 a large sum was due to the plaintiffs, and they held some dishonoured cheques and bills of Colles; there was another bill falling due, and Colles had no funds to meet it. Under these circumstances the plaintiffs refused to go on printing the paper, or to deliver the issue of July 30, unless they were paid, and on July 26, 1904, the defendant O'Malley and Colles saw Mr. Robinson, a representative of the plaintiffs, with a view to induce them to continue to print and to deliver the issue of July 30. The result was the writing to the plaintiffs by Colles and O'Malley of the following letter: "Referring to our conversation with your Mr. Robinson this morning, I am willing and hereby agree to assign you all advertising book debts belong to Chic (Limited) or to me as receiver for the debenture-holders, and I further agree to assign, and hereby authorize you to collect, the revenue from advertisements in the present week's issue of the paper, and each week hereafter, until your accounts, both present and future, are cleared. It is understood that the said accounts are collected in the name of Chic (Limited) and that you appoint me one of your agents at 3 Arundel Street, Strand, to receive and give receipts on your account, such remittances to be sent daily to you or paid to your order. As consideration herefor you agree to deliver copies of the present week's issue immediately, and to deliver all future copies punctually to time arranged, also that you arrange to take up the bills and drafts at present outstanding. It is understood that the amount of the printing and paper (which paper you will supply for the present) will be covered by the advertisement revenue of each issue subject to arrangement of costs of collection. Any difference or dispute as to the meaning or construction of any of this letter is to be referred to the arbitration of such arbitrator as is agreed upon by Mr. Thomas Robinson and Mr. William O'Malley, M.P., or in the event of any disagreement by the president for the time being of the London Chamber of Commerce.—RAMSAY COLLES, Receiver for the de-

benture-holders. I concur with above arrangement. — W. O'MALLEY." The plaintiffs thereupon consented to deliver, and did deliver, the current issue, and continued to print for the plaintiffs until the events happened which are mentioned in the next paragraph.

On September 27, 1904, the defendants O'Malley, Fuller, and Mustart appointed the defendant Carr to be receiver and manager of the business of the company, and of all its property and effects comprised in the debentures in the place of Colles. On September 28 the defendant Carr wrote the following letter to the plaintiffs: "Chic (Limited). I beg to inform you that I have been appointed receiver for the debenture-holders in the above company. I also beg to inform you that the letter given to you on July 26 last, charging the book debts of Chic (Limited) to your company, is irregular and cannot be recognized by me, and I have to request you not to make application for any of the said book debts. The work which you have in hand for the next issue—7,000 copies and 600 posters—I shall be prepared to pay for on the papers being delivered at Arundel Street on Tuesday morning next." The work in hand was duly delivered, but the defendant Carr failed to pay the cost thereof, amounting to 63*l.* 0*s.* 8*d.*, but with his defence he paid that sum into Court with a denial of liability.

On October 14, 1904, the plaintiffs issued the writ in this action against *Chic, Lim.*, the receiver Carr, and the three debenture-holders, and claimed (*inter alia*) against all the defendants a declaration that they, the plaintiffs, were entitled by virtue of the agreement of July 26, 1904, to an equitable lien or charge upon all advertising book debts belonging to *Chic, Lim.*, or to the receiver for debenture-holders, and to the revenue from advertisements appearing in *Chic, Lim.*, until the account due to the plaintiffs for printing *Chic*, and for the paper supplied by the plaintiffs to *Chic*, was paid and satisfied; if and so far as might be necessary an account of all moneys due to the plaintiffs and payment thereof; and against the defendant Carr an account of all moneys received by him

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in respect of advertising book debts belonging to *Chic*, Lim., and payment thereof. In the Long Vacation an application was made to Warrington, J., for a receiver of the advertising book debts, and refused. Upon appeal, the Court of Appeal on November 24, 1904, appointed the defendant Carr receiver of the advertising book debts belonging to *Chic*, Lim., existing on September 27, 1904. The defendant Carr carried in an account as receiver under this order, and from that account it appeared that at the date of the issue of the writ he had received a sum of 17*l.* 17*s.* in respect of debts becoming payable on or before September 27, 1904.

Levett, K.C., and *T. Eustace Smith*, for the plaintiffs.—It cannot be disputed that the letter of July 26, 1904, purported to give an effective charge upon the advertising book debts, and it was to endure until the debts were paid. An agent is entitled to be indemnified out of his receipts against all his liabilities, and this right is prior to that of the debenture-holders—*Strapp v. Bull, Sons & Co.* [1895],² *Levy v. Davis* [1900],³ and *Glasdir Copper Mines, Lim., In re* [1905].⁴ This right he could transfer to the plaintiffs, and being subrogated to his rights have claim to the property in priority to the debenture-holders. But the power "to make any arrangement or compromise which he shall think expedient in the interests of the debenture-holders" authorises the making of a mortgage—*Jones, In re*; *Dutton v. Brookfield* [1889].⁵ There is the further question—namely, whether or not the debenture-holders are personally liable. It has been decided that they are under the circumstances—*Vimbos, Lim., In re* [1900].⁶ The measure of liability is that laid down by the Court of Appeal in *Gaskell v. Gosling* [1896].⁷ This is unaffected by the reversal of this case by the House of Lords in *Gosling v. Gaskell* [1897].⁸

Henry Terrell, K.C., and *Ashton Cross*, for the debenture-holders.—The receiver was the agent of the mortgagor, the defendant company, and not of the debenture-holders. A receiver appointed by the Court is from the nature and object of his appointment the agent of both parties. Under the Conveyancing and Law of Property Act, 1881, the receiver is the agent of the mortgagor, and the parties here, by incorporating the provisions of that statute, and from the other terms of the debentures, have made it clear that the receiver was to be the agent of the mortgagor. *Vimbos, Lim., In re*,⁶ is no decision on the point for which it is cited. The result of *Jefferys v. Dickson* [1866],⁹ which is cited in that case, is incorrectly given. *Jefferys v. Dickson*,⁹ *Gosling v. Gaskell*,⁸ and *Cox v. Hickman* [1860]¹⁰ are opposed to any idea of authority in the receiver to create rights in priority to the debenture-holders. A receiver who is not appointed by the Court is under no personal liability, and being under no personal liability cannot claim an indemnity—*Owen & Co. v. Cronk* [1894]¹¹ and *Burt v. Bull* [1894].¹² There is no foundation for a personal claim against the debenture-holders.

W. J. L. Ambrose, for the receiver.—At the date when the writ was issued there was no available cause of action against the receiver. The plaintiffs have misconceived their remedy, which is in other proceedings when the receiver brings in his account.

Levett, K.C., in reply, referred to *Law v. Glenn* [1867].¹³

April 14.—WARRINGTON, J., read written judgment in which he set out the facts as above, and continued: The plaintiffs contend—First, that they are entitled to a charge in priority to the debentures, on all the advertising book debts covered by the letter of July 26, with necessary ancillary relief, including payment by the defendant Carr of the 17*l.* 17*s.* as moneys of the plaintiffs in his hands at the date

64 L. J. Ch. 658; [1895] 2 Ch. 1.

35 L. J. N.C. 458; W. N. (1900), 174.

40 L. J. N.C. 241; W. N. (1905), 57.

59 L. J. Ch. 31.

69 L. J. Ch. 209; [1900] 1 Ch. 470.

65 L. J. Q.B. 435; [1896] 1 Q.B. 669.

66 L. J. Q.B. 848; [1897] A.C. 575.

(9) 35 L. J. Ch. 376; L. R. 1 Ch. 183.

(10) 30 L. J. C.P. 125; 8 H.L. C. 268.

(11) 64 L. J. Q.B. 238; [1895] 1 Q.B. 265.

(12) 64 L. J. Q.B. 232; [1895] 1 Q.B. 276.

(13) L. R. 2 Ch. 634.

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of the issue of the writ. They contend, secondly, that the three debenture-holders are personally liable for the moneys due to the plaintiffs on the footing that Colles was their agent and had authority to pledge their credit to the plaintiffs. They also contend that Carr is personally liable for the 63*l.* 0*s.* 8*d.* The plaintiffs' first contention involves the consideration of the position of the receiver appointed under the debentures, whose agent he was, and what was the extent of his authority; and also the true construction and effect of the letter of July 26. First, then, as to the position of the receiver. There is no general rule of law which is of any assistance. In *Jefferys v. Dickson*⁹ Lord Chancellor Cranworth said: "a receiver who has been appointed by a mortgagee under the ordinary power for that purpose, is in possession as agent, not of the mortgagee, but of the mortgagor, and it cannot be that the mortgagor, if his agent is receiving and misapplying the rents, has no means of calling him to account without paying off the mortgage. It may be that he could not make the mortgagee party to a bill against the receiver without offering to redeem; but if that be so, it must follow that he might file a bill against the receiver alone, treating him as his agent, bound to account for all his receipts after keeping down the interest due to the mortgagee. And this may well be; for though it is the mortgagee who in fact appoints the receiver, yet in making the appointment the mortgagee acts, and it is the object of the parties that he should act, as agent for the mortgagor. He, as agent of the mortgagor, appoints a person to receive the rents, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions are supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver, therefore, in the relation between himself and the mortgagor, stands in the position of a person appointed by a deed to which the mortgagee was no party." The Lord Chancellor is there dealing with a receiver appointed under the ordinary power—that is to say, either by

the mortgagor himself in pursuance of provisions in the mortgage deed, or by the mortgagee under similar provisions, or under the Act then subsisting—namely, Lord Cranworth's Act (23 & 24 Vict. c. 145). In all these cases there was an express provision that the receiver should be the agent of the mortgagor (see the remarks of Lord Justice Rigby in *Gaskell v. Gosling*⁷). This case, therefore, and, for similar reasons, *Owen v. Cronk*¹¹ and *Gosling v. Gaskell*,⁸ are of no assistance to me in deciding the question now before the Court.

I turn, therefore, to the construction of the debenture, and notice the following points. The receiver is appointed receiver of the property charged. His appointment is to be as effective as if all the debenture-holders had concurred. He is to have power not only to take possession of the property and to carry on the business, but he is to sell the property comprised in the debentures. He may make arrangements in the interests of the debenture-holders; and, finally, any moneys in his hands are to be applied in satisfaction of the debentures. If he exercises his power to sell it must be by virtue of and for the purpose of realising the charge created by the debentures; the business is carried on for the sole benefit, so far as the provisions of the document are concerned, of the debenture-holders, and, in my opinion, having regard to all the points I have mentioned, he is their agent. I think he is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture. I am glad to be supported in the view that the receiver is the agent of the debenture-holders by the judgment of Mr. Justice Cozens-Hardy in *Vimbois, Lim.*, *In re*,⁶ where that learned Judge, after reading the very similar condition indorsed on the debenture he was considering, says this: "It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for

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his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed; and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver." The condition that learned Judge was dealing with was almost, but not quite, identical with that in the present case.

Next, as to the extent of the receiver's authority. Appointed as he was by the debenture-holders as their own agent, and authorised to make such arrangements as he might think expedient in their interests, I am of opinion that he had authority to pledge the assets in priority to their charge, if, as in the present case, he thought it desirable so to do to insure the effectual carrying on of the business, and, further, so far as the authority of the company was required, to make such charge effectual, he had their authority. I now come to the letter of July 26. If I am right in the views I have expressed, the receiver had power to dispose of debts due to the company at the date of his appointment, and those subsequently becoming due to himself as agent of the debenture-holders during the continuance of his agency, but he would have no authority to dispose of debts becoming due to a subsequent receiver. In my judgment the true effect of the letter of July 26 is to assign in equity to the plaintiffs the debts of which he had power to dispose, to such an extent as was necessary to secure payment of the moneys then due and thereafter to become due to them. The plaintiffs are therefore entitled to a declaration substantially in accordance with paragraph 1 of the claim—namely, to receive the advertising book debts belonging to *Chic*, Lim., or to the receiver, and to revenue from advertisements until the account due is paid,

limited to debts existing on September 27, 1904, and to ancillary relief.

Secondly, as to the personal liability of the debenture-holders. The receiver is their agent, he is authorised by them to carry on a business on their behalf and for their benefit; according to principles of law recognised in *Cox v. Hickman*¹⁰ the principals are in such a case liable for debts properly incurred in the ordinary course of the business in question. The original contract of March 5 was, I think, determined by the change of personality involved in the appointment of the receiver, and the subsequent employment of the plaintiffs was a fresh contract between them and the receiver, and they are entitled to look to the debenture-holders for payment. As regards Mustart, however, I do not see how he can be liable for any debt incurred before he became a debenture holder. There must therefore be an order against the defendants O'Malley and Fuller to pay to the plaintiffs the amount of their claim when ascertained, and against the defendant Mustart a similar order confined to so much of their claim as arose since he became a debenture-holder. As to Carr, the letter of September 28 contains, in my opinion, a personal promise to pay, and the 63*l.* 0*s.* 8*d.* must therefore be paid out to the plaintiffs. The defendant Carr has also admitted by his account that he had in his hands at the date of the writ 17*l.* 17*s.*, which, according to the views I have expressed, should have been paid to the plaintiffs. There must be an order on him to pay this sum. I do not see how I can make any distinction in the matter of costs, and there must be an order on the defendants generally to pay the costs.

Solicitors—C. G. Algar, for plaintiffs;
H. Nelson Paisley, for defendants.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.]

[IN THE CHANCERY DIVISION AND IN
THE COURT OF APPEAL.]

BUCKLEY, J.

1905.

April 1.

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

May 2.

NORTH OF
ENGLAND
STEAMSHIP
Co., *In re*.

Company — Special Resolution — Two Meetings Convened by One and the Same Notice—Special Regulation of Company — Companies Act, 1862 (25 & 26 Vict. c. 89), s. 51.

A provision in the articles of association of a limited company—that whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting—is not ultra vires or inconsistent with the letter or the spirit of section 51 of the Companies Act, 1862; and a notice given in conformity with this provision would be a valid notice, and the second meeting summoned by it would be duly summoned.

Alexander v. Simpson (59 L. J. Ch. 137; 43 Ch. D. 139) distinguished.

Petition by a limited company asking that the sanction of the Court should be given to a reduction of its capital, for which a resolution had been passed and confirmed as a special resolution at extraordinary general meetings of the company summoned in accordance with its articles of association.

Article 70 provided that seven days' notice at the least of a general meeting should be given to the members, and that "whenever it is intended to pass a special resolution, the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting."

The notice given was in the following terms:

"4th February 1905.

"Notice is hereby given that an extraordinary general meeting of the North

of England Steamship Company, Limited, will be held at 62 High St. Stockton-on-Tees on Wednesday the 15th day of February 1905 at 3 o'clock in the afternoon, when the subjoined resolution will be proposed; should such resolution be duly passed by the required majority the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company, which will be held on Friday the 3rd day of March 1905 at the same time and place." [Here followed a copy of the resolution.]

Both meetings were accordingly held, and the resolution was passed and confirmed—in each case unanimously.

On presentation of this petition the question arose whether the notice, so far as it related to the second meeting, was in accordance with section 51 of the Companies Act, 1862.¹

The petition had not been served on any person.

Martelli, for the company.

BUCKLEY, J., after reading the relevant portions of the section and article, said: It is necessary to determine whether section 51 allows a contingent notice of a meeting. The language of the notice which was sent out in this case is exactly the same as that of the notice in *Alexander v. Simpson* [1889].² It concludes as

(1) Companies Act, 1862, s. 51: "A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed. . . . Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company."

(2) 59 L. J. Ch. 137, 141; 43 Ch. D. 139, 148.

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follows: "should such resolution be duly passed by the required majority the same will be submitted for confirmation as a special resolution to a subsequent extraordinary general meeting of the company which will be held on Friday the 3rd day of March 1905 at the same time and place." That is to say, it is a notice that only in a contingency—namely, that of the resolution being passed at the first meeting—will there be any second meeting at all.

The question, therefore, is whether that is a compliance with section 51. The decision of the Court of Appeal in *Alexander v. Simpson*² was simply on the articles of association; it was not necessary to go back to the statute. The Court held that the regulation had not been complied with. Article 52 of the company in that case provided as follows: "Seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt of such notice shall not invalidate the proceedings at any general meeting." The company in that case gave such a notice as is now before me; and Lord Justice Bowen, after reading the words which occur in both, said, "If that paragraph is to be read as a notice that the subsequent extraordinary general meeting of the company would only be held on that day in the event of the passing of the resolutions at the former meeting, it is obvious that it would not be a good notice, because it would leave a shareholder who got the notice in ignorance whether or no the general meeting" (that is to say, the second meeting) "of the 29th of July was to be held." The Court of Appeal held on the document then before it that notice of a contingent meeting was not notice of a meeting within article 52; and it was not necessary for that Court to determine the question which I have to determine here—namely, supposing you have complied with your articles, have you complied with the statute?

Section 51 of the Act says that the notice of a meeting shall, for the purposes of the section, be deemed to be duly given when it is given "in manner prescribed

by the regulations of the company"; and on the construction of those words, with the authority of *Alexander v. Simpson*,² it has been contended that the notice is good. But that case decides plainly that it is not giving notice of a meeting to give notice of a contingent meeting. The petitioners' counsel seeks to get over this by saying that the notice is given "in manner prescribed by the regulations"; and endeavours to get over the difficulty by saying that these articles do provide for notice of a contingent meeting. But the articles cannot override the Act of Parliament, and the Act speaks of a notice of a meeting. The manner of giving the notice may be determined by the articles, but the subject-matter of the notice must be a meeting. *Alexander v. Simpson*² decides that a contingent meeting is not a meeting. The point is the same in this case as in *Alexander v. Simpson*²; but here the question arises on the statute, and not on the articles. This is not pedantry, but is a very important matter. A special resolution is a serious and solemn thing; and the statute provides that it shall be submitted to two meetings. The notice of the second meeting must be separate in order to be an efficient and effectual thing. The Legislature thought that members might stay away from the first meeting because they knew they could come and object at the second meeting. The second meeting is a solemn reality required by statute. It is not a mere form, and to treat it as such is not to give due effect to the Act. The shareholders cannot be said to get notice of the second meeting when they do not know whether a second meeting will be held or not; and that is their position by reason of this article unless they attend the first meeting, or ascertain by enquiry what its result was. I hold, therefore, that the notice of the second meeting has not been given in the manner prescribed by section 51, and that the special resolution has not been passed and confirmed as required by that section; and I dismiss the petition.

The company appealed.

Martelli, for the appeal.—Buckley, J., decided mainly upon *Alexander v. Simpson*,² but the articles there were different,

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and the decision went practically on the articles. The last part of article 70 of this company's articles of association is in the form suggested in *Palmer's Company Precedents* (8th ed.), pp. 591, 592, for obviating the difficulty that arose in *Alexander v. Simpson*,³ and the notice is in exact conformity with the articles. There have been three other cases on the subject, in which notice of two meetings was given by the same notice, and the notice was held to be valid—*Espuela Land and Cattle Co., In re* [1900],⁴ *Jenner Institute of Preventive Medicine, In re* [1899],⁴ and *Tiessen v. Henderson* [1899].⁵

The decision of Buckley, J., is, in effect, that article 70 is inconsistent with section 51 of the Companies Act, 1862, and is *ultra vires*, but there is no ground for saying that. An article is only *ultra vires* if it provides for something which is contrary to the Act—for example, if it were to provide that a contributory might not present a petition to wind up the company. There is nothing contrary to section 51 in providing that notice of the two meetings required by that section may be given by the same notice. The section leaves the mode of summoning meetings to be prescribed by the regulations of the company, and under section 16 of the Act the articles are binding on the members of the company.

VAUGHAN WILLIAMS, L.J., referred to the statements as to the loss sustained by the company, and said that, on the whole, he was willing to accept them as sufficient. He continued: The question which we have to determine is whether this confirmatory meeting, which was essential to the passing of this resolution, was a meeting of which due and proper notice was given. It was said that the notice was not a due and proper notice because it was not a notice of a meeting which would in any event take place, but was notice of a contingent meeting which would take place only if something happened before the day fixed for the meeting—that is to say, that it was a notice that the meeting would be held for the purpose

of confirming a resolution if the resolution submitted to the first meeting was duly passed, and that such a notice was a bad notice, and the proceedings consequent upon it invalid. It was said that we ought so to hold in this case by reason of the decision of the Court of Appeal in *Alexander v. Simpson*.² I myself do not think that that decision obliges us to hold that the notice of this confirmatory meeting was bad. Lord Justice Bowen, in his judgment there, was in no way dealing with section 51 of the Companies Act, 1862, but was dealing with article 52 of the articles of association of the particular company in question there. That article provided that "Seven days' notice in writing specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members before every general meeting, but the non-receipt of such notice shall not invalidate the proceedings at any general meeting." A notice was given of an extraordinary general meeting to be held on July 12, 1889, to consider and, if deemed advisable, to pass certain resolutions, and the notice concluded thus: "Should such resolutions be duly passed the same will be submitted for confirmation as special resolutions to a subsequent extraordinary general meeting of the company, which will be held on Monday the 29th of July, 1889, at the same time and place." The question which was really argued there was what was the proper construction of that notice. Did it mean that the second meeting would in any event be held on July 29, and the resolution for confirmation would then be submitted provided such resolution had been passed on July 12; or did it mean that the meeting called for the 29th would only be held in the event of the previous resolution being passed on July 12 subject to confirmation? The Court held that, according to the natural construction of that notice, any shareholder could properly come to the conclusion that the second meeting would only be held contingently upon the resolution being passed on July 12, and they refused to accede to the argument of Mr. Rigby, who invited them to hold

(3) 48 W. R. 684; W. N. (1900), 139.

(4) 15 Times L. R. 394.

(5) 68 L. J. Ch. 353; [1899] 1 Ch. 861.

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that the notice should be construed as a notice that the second meeting would be held in any event, and the resolution would be submitted for confirmation if passed at the earlier meeting on July 12. That was all the Court had to decide there; and it is remarkable that, according to the report of the argument on behalf of the appellants, this was said: "If the notice had said, 'If the resolutions are passed a meeting to confirm them will be held on the 29th of July,' that, no doubt, would not have been a good notice; but what they say is, in substance, 'A second meeting will be held on the 29th of July, and if the resolutions are passed at the first meeting they will be submitted to the second for confirmation'; and that, we say, is a sufficient notice."

It is plain, therefore, that the whole point there was a point of construction. The appellants admitted that if the construction was that the meeting would only be held contingently upon the resolution being passed at the first meeting, that would, having regard to the terms of article 52, be an invalid and insufficient notice. But we have nothing to do here with that article. The articles of this company were obviously drawn with a desire of having an article which would differ from the article upon which *Alexander v. Simpson*² was decided; so there was added to the first part of article 70, which substantially coincides with the article in question in that case, words which entirely differentiate it from article 52 of the articles in question in *Alexander v. Simpson*²; and it seems to me that the notice which has been given in the present case, which, in effect, is in the same form as the notice given and discussed in *Alexander v. Simpson*,² has been made a proper notice, so far as the articles are concerned, by those words introduced into the concluding part of article 70. I think that those words amply justify the notice which has been given in the present case.

That being so, the question that we have to decide in this case is a question upon section 51 of the Companies Act, 1862. Having regard to article 70, the notice is valid unless article 70 is, by

reason of the words at the conclusion of it, *ultra vires*, and that depends upon section 51 of the Act. I can see nothing in that section which would render article 70 *ultra vires*. The earlier part of the section prescribes the steps to be taken for the passing of a special resolution, and in order to see whether all those steps have been carried out, one must read the words at the end of the section: "Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company." The regulations of the company in the present case provide that notice may be given, in effect, in the form in which this notice has been given, and I myself am unable to see that there is anything in this article, which expressly authorises the giving notice of a contingent meeting, which is inconsistent either with the spirit or the letter, of section 51. That section does not say in any express terms, or by any implication, as it seems to me, that there may not be a notice of a meeting which shall take place contingently upon the passing of a resolution at a former meeting. I can quite understand that there might be an article with reference to notice of a meeting which would be really inconsistent with the spirit, if not with the letter, of section 51. One can quite understand that in substance the basis of section 51 is that the Legislature thought that there ought to be a first meeting at which a resolution would be submitted to the shareholders, and that then there should be a proper interval of time in which the shareholders should be able to consider the expediency of passing the resolution, and if an article authorised giving notice in such terms as substantially to deprive the shareholders of the opportunity of consideration which the Legislature intended that they should have, I can conceive that that might be *ultra vires*; but I cannot come to the conclusion that an article authorising the giving of notice of the two meetings required by section 51 in one notice, and giving it subject to the proviso that the second meeting would only take place in

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case such a resolution was passed at the first meeting as could be the subject of confirmation at the second, deprived or could deprive the members of the company of anything to which the Legislature thought that they should be entitled for their security. The fact of the matter is that, word it how you like, if you have a provision like that in section 51 requiring two meetings, and that the resolution shall only become effective if confirmed at the second meeting after the stated interval of time, you cannot prevent the second meeting from being contingent upon the passing of the resolution at the first meeting. It must necessarily be contingent. It has been said that, if that was so, there should always be two notices, and that notice of the second meeting should not be given until the contingency had arisen by the passing of the resolution at the first meeting. I think that that is a mere matter of detail and does not substantially affect the shareholders in any way.

As I understand the judgments both of Mr. Justice Chitty and of the Lords Justices in *Alexander v. Simpson*,² all of them seem to have assumed that you might by a proper statement that the second meeting would be held whether the contingency contemplated by the Act had arisen or not have made the notice a valid notice, and under these circumstances the Court of Appeal seem to me to have, in effect, said that there is nothing in the mere fact of including the notice of both meetings in one document which would make the article which authorised that *ultra vires*. It seems to me, therefore, that there is nothing in article 70 which is invalid, or which in any way interferes with the rights or the protection which the Legislature intended the shareholders to have.

I think that in substance the decision of Mr. Justice Buckley is that article 70 is *ultra vires*. I do not agree with him. I desire to say that with respect to any decision of Mr. Justice Buckley, especially upon such a subject as this, I never differ from him without feeling that I am taking a step which I should not like to take without strong conviction; but I think his decision in this case is wrong, because, as I think, it is

based upon a wrong idea of section 51 and of the effect of the decision of the Court of Appeal in *Alexander v. Simpson*.²

In these circumstances I think that we ought to allow this appeal, and to sanction the reduction of the capital of this company.

ROMER, L.J.—I have come to the same conclusion. I know of no sufficient reason for supposing that there may not be an absolute notice of a meeting for the purpose of considering and, if thought fit, of passing a resolution on a subject which is of necessity contingent. I think that a notice of such a meeting is not in itself necessarily bad because it deals with a contingent matter as the subject of the resolution—for instance, notice of a meeting to appoint a liquidator of a company if the company at the same meeting or before passes a resolution for a voluntary liquidation. I cannot see why that notice should not be good, and be acted upon, if the resolution to wind up is passed. If a meeting has to be called to pass a resolution which in its nature is contingent, the substance of the notice, whatever the wording may be, should be looked at; and, in order to make it valid, the notice should be construed, if it can be, not as a contingent notice, but as an absolute notice of a meeting to consider and, if necessary, pass a resolution as to a contingent matter. Of course, if the subject-matter to be dealt with at the meeting is contingent, it will be obvious that it will not be necessary to attend the meeting if the contingency does not arise.

I should have thought, but for the decision that was arrived at, that the notice in *Alexander v. Simpson*² might have been treated not as a contingent notice, but as an absolute notice of a meeting to deal with a matter which was contingent, and which only took a contingent form because obviously it would have been no use to attend the meeting if the resolution which was to be confirmed were not passed. But there is the decision in *Alexander v. Simpson*,² and we are bound by it, but I personally

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am not disposed to extend it if I can help doing so. I think the ground of the decision must be taken to be that the Court was of opinion that the notice of the second meeting was not such as complied with the articles of association of the company, and that the informality of the notice could not be got over because there might have been some shareholders who were relying upon the terms of the articles, and might be misled by the terms of the notice; but, in the case before us, as was pointed out by my Lord, article 70 of the articles of this company expressly provides that notice of the second meeting may be given contingently upon the resolution being passed at the first meeting. I can see no sufficient reason for holding that such a provision in the articles is *ultra vires*, either as offending against the statutory provisions of section 51 of the Companies Act, 1862, or on any other ground. That being so, I think that the notice should be held to be a valid notice binding on all the shareholders, and, accordingly, that the meeting summoned by it was duly held, and the resolution passed at that meeting duly passed, and that that resolution, which is binding on all the shareholders and valid, ought to be acted upon.

The petition, therefore, ought to have been heard on the merits. We have heard it, and we think that the prayer ought to be granted.

STIRLING, L.J.—I am of the same opinion. The question which we have to consider is whether the special resolution has been duly passed by the company. Under section 51 of the Companies Act, 1862, as we all know, a special resolution must be passed at one meeting and confirmed at another, and the Act provides that notice must be duly given of the second meeting; and it then proceeds to say that a notice shall be deemed to be duly given when given in manner prescribed by the regulations of the company. We are therefore referred by the Act itself to the articles of association of the company for the purpose of determining the validity of the notice. There is no question here that the first meeting was duly held. The difficulty is as

to the second meeting, and the reason of the difficulty is that notice of both meetings was given by the same notice. There is no question that that notice was in entire conformity with the articles of association of the company. Article 70, by the last clause, provides for giving notice in this precise form. Why, then, are we not to hold that this meeting was duly held and the notice duly given?

The learned Judge referred to *Alexander v. Simpson*,² and he held, and rightly, that that case did not actually govern the present; and he so held for this reason, that the question arising there was upon the construction of the articles of association of the company in question; and those articles were, so far as material to this question, entirely different in form from those with which we have now to deal. The words in article 70 have been obviously inserted to meet the difficulty to which that decision gave rise; and, unless it appears that in some way this article infringes the terms of the Companies Act, we are bound to give effect to it.

If section 51 is read in the strict way in which the articles of association in *Alexander v. Simpson*² were construed, it would give rise to considerable difficulty in cases where a large proportion of the shareholders are resident at a distance; and I do not myself see that it is not reasonable and proper to introduce into the articles such a provision as this for the purpose of facilitating the passing of the resolution. I do not see that this provision does infringe in any way against the provisions of section 51 of the Act, which are for the benefit of the shareholders, or deprives them of any protection to which they are entitled.

I think therefore that the second meeting was duly held in accordance with the articles of association, and that this appeal should be allowed.

Appeal allowed.

Solicitors—Gibson & Weldon, agents for John Bertrand Watson, Stockton-on-Tees.

[Reported by R. Hill and A. J. Hall, Esqs.,
Barristers-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	}	JAMAICA
ROMER, L.J.		RAILWAY
STIRLING, L.J.		v.
1905.		COLONIAL
March 29, 30.		BANK.

Practice—Default in Appearance—Amendment of Writ by Addition of Plaintiff—Filing in Central Office—Personal Service—Notice of Motion for Judgment—Rules of Supreme Court, 1883, Order IX. rule 2; Order XVI. rule 13; Order XIX. rule 10; Order XXVIII. rule 10; Order LXVII. rule 4.

There is nothing in the Rules of Court which requires an amended writ of summons to be personally re-served on a non-appearing defendant who was personally served with the original writ. The amended writ therefore can prima facie be filed in the Central Office against a non-appearing defendant under Order LXVII. rule 4, without any personal re-service on him, but the Court in each case has a discretion to require stricter service, either as a term of granting leave to amend or as a condition of giving judgment by default, if the nature of the amendment is such as to raise a new case against the non-appearing defendant.

Hartley, *In re*; Nuttall v. Whittaker ([1891] 2 Ch. 121), Gee v. Bell (56 L. J. Ch. 718; 35 Ch. D. 160), Webster v. Myer (54 L. J. Q.B. 101; 14 Q.B. D. 231), Tilling v. Blythe (68 L. J. Q.B. 350; [1899] 1 Q.B. 557), and The Cassiopeia (48 L. J. P. 39; 4 P. D. 188) discussed and explained.

Appeal against an interlocutory order of Swinfen Eady, J.

The action as originally framed was by the Jamaica Railway Co. and Sir Augustus Hemming, the then Governor of Jamaica, suing on behalf of the Government of Jamaica, against the Colonial Bank and the West India Improvement Co., and claimed payment to the plaintiffs of certain moneys in the hands of the Colonial Bank on the undertaking of the plaintiffs to apply these moneys for purposes connected with the plaintiff company's railway. The Colonial Bank appeared to the original writ, and delivered a statement

of defence in which, amongst other things, they raised a question of marshalling. The original writ had also been personally served on the West India Improvement Co., who did not appear. Before the action came on for trial, Sir Augustus Hemming had ceased to be Governor, and Sir James Swettenham, the present Governor, was appointed in his place.

On November 21, 1894, on a summons by the plaintiffs, an order was made giving them liberty to amend the writ and pleadings by adding Sir James Swettenham as co-plaintiff and making the necessary consequential amendments in the statement of claim. The writ was amended accordingly, and the statement of claim was amended by stating that Sir James Swettenham had succeeded Sir Augustus Hemming, and that the former sued as Governor and on behalf of the Government.

The amended writ had not been personally served on the West India Improvement Co., but merely filed at the Central Office pursuant to Order LXVII. rule 4.¹

When the action came on for trial the Colonial Bank took the preliminary objection that the amended writ ought to have been personally served on the non-appearing defendant.

Swinfen Eady, J., held that the Central Office practice, which required a writ amended by addition of plaintiffs or alteration of indorsement to be re-served on a non-appearing defendant in the same way as the original writ, was invariable and ought to be followed. His Lordship accordingly made an order that, the Court being of opinion that the West India Improvement Co. had not been properly served with the amended writ, the action should stand over generally, with liberty to apply, and that the plaintiffs should pay the costs thrown away.

The plaintiffs appealed.

(1) Order LXVII. rule 4: "Where no appearance has been entered for a party, or where a party or his solicitor, as the case may be, has omitted to give an address for service as required by Orders IV. and XII., all writs, notices, pleadings, orders, summonses, warrants, and other documents, proceedings, and written communications in respect of which personal service is not requisite may be served by filing them with the proper officer."

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Noville, K.C., T. H. Carson, K.C., and Greenland, for the appellants.—There is no such general rule requiring personal re-service of the amended writ upon a non-appearing defendant as the Judge thought binding on him. Order IX. rule 2 has no application to an amended writ, and the express provisions in the Rules of Court relating to the amendment of the writ by the addition of a plaintiff, which are contained in Order XVI. rules 11 and 12, do not deal with the service of the amended writ. Rule 13 of the same Order expressly provides that where a defendant is added or substituted the amended writ is to be served on such new defendant in the same manner as original defendants are served, but that relates only to the new defendant. Order XXVIII. rule 10 provides that when any indorsement or pleading is amended such amended document shall be delivered to the opposite party within the time allowed for amending the same; and it was decided in *Hartley, In re; Nuttall v. Whittaker* [1891],² that, by virtue of Order XIX. rule 10 and Order LXVII. rule 4, where the indorsement had been amended the amended writ was properly delivered to a non-appearing defendant by filing it at the Central Office. The present practice of the Central Office, which, contrary to that decision, requires the writ to be re-served on the non-appearing defendant, is not based on anything in the Rules of Court, and is not required for the protection of the non-appearing defendant, for the indorsement cannot be amended without leave—Order XXVIII. rule 1; and if a new case is raised by the amendment the Court can impose terms. In addition to which, the non-appearing defendant can always search the file at the Central Office. *Dymond v. Croft* [1876]³ shews that filing at the Central Office was intended for notice to a non-appearing defendant. If the amendment were asking for additional or different relief it might be said that filing at the Central Office was insufficient delivery, and this is the explanation of what was said in *The Cassiopeia* [1879].⁴

Gee v. Bell [1887]⁵ was a case where the plaintiff was asking additional relief by his statement of claim under Order XX. rule 4. In *Jackson v. Kilham* [1891]⁶ an order for revivor was held to fall within Order LXVII. rule 4. An amended writ is not a new writ for the purpose of calculating the period during which it is in force—*Jones, In re; Eyre v. Cox* [1877].⁷ No practice of the Masters, however long established, however continuous, it may have been, is of any legal authority, or in any way binds the Court, unless it has been determined by the Court itself to be a right practice—*Stumm v. Dixon* [1889],⁸ per Lord Esher, M.R. On the face of it the case falls within Order LXVII. rule 4, and there is no reason in the facts of the present case for imposing any stricter terms.

[They referred to the *Annual Practice*, pp. 47, 171, 360, 1027; *Daniell's Chancery Practice* (7th ed.), p. 340; and the *Yearly Practice*, pp. 180, 277.]

Eve, K.C., and Christopher James, for the respondents.—The case is not expressly within the language of Order LXVII. rule 4, as the word "writs" in that rule has a more limited meaning and does not necessarily embrace writs of summons. In any case it is not within that rule if personal service is requisite, and on general principle an amended writ ought to be personally served, just as much as the original writ. The addition of a plaintiff is an amendment which may entirely alter the nature of the case against a non-appearing defendant, and the latter is not sufficiently protected by the fact that he can inspect the document by searching the file at the Central Office. If, as appears to be the case, there is no express provision in the Rules of Court as to re-service of the amended writ, the Court will follow the authority of such cases as *Webster v. Myer* [1884],⁹ which decided that personal service was required under Order LXIV. rule 14, and *Tilling v. Blythe* [1899],¹⁰ which decided that

(5) 56 L. J. Ch. 718; 35 Ch. D. 160.

(6) 26 L. J. N.C. 147; W. N. (1891), 171.

(7) 46 L. J. Ch. 316.

(8) 58 L. J. Q.B. 183, 185; 22 Q.B. D. 529 531.

(9) 54 L. J. Q.B. 101; 14 Q.B. D. 231.

(10) 68 L. J. Q.B. 350; [1899] 1 Q.B. 557.

(2) [1891] 2 Ch. 121.

(3) 45 L. J. Ch. 612; 3 Ch. D. 512.

(4) 48 L. J. P. 39; 4 P. D. 188.

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personal service was required to obtain equitable execution. *Gee v. Bell*¹ is to the same effect, and shows how jealously the Court protects the rights of the absent party. *Hartley, In re; Nuttall v. Whittaker*,² goes too far, and is inconsistent with *The Cassiopeia*.⁴

[ROMER, L.J.—An order might have been obtained in the present case under Order XVII. rule 4, without any amendment of the writ at all, and the order so obtained would not have required personal service.]

The plaintiffs having amended the writ, the case must be dealt with on that footing. The mode of service of a writ amended by the addition of a plaintiff is a *casus omisus* from the Rules of Court, and in the absence of any express provision the Court will insist on personal service. The practice of the Central Office is a sound one and should be made without exception.

No reply was called for.

VAUGHAN WILLIAMS, L.J.—In my judgment this order of Mr. Justice Swinfen Eady is wrong. He prefaces the order by this recital: "The Court being of opinion that the defendants, the West India Improvement Co., have not been properly served with the re-amended writ this Court doth order," and so on. In my judgment it is not true to say that the defendants, the West India Improvement Co., have not been properly served in this case. The amendment which we have to deal with is an amendment of this nature. The action having been brought by the Jamaica Railway Co. and Sir A. Hemming, who was the then Governor of Jamaica, representing the Government of Jamaica, there occurred a change in the person of the Governor. Sir A. Hemming ceased to be Governor, and Sir James Swettenham succeeded in his place, and that necessitated the amendment which was dealt with in this order. The order was an order to add Sir James Swettenham as a co-plaintiff. Now, *prima facie* the question whether this amended writ required personal service upon the defendants, the West India Improvement Co., who had not appeared, must depend upon the Rules.

The rule upon which reliance has chiefly been placed by those who say that there was no necessity for personal service of this writ amended by the addition of this plaintiff is rule 4 of Order LXVII. There is no question in this case that the amended writ has been properly filed with the proper officer under that rule. The suggestion is not that there has not been a filing in compliance with that rule, but that the filing is not sufficient, because it is necessary to personally serve the amended writ upon these defendants, the West India Improvement Co. That being so, I look in the first instance to see whether this amended writ falls within the terms of rule 4 of Order LXVII. It has been contended on behalf of the appellants that it falls within the term "writs." In my judgment an amended writ does fall within the term "writs." If the writ was a new writ it would not fall within the words of rule 4, because those words exclude from the operation of the rule writs or other documents in respect of which personal service is requisite. It only applies to writs and documents in respect of which personal service is not requisite. But it cannot be denied that an amended writ, if it is not a document in respect of which personal service is requisite, falls within the words of rule 4 of Order LXVII. Under those circumstances, the question that I have to ask myself is simply this: Is an amended writ of the character of this amended writ one in respect of which personal service is requisite? I ask myself first whether it is requisite by the Rules. Now dealing merely with the Rules, it seems to me that personal service is not requisite. Order IX. rule 2 provides for personal service of a writ. Rule 1 says: "No service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance." Then rule 2 is: "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made." I need not read the rest of the rule. Now there is no dispute but that in this case the writ was originally personally served. Rule 2 contains no obligation to personally serve

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a writ a second time, and therefore I have to ask myself, Is this writ always the same writ? If it is, it has been served; and I find no provision in the Rules that a writ that has once been served shall be re-served or served as a separate writ. Under those circumstances it seems to me that in the first instance this amended writ is a writ within the meaning of rule 4 of Order LXVII., and that it is not a writ to which rule 2 of Order IX. applies at all. It seems to me that under those circumstances *prima facie* the amended writ not requiring personal service, and having been dealt with in the manner required by Order LXVII. rule 4 in respect of documents not requiring personal service, the order of Mr. Justice Swinfen Eady is wrong in so far as it says that this document has not been properly served. I think it was properly served, as the original writ was personally served; and I think that, having regard to the Rules, there is no provision whatsoever in them for re-service of a writ upon its being amended in the way the writ in this case has been amended.

Counsel for the respondents met this by saying that this is a *casus omissus* and is not dealt with by the Rules at all, and one ought to assume outside the Rules that, independently of any express provision, every amended writ ought to be re-served after amendment. I do not at all agree that we ought to make that assumption. Amongst other reasons for not doing so, I look at rule 10 of Order XXVIII., and I find by that rule that "Whenever any indorsement or pleading is amended, such amended document shall be delivered" — not personally served — "to the opposite party within the time allowed for amending the same." It seems to me that an amendment of the indorsement or an amendment of the pleadings may affect the character of the action just as much as, and generally speaking more than, the amendment by the addition of a new party. But I think that, in the face of this provision made by rule 10 of Order XXVIII., it is impossible to say that every amendment of a writ requires a re-service of the writ; and counsel for the respondents in the course of the argument seemed to me

to admit that they could not maintain that general proposition. I should quite assent to the suggestion that every amendment of a writ which makes the writ a new writ will require personal service, but that is because such a case falls plainly within rule 2 of Order IX. But unless the nature of the amendment is such as to make the writ a new writ, in my judgment there is nothing in the Rules to require personal service of the amended writ.

I do not know that I really need say any more. If an amended writ comes within the terms of rule 4 of Order LXVII., and the writ in question is not a new writ, then there is nothing in the Rules which requires personal service. In addition to that, if we look at the substance of the transaction it is quite plain that the substance of the transaction here is covered by Order LXVII. rule 4, and it is quite plain that under the provisions of the Rules in a case which does not differ in substance from the present case you can, by making the proper application and getting the proper order made, effect an amendment of this character without necessitating anything in the nature of a re-service of the writ.

Then it is said that there are many cases in which it might work great hardship and do grave injustice or render grave injustice possible or probable, and that therefore we ought in some way or other so to construe the Rules as to make these possibilities of injustice impossible. I think I am putting the argument in rather too complimentary language, because it is not really an invitation to the Court of Appeal so to construe the Rules as to make this injustice impossible, but it is an invitation to them so to misconstrue the Rules as to render an injustice impossible. I do not think that is part of the functions of the Court of Appeal. If the Rules have been so drawn that, if they are construed according to their plain and obvious sense, injustice will be worked, then the proper way of preventing that is not by legislation or rule-making on the part of the Court of Appeal, but by bringing the matters in question before the notice of the Rule Committee or the Legislature, as the case

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may be. In my judgment, however, there is really no substantial danger of any such injustice. It is admitted that in many cases of the addition of a plaintiff the substance of the action will not be altered at all. I do not suppose it will be denied that in such cases there could be no necessity as far as justice is concerned for re-service or fresh service of the writ upon an absent defendant who has not appeared. It seems to me that, although there are cases in which it would be unjust to proceed to judgment because of the danger that the absent defendant may really be lulled into a sense of false security by reason of the amendment not in fact having come to his notice, no case has yet been suggested to us in which the actual occurrence of that injustice cannot always be prevented by the Judge before whom the case comes for trial. I am not very much impressed with the argument of necessity or convenience based upon the suggestion of the possibility of injustice being done.

I only want to say one word more about the matter. Cases have been cited to us like *Gee v. Bell*⁵ and *Tilling v. Blythe*,¹⁰ and the case of *Webster v. Myer*,⁹ as to which it was suggested that the Judges had adopted the course of amending the Rules, or refusing to read them according to their natural sense, because they were found difficult or dangerous of application. I do not say with regard to the two cases before Mr. Justice North, one of which I have mentioned—*Gee v. Bell*⁵—that there are not observations in the judgment which suggest that he did take such a course; but my answer is, that, whatever those observations may seem to point at, in truth and in fact in each one of those cases there was no necessity to misread the Rules in question or to refuse to read them according to the natural meaning of their words, each one of them being cases in which the Judge might have arrived at exactly the same result by saying, "Although the procedure taken in this case is a right practice, having regard to the words of the Rules, I shall not give effect to that which has been done by ordering judgment, because in the exercise of my discretion I have a jurisdiction and a duty

to take care, in any case in which I think there is any probability of danger of injustice, that there shall be personal notice given to or personal service made upon the defendant before I give the judgment against him which is asked for." I point out, moreover, that in two of the cases—that is to say, *Tilling v. Blythe*¹⁰ and *Webster v. Myer*⁹—the Court expressly affirms that jurisdiction.

For the reasons which I have given I think that this case ought now to be restored to the list, and that then the learned Judge when he hears the case can, if he considers any order necessary for the protection of these defendants who have not appeared, make such order at the trial; but I do not think he ought to have refused to continue the hearing upon the ground that the writ had not been properly served.

ROMER, L.J.—I am of the same opinion, and as the case is an important one of practice I think it right to state somewhat at length the reasons why I think the appeal ought to succeed. The Judge in the Court below, as I gather, acted on the view that there is a hard-and-fast rule without exception that, as against a defendant who has not appeared after due service on him of the original writ of summons, if the writ be then amended, whatever be the nature of the amendment, the amendment must be personally served on that defendant, and that, if that be not done, the Court has no jurisdiction to proceed with the trial of the action as against that defendant. I think that view cannot be maintained. There is, in my opinion, nothing in the Rules or in any Act of Parliament or in any decision of the Court or otherwise, or in any other reason urged, which requires personal service of an amended writ in every case of amendment. In the first place, it is clear beyond question from the Rules of Court that where a defendant has appeared personal service of an amended writ as against him is not required. It is clear also that an amended writ is not a fresh writ or the commencement of a new action; and there is in my opinion nothing in the Rules or in any Act of Parliament, nor is there any decision of the Court

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(and how far those decisions have gone I will consider in a moment), nor any other satisfactory or good reason, which requires or shews that a defendant who has not appeared is entitled as of right in every case to be placed in a different position from a defendant who has appeared with regard to an amended writ, or to require personal service of the amended writ as if it were the original writ of summons. In my opinion Order LXVII. rule 4 applies in such a case, for I think that, with regard to an amended writ, personal service within the words of Order LXVII. rule 5 is not required by the Rules or otherwise. That being so, when you look at Order LXVII. rule 4 there is a provision in the case of no appearance by a defendant that all writs, notices, pleadings, and so forth, in respect of which personal service is not requisite, may be served by filing them with the proper officer. An amended writ is a writ, and, as I have pointed out, it is not a writ that requires by the Rules or otherwise personal service. That being so, looking at the terms of Order LXVII. rule 4, a plaintiff in a case where a defendant has not chosen to appear is *prima facie* entitled to act upon rule 4, and as to an amended writ to file it with the proper officer; and if he does that (and the plaintiff did that in the present case) then to my mind it cannot be said that the Court has no jurisdiction to proceed with the trial of the action.

But there is undoubtedly a principle on which this Court has long acted in mercy to a defendant who has not appeared which trenches to a very large extent upon the Rules of Court in favour of such a defendant. The Court has always borne in mind that an absent defendant served with the original writ may have acted upon the supposition that he thereby gathers substantially what the case is against him, and relies upon that case being made against him, and on that footing does not choose to appear. Accordingly the Court has refused in many cases to act upon the rule which covers in terms a defendant who has not appeared in cases where the Court comes to the conclusion that it would not be just as against such a defendant to enforce the rule—not that the Court had no jurisdic-

tion to proceed, but that it did not think it right to proceed in such a case. Let me instance Order XX. rule 4, which is clear on the face of it. That rule could not be clearer. It says that a statement of claim may modify or extend the plaintiff's claim without any amendment of the indorsement of the writ, and yet it has been repeatedly held—for example, in *Gee v. Bell*⁵ and other cases—that where the statement of claim goes substantially beyond the indorsement on the writ in asking for relief against an absent defendant, the Court will refuse to act upon Order XX. rule 4, and will require the plaintiff, if he wants to get greater relief in substance against such a defendant than that which appears upon the indorsement on the writ, to amend his writ and re-serve it. But that is a matter of grace. It is not that the Court has not jurisdiction, but that it will not exercise it in such a case; and I think that is the right view to take of the case of *Gee v. Bell*⁵ and similar cases to which I have referred. Again, it has been held in favour of an absent defendant who has not appeared, that, if a writ be amended by altering the claim indorsed so as substantially to increase the claim against the defendant, in the exercise of its discretion the Court will not allow the plaintiff to obtain, as against such a defendant, the relief sought by the amended indorsement or extended claim unless the defendant be re-served personally with the amended writ. To my mind, that again was a case where the Court acted in its general discretion in refusing under the circumstances to apply a rule, and not because the Court had not jurisdiction to do it. If the case of *The Cassiopeia*⁴ be looked at, it will be seen that it gives no countenance to the idea that every amended writ must of necessity be personally re-served upon a defendant who has not appeared. Looking at the judgment of Lord Justice Brett, which was concurred in by the other Lords Justices in that case, where they had to consider the point of an amended indorsement of the claim on the writ, it will be found that they expressly limited their view as to personal service being required in the case of the amended writ to

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cases where the writ is amended, as it had been in that case, by a substantial alteration in the indorsement, with the result, as they point out, of introducing a substantially new claim. The very form the decision and judgment took in that case shews that the hard-and-fast rule supposed to exist, and on which the learned Judge in the Court below has acted, is not one that can be maintained. The only other authority is against the respondent in this case, and that is the case of *Harley, In re; Nuttall v. Whitaker*.³ I agree in thinking that that case went too far, but I do not agree in saying that it was wrongly decided so far as it held that the Court had jurisdiction to proceed in a proper case even as against a defendant who has not appeared when the plaintiff has acted on Order LXVII. rule 4, and filed the amended writ with the proper officer.

To my mind, then, in the present case the Court had jurisdiction to try the case, notwithstanding that the amended writ had not been re-served on the absent defendant. But I would go so far with the respondents in the present case as to say that I can well understand how the practice which has apparently grown up amongst the Masters of the High Court in stating or considering that an amended writ must be re-served has grown up, and can to a certain extent be justified. Many cases, and I will go so far as to say even most cases, of an amendment of the writ do substantially affect a defendant. Even if the amendment be only one of adding a plaintiff there are many cases where adding a plaintiff to the writ will be making a substantially different case as against that defendant, at any rate as regards the new plaintiff, and may make the action take a substantially different form against that defendant. Therefore I think that in the majority of cases, probably the great majority of cases, a plaintiff who amends his writ will be well advised in re-serving personally that amended writ on a defendant who has not appeared; but to my mind there are some cases, at any rate, where personal service of an amended writ is not required in the true interests of the absent defendant, and where there is no reason why the

Rules of Court as they exist should not be acted upon, and why the Court should not exercise its jurisdiction and proceed to judgment at the trial of the action against the absent defendant although he has not been personally served with the amended writ. Take a case which I put in the course of the argument brought against two defendants, A and B, asking for relief against them jointly, and then special relief as against B. A does not appear; there is an amendment of the writ asking for further relief as against B only, and not affecting the claim against A at all: is there any reason why that amended writ should be personally served upon A, who has not appeared? I think not. I have pointed out why it is not required by the Rules or by any Act of Parliament, or by any binding decisions; and I now point out that there is no good reason why in such a case personal service should be effected of the amended writ. Take another case, which my Lord suggested in the course of the argument, of one of the old companies suing by its public registered officer. In the course of the action that officer is changed, and the writ is amended by changing the name of the public officer from the old to the new one: is there any reason why that amended writ should be personally served on the defendant? None, to my mind; and, as I have pointed out, there is no hard-and-fast rule which requires it should be re-served. In such a case, again, the Court, to my mind, ought to proceed with the trial of the action notwithstanding there has been no personal service of the amended writ on the absent defendant. Of course, other cases might be suggested. I have pointed out why in the great majority of cases the plaintiff would be well advised to re-serve his amended writ on the absent defendant; but, at any rate, I will say that there are exceptional cases where the plaintiff may be able to satisfy the Court at the trial that the amendment of the writ was not one which against the non-appearing defendant substantially changed or affected the case made by the original writ against that defendant so as to render it just that the amended writ should be re-served upon him; and in that case the plaintiff ought

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to be able to call on the Court to proceed with the action. The plaintiff would of course act at his own risk in proceeding to decide for his own purposes whether the case was an exceptional one which justified him in taking that course or not. It might be that at the trial of the action he failed to shew it, and the Court would then exercise its discretion, if it thought it was a case where it was not fair as against the non-appearing defendant that the case should be proceeded with, in which case the Court would do what was right with regard to costs and otherwise.

In the present case the learned Judge in the Court below has not considered the point whether in substance the absent defendant has been prejudiced by the amendment which was made by adding a co-plaintiff. So far as I can see, and so far as counsel have been able to make any suggestion, the change of plaintiff made by amendment in the present case was one which did not substantially affect the absent defendant—that is to say, did not substantially change the nature of the case against that defendant, and was not such an alteration as in justice to the absent defendant would render it requisite or proper that he should be personally re-served with the amended writ. Therefore, to my mind, the case must go back. Of course this will not prevent the Judge when the case comes before him, if he finds—contrary to what appears to me to be probably the case—that justice does require that the absent defendant should have personal service of the amended writ—from requiring that to be done. As at present advised, and so far as I can gather, this case does certainly appear to me to be one in which the absent defendant would not be entitled to call upon the Court to take such a proceeding. I cannot help thinking that when this case is tried out it will be found that the Judge would be right in every point of view in proceeding to try it, notwithstanding the absent defendant has not had personal service effected upon him of the amended writ. It appears to me, therefore, for these reasons, that the appeal ought to be allowed.

STIRLING, L.J. — In this case the learned Judge in the Court below has dealt with this present action which was brought before him for trial in this way. There are two defendants, one of whom has appeared and the other has not, and the learned Judge, being of opinion that the amended writ in this action had not been properly served upon the defendant who did not appear, directed the action to stand over generally, with liberty to apply to restore it. The question is whether, according to the Rules of Court, the learned Judge was justified in making that order. Now the point which has been mainly argued before us is whether or no, according to the Rules of Court, the amended writ has been properly served. I will state shortly my view upon that point, and then deal with the question which arises as to the application of the Rules of Court to this particular case. There is no question here that the original writ in the action was properly served personally, in accordance with the Rules of Court, upon the defendant who does not appear. The question is as to the service of the amended writ. An amendment of the writ may, according to the Rules, take place in one or in two ways. It may take place either by adding parties or by amendment of the indorsement on the writ. The amendment by adding parties is provided for by Order XVI. rule 11. Reading it shortly, that rule provides that the Court or a Judge may at any stage of the proceedings, on such terms as may appear to the Court or Judge to be just, order that the names of any parties, whether plaintiffs or defendants, “who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.” Then it provides that “No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto.” And lastly there is this: “Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be

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prescribed by any special order." In that rule, therefore, we find an explicit direction that as to a new defendant the writ of summons shall be served in the way pointed out by the Orders. Nothing is said as to what is to happen when either a new plaintiff is added, or as to service upon the original defendant when a new defendant is added. The rule is silent, and the rule therefore does not require in terms, in those two instances which I have last mentioned, that the amended writ shall be re-served personally. The second case is where the indorsement is amended. The rule that deals with that is Order XXVIII. rule 1, which provides that "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just." Rule 10 of the same Order provides that "Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same." Therefore it is plain from that rule that personal service of the amended writ by indorsement is not required, but that what is required is that the amended writ shall simply be delivered. Now we come to Order LXVII. rule 4, which provides that "Where no appearance has been entered for a party,"—and that applies here—all "writs," amongst other things, "in respect of which personal service is not requisite may be served by filing them with the proper officer." The question, therefore, which I have to ask myself in this case is, Is personal service of the amended writ requisite? I cannot find that it is, according to the Rules; and therefore it seems to me that *prima facie* in this case the proper course has been pursued, and that by filing the amended writ it has been properly served upon the absent party.

But then it is said that if full effect is given to this construction of the rule, which seems to me the proper one, injustice may be done to the absent party. I am in full sympathy with the view that this Court ought to take great care that no injustice is done to an absent party by an

amendment, and I think the Rules themselves indicate the way in which injustice is to be avoided. No amendment, whether by the addition of parties or by an alteration of the indorsement, can take place without leave after service, and in both rules which I have read the amendment is only to be permitted by the Judge upon such terms as seem to him to be just. I think, therefore, that, when an application is made for amendment, it is the duty of the Judge to consider the nature of the amendment which is proposed, and if he finds that the alteration which is proposed in the constitution of the suit by the addition of parties, or in its character by the alteration of the indorsement, is such as to introduce a substantially new case, which would not naturally be brought to the notice of the absent defendant by the original writ, it would be right in him to impose as a term of granting that amendment that the writ should be again personally served on the absent defendant. But further, I do not think the matter stops there. I think that when the case comes on for trial the Judge has still a right to deal with the case in the way in which Mr. Justice Swinfen Eady has dealt with it. If it appears to him when he hears the case that by the amendment of the writ a substantial alteration has been made in the character of the action, it is quite within his power to direct the action to stand over until the alteration which has been made has been brought to the personal notice of the defendant, so that he may have an opportunity of defending himself if the learned Judge thinks that substantial justice so requires.

That being so, I have to say why I think, with all respect to Mr. Justice Swinfen Eady, that in this case he went too far. What is the nature of the action? The action is brought by the Jamaica Railway Co. and by the Governor, who, at the time when the writ was issued, was Sir Augustus Hemming. The Government of Jamaica claim apparently to have some interest in the subject-matter of the action, and the last paragraph of the statement of claim is this: "The plaintiff Sir Augustus Hemming is Governor of the Island of Jamaica and its dependencies

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and sues in this action on behalf of the Government of that Island." Thus substantially, although one of the nominal plaintiffs was Sir Augustus Hemming, the real plaintiff he represented was the Government of the island. Now what has happened? Sir Augustus Hemming ceased to be Governor of the island and was succeeded by Sir James Swettenham, and thereupon an order is made giving leave to the plaintiff to add Sir James Swettenham as a co-plaintiff; and that is all the alteration which has been made. The substantial allegation in the statement of claim is that this is an action in which Sir Augustus Hemming was suing not in his own personal capacity but on behalf of the Government, and the Government was the real plaintiff. The same allegation is made in the amended statement of claim; and although Sir James Swettenham has been added as a co-plaintiff, the real plaintiff still remains the same—namely, the Government. Upon the materials before me I am quite unable to see that any injustice can be done to the absent defendant by the action proceeding in that state of things. I therefore agree with my brethren in thinking that in this case the learned Judge, in his desire to protect the absent party, has gone too far. He has never really exercised his judgment on the case at all from the point of view whether injustice would be done, but has acted on a hard-and-fast rule that every amended writ must be served as if it were a new writ requiring personal service. I agree, therefore, that this order ought to be discharged and the case sent back for trial.

Appeal allowed.

Solicitors—F. Stuttford, for appellants;
Druces & Attlee, for respondents.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

BUCKLEY, J. } TAYLOR, *In re*; MATHESON
1905. } v. TAYLOR.
April 7.

Settlement—Tenant for Life and Remainderman—Railway Bonds—Cumulative Interest—Payment out of Net Earnings of any Year Remaining Available—Deficiency of Earnings—Arrears of Interest—Sale of Bonds—Apportionment of Proceeds as between Capital and Income.

Bonds of a company were settled on trust for one for life, with remainders over. They contained a proviso for payment of interest "accumulative" at a rate per cent. twice in each year "as and when earned out of any net earnings of any year remaining after" certain other payments, "and if in any year the net earnings so remaining available . . . shall not be sufficient to pay such interest in full . . . any deficiency shall . . . be paid . . . out of the net earnings of any subsequent year or years as and when there shall be any net earnings available for such purpose." Coupons attached stated interest to be payable "only as and when earned out of any net earnings available." There were never sufficient earnings to pay the interest in full. The bonds were sold in the lifetime of the tenant for life for a sum not sufficient to pay both principal and arrears of interest:—Held, as between tenant for life and remainderman, that the sum was not apportionable between capital and income, but must be treated wholly as capital.

By a settlement dated May 22, 1899, made prior to the marriage of Miss Hilda Nora Grace Matheson and Mr. Walter Taylor, certain bonds of the Mexican National Railroad Co. were settled upon trust to pay the income to Mrs. Taylor for life, and after her death to pay the income to Mr. Taylor, and after the survivor's death in trust (in the events which happened) for the persons who under the statutes for the distribution of the effects of intestates would on Mrs. Taylor's decease have been entitled thereto if she had died intestate and without having been married.

The bonds were part of an issue of second mortgage bonds created in 1886.

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They contained a proviso by the company to pay the principal in 1917, and interest from January 1, 1887, "accumulative, at the rate of 6 per cent. per annum in gold coin on the 1st days of March and September in each year, upon surrender of the annexed coupons, as and when earned, out of any net earnings of any year remaining after interest on said company's First Mortgage Bonds outstanding shall have been paid for such year, and if in any year the net earnings so remaining available . . . shall not be sufficient to pay such interest in full, there shall be paid any part thereof earned and available, and any deficiency shall not be waived but shall be paid to the holder hereof out of the net earnings of any subsequent year or years, as and when there shall be any net earnings available for such purpose." They also contained a provision that no distribution of net earnings by way of partial payment should be obligatory unless the amount available should equal 1 per cent. on the outstanding bonds.

Each coupon stated that the company would pay the bearer a certain sum "being six months' interest" on the bond, "such interest to be payable only as and when earned out of any net earnings available therefor, as provided in the mortgage."

Interest was from time to time paid by the company upon the bonds, but never at the full rate, there never having been any sufficient net earnings remaining available.

On March 8, 1902, the bonds were sold under the settlement for 2,700*l.*, which was not sufficient to pay both the principal of the bonds and arrears of interest then due.

Mrs. Taylor died on May 22, 1902, intestate and without having had any issue, and her husband took out letters of administration to her estate.

An originating summons was taken out for the determination of the question whether any and, if any, what part of the 2,700*l.* proceeds of sale of the bonds was payable to Mr. Taylor as legal personal representative of his wife, as representing arrears of cumulative interest.

Howard Wright, for the plaintiffs, stated the facts.

Buckmaster, K.C., and *G. P. C. Lawrence*, for Mr. Taylor.—The 2,700*l.* ought to be apportioned between principal and interest. The deficiency of each year's interest is due, if not yet payable, by the company. By the express terms of the bond it was not to be waived, and it cannot be disregarded on a sale of the bonds for a lump sum. Some part of the proceeds must be attributed to the possibility of receiving the deficiency of income. Mr. Taylor is therefore entitled to have an apportioned part for income paid to him—*Atkinson, In re; Barbers' Co. v. Grosse Smith* [1904].¹

Astbury, K.C., and *J. I. Stirling*, for the next-of-kin.—There was no legal debt in respect of the deficiencies for which the tenant for life could have recovered against the company. The bonds never carried interest as a debt, but only gave a right against profits, if any. There being no sufficient profits, no part of the 2,700*l.* is attributable to interest. This case is really the converse of *Bouch v. Sproule* [1887].²

[They also referred to *Armitage, In re; Armitage v. Garnett* [1893].³]

BUCKLEY, J.—The bonds as to which the question arises were the subject of a tenancy for life which came to an end on May 22, 1902. It is admitted that down to that date there were not in existence any earnings such as are referred to in the bond. In other words, it is admitted that the fund out of which the interest was to be paid was at that time non-existent. The question is whether in that state of things the estate of the tenant for life is entitled to any and what part of a sum of 2,700*l.* for which the bonds have been sold. It is obvious that that purchase-price included all expectation of everything which was to come under the bond. It included arrears—if that word can be used in any proper sense—of interest on the bonds as well as principal money in respect of the bonds, and if these were

(1) 73 L. J. Ch. 585; [1904] 2 Ch. 160.

(2) 56 L. J. Ch. 1037; 12 App. Cas. 385.

(3) 63 L. J. Ch. 110, 113; [1893] 3 Ch. 337, 346.

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arrears which accrued during the currency of the tenancy for life I have no doubt that an apportioned part of the purchase-price ought to be paid to the tenant for life; but, in my judgment, there were no such arrears.

The question falls to be decided, I think, on the examination of the bond. The bond was one under which interest was to be paid "as and when earned, out of any net earnings of any year remaining after" paying certain interest on the first mortgage bonds. So the interest was payable only out of a fund, and as and when that fund came into credit. It seems to me plain from that, that until there was a fund there was no debt at all in respect of the interest. The bond went on to provide that, if in any year there were any net earnings available for payment of the interest, "there shall be paid any part thereof earned and available, and any deficiency shall not be waived but shall be paid to the holder hereof out of the net earnings of any subsequent year or years." The coupon which is attached to the bond is, if it be possible, more plain, and is an express obligation to pay the bearer six months' interest, "such interest to be payable only as and when earned out of any earnings available therefor." It seems to me that under that instrument there was no interest payable at all as income of a year in which there was no fund available for its payment. Supposing that in the year 1904 there was no fund available, and the tenant for life died on December 31, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905 and not income of the year 1904. And if a second tenant for life were in the enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest.

It all turns on this, that there is no obligation in this instrument to pay interest in any event; there is only an obligation to pay interest out of a fund, and there is

no obligation to pay until there is such a fund; and, if there be not such a fund during the existence of the tenancy for life, then the tenant for life, as it appears to me, is not entitled to any interest.

Under those circumstances, it seems to me, the tenancy for life, which came to an end on May 22, 1902, down to which date there was no fund, is not entitled to anything in respect of income. Therefore the sum which has been received for purchase-money is not apportionable.

Solicitors—Freshfields, for trustees and next-of-kin; Hind & Robinson, for Mr. Taylor.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

1905.

April 3, 4, 5.

FREDERICK
KING & Co.
v. GILLARD.

Costs—Judge's Discretion to Deprive Successful Defendant—Conduct having no Connection with the Plaintiff's Case—Appeal without Leave—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49—Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5—Rules of Supreme Court, 1883, Order LXV. rule 1.

Where a Judge exercises his discretion so as to deprive a successful party of costs upon a stated ground which is untenable, an appeal lies without leave. Civil Service Co-operative Society v. General Steam Navigation Co. (72 L. J. K.B. 933; [1903] 2 K.B. 756) followed.

In an action to restrain the defendant from passing off his goods as those of the plaintiff, it is no ground for depriving the successful defendant of his costs of the action, that the defendant, in the sale of his goods, makes representations calculated to mislead the public as to the nature of certain awards and medals, those representations having nothing to do with the plaintiff's case which fails.

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Appeal by the plaintiffs against a decision of Kekewich, J., who dismissed the action without costs.

There was also a notice of cross-appeal by the defendants asking that their costs in the Court below might be paid by the plaintiffs.

The action was brought to restrain the defendants from selling dried soup preparations not of the plaintiffs' manufacture in packets, boxes, tins, or canisters only colourably differing from those used by the plaintiffs in their sale of Edwards' desiccated soups, and from passing off any dried-soup preparation not of the plaintiffs' manufacture as and for the plaintiffs' goods. At the trial of the action Kekewich, J., held that the plaintiffs' case failed, and gave judgment for the defendants, but without costs, giving as his reason for so exercising his discretion that there were on the defendants' packets references to medals and awards gained by them which were made in such a way as to lead to the inference that the awards had been made in respect of the defendants' desiccated soups, which was not the fact. In reference to this Kekewich, J., in delivering judgment, said: "Now I come to the question of costs, and upon that I think I am bound to make some strong observations. On this packet of Gillard's Desiccated Soup I find printed 'Highest Award at the Coolgardie Exhibition Western Australia 1902,' and again 'Highest Award' at another exhibition and '10 Gold Medals awarded' besides. Now these defendants only started this business last September, and the Coolgardie Exhibition was long before that. They never had those awards, and it is untrue. The answer made here is: It is customary to put upon any goods sold by a firm notice of the awards which they have received in the shape of prizes in respect of other goods? Custom, of course, in the legal sense there cannot be. I suppose it is meant it is usual to do that; and I am extremely sorry to hear that it is usual to be dishonest, for it is dishonest. There can be no possible object in putting this statement upon goods of this kind except to induce the purchaser to believe that these awards have been granted for these

particular goods, and therefore to enhance the value in the purchaser's eyes, and intended to be used, of course, as an advertisement. This seems to me distinct dishonesty which the Court ought to reprobate. Therefore, in giving judgment for the defendants, I shall give it without costs."

As regards the plaintiffs' appeal, which does not call for a report, their Lordships dismissed the appeal, holding that the get-up of the defendants' goods was not calculated to deceive, and that no actual deception had been proved. As regards the defendants' appeal,

Lewis Edmunds, K.C., and *W. E. Vernon*, for the appellants.—Kekewich, J., has expressly stated the ground upon which, in the exercise of his discretion, he has thought fit to deprive the defendants of their costs; and if that ground is not tenable, then, notwithstanding section 49 of the Judicature Act, 1873, an appeal lies without leave—*Civil Service Co-operative Society v. General Steam Navigation Co.* [1903]¹ and Judicature Act, 1890, s. 5; Order LXV. rule 1; *Annual Practice*, p. 467. Even if Kekewich, J.'s view of the facts were correct, this would afford no ground for such an exercise of his discretion, since the conduct of the defendants towards the public at large had nothing to do with the plaintiffs' case which failed; but, as a matter of fact, Kekewich's, J. view was erroneous, and there was no dishonesty towards the public in the way in which the defendants referred to their medals and awards.

Stewart-Smith, K.C., and *Waggett (Moulton, K.C., with them)*, for the respondents.—Kekewich, J., took a right view of the facts, and exercised his discretion on sufficient grounds. There is ample authority to shew that the Court has a right to deprive a successful party of costs on the ground of his conduct in connection with the subject-matter of the action—*Sebastian on Trade Marks* (4th ed. 1889), p. 220; *Bradley's Trade Mark, In re* [1892],² *Warsop v. Warsop* [1904],³ *Paine & Co. v. Daniell & Sons' Breweries*;

(1) 72 L. J. K.B. 933; [1903] 2 K.B. 756.

(2) 19 Rep. Pat. Cas. 205, 209.

(3) 21 Rep. Pat. Cas. 481.

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Paine & Co.'s Trade Marks, In re [1893],⁴
Neuman v. Pinto [1887],⁵ and *Thorneloe v. Hill* [1894].⁶

VAUGHAN WILLIAMS, L.J., after dealing with the facts of the case, continued: Now, I want to say that, in my judgment, no attention whatever ought to be paid to a matter which was urged against the defendants with reference to a statement which appears upon their wrappers as to medals and as to highest awards. There is no doubt that it was inaccurate to say—as construed strictly the wrapper does say—that the defendants had any medals or highest awards in respect of the desiccated soup which was enclosed in the wrapper; but with every desire not to say anything which may encourage any sort of dishonesty in commerce, I do not think that an inaccuracy of that sort can or ought in the slightest degree to affect our judgment in this case.

Having said that, I think it is a convenient opportunity to consider the way in which Mr. Justice Kekewich dealt with the defendants' costs in consequence of these statements which appeared on the defendants' wrappers in respect of the medals and the highest awards. What Mr. Justice Kekewich says at the end of his judgment is this: [His Lordship read the passage above set out, and continued:] I wish to say for myself that I do not think the facts with regard to these awards and medals are such that one ought on those facts to impute to respectable people of good commercial standing that they were dishonest in the sense of meaning anything to be understood which was untrue; but I wish to say, beyond that, that, even if it had been untrue, in my judgment it would not have been right to deprive the successful defendants of their costs by reason of this wrong done to the public unless the wrong done to the public was something which was connected with the wrong which was done to the plaintiffs as private individuals. In my judgment, where a plaintiff comes

for relief, if in the course of establishing the title on which he relies he has been guilty of fraud upon the public, it is right to say to the plaintiff, "You cannot come to the Court to get relief because of your own conduct in establishing your own title, which has involved a fraud upon the public." But, in my judgment, with regard to a defendant the Courts have no right to deprive him of his costs because he has done some act which is a wrong to the public merely, as distinguished from some act which is wrong in the course of that transaction which is complained of by the plaintiff; and I do not think that in the present case there were any materials upon which a judicial discretion could be exercised so as to deprive the defendants of their costs. In my opinion, therefore, the cross-appeal must be allowed.

ROMER, L.J., after deciding that in his judgment the plaintiffs' case failed and that the action ought to have been dismissed with costs, continued: But Mr. Justice Kekewich has thought fit to deprive the defendants of the costs to which, in my opinion, they were justly entitled. What is his ground? It might have been a ground which brought it within his power as a Judge to say that he had exercised his discretion in the matter, even though this Court would not have exercised the discretion in the same way. If that had been the case, I agree that a cross-appeal on the part of the defendants as to costs would not lie; but that is not so in this case. Mr. Justice Kekewich has stated, and stated clearly, the ground, and the sole ground, on which he is prepared to deprive the defendants of their costs. What is that ground? The ground is that the defendants stated on their packets and on their tins that they and their predecessors had obtained ten gold medals and certain awards, and he came to the conclusion that that was a false representation on their part—dishonest, as he puts it, and, as I understand him, dishonest towards the public, because it appears that the medals and awards were not given in respect of desiccated soup, but in respect of other food materials which the defendants' firm had previously

(4) 62 L. J. Ch. 732; [1893] 2 Ch. 567.

(5) 4 Rep. Pat. Cas. 508.

(6) 63 L. J. Ch. 331, 334; [1894] 1 Ch. 569, 578.

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sold, and in respect of which they had obtained the medals and awards which I have referred to. I first wish to point out that, even if that view were correct in fact, and if the defendants had been guilty of misrepresentation on this collateral matter towards the public, still that has nothing to do with the plaintiffs' case in the present action. The plaintiffs' case entirely failed. The plaintiffs' case was that the goods of the defendants were made up so as to represent the goods of the plaintiffs. Mr. Justice Kekewich has held, and rightly held, that is not so. Then, is a representation appearing on the defendants' goods—something which might be taken to be wrong towards the public at large, but which in no way concerns the plaintiffs or the rights in respect of which they are suing—is that a ground on which a Judge in the exercise of his discretion—it being in no way a matter affecting the subject-matter of the action or the plaintiffs' rights—can deprive the defendants of their costs? In my opinion it is not. It is not a matter in respect of which in the exercise of his judicial discretion he could deprive the defendants of their costs. [His Lordship then dealt with the facts, and came to the conclusion that there was no dishonesty in the way in which their awards and medals were referred to by the defendants, and expressed his opinion that on both grounds the cross-appeal ought to be allowed with costs.]

STIERLING, L.J.—I also agree with the conclusion which has been arrived at with regard to the defendants' costs. I think that the learned Judge has expressly deprived the defendants of costs on a ground which is not open to him, and that the case is brought within the decision of this Court in the case of *Civil Service Co-operative Society v. General Steam Navigation Co.*,¹ which was referred to on behalf of the defendants. No doubt the case is very near the line. It seems to me that if the learned Judge had exercised his discretion on this ground along with other facts of the case it would have been a case in which his discretion could not have been disturbed, but it appears to me that he has singled out this fact,

which was not open to him, to deprive the defendants of their costs.

I further say I entirely agree with what has been said by Lord Justice Romer on the question of whether the statement was dishonest. I think, in coming to a conclusion with regard to that, one is bound to remember the statement which is found on the exterior of the boxes in which these packets are placed, which is perfectly accurate, and does not convey the slightest idea of the appropriation of the medals and the awards to the desiccated soups which are contained in the packets. For these reasons, therefore, I agree that the appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed and cross-appeal allowed.

Solicitors—Neish, Howell & Haldane, for plaintiffs; H. W. Christmas, for defendants.

[*Reported by A. Cordery, Esq., Barrister-at-Law.*]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} LONGMAN v. BATH ELECTRIC TRAMWAYS, LIM.
ROMER, L.J.	
STIERLING, L.J.	
1905.	
March 27, 28.	

Company—Shares—Transfer—Certification—Estoppel—Share Certificates—Return to Transferor—Subsequent Fraudulent Transfer—Liability of Company to Subsequent Transferee—Negligence of Company—Proximate Cause of Loss.

On April 19, 1904, B. became the registered owner of shares in the defendant company, and certificates of his ownership were made out, but were not sent to him. On the same day a transfer by B. to H. and M. of 1,500 shares was presented to the secretary of the company, and the secretary indorsed upon it a certification certifying that the certificates had been forwarded to the company's office, and the transfer so certified was returned to H. and M., and they then executed it, and had since become the registered owners of the shares.

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On April 22 the secretary, having occasion to send B. certificates for other shares in the company, by mistake enclosed the certificates for the 1,500 shares which had been transferred to H. and M. Subsequently the plaintiffs made advances to B. on a deposit of the certificates for the 1,500 shares, with transfers of the shares. The loans not being repaid, the plaintiffs sent in the transfers to the company for registration. Finding that they were unable to obtain registration, they brought the action for registration of the transfers and delivery of the certificates, and damages. They based their claim on estoppel arising from the negligence of the secretary in returning the certificates to B. after the certification:—Held, that, admitting that there was negligence for which the company might have been liable to those who were entitled to rely on the certification, the plaintiffs were not persons who could rely on it, and they had failed to shew that there was any duty on the part of the company to retain the certificates, either to them personally or to the public, or to any section of the public, or to persons desirous of becoming members of the company; under section 31 of the Companies Act, 1862, a certificate was only *prima facie* evidence of title to shares, and the plaintiffs were not entitled to assume as against the company, without enquiry, that there had been no dealing with the shares since the issue of the certificates to B., from the mere fact of finding them in his possession; further, the negligence was not the real or proximate cause of the plaintiffs' loss, but the improper use of the certificates made by B. after they were returned to him; and mere negligence would not raise estoppel. The circumstances, therefore, were not sufficient to raise a case of estoppel against the company.

Statements of the law in Swan v. North British Australasian Co. (32 L. J. Ex. 273, 277, 280; 2 H. & C. 175, 182, 192) and *Bishop v. Balkis Consolidated Co.* (59 L. J. Q.B. 565, 571; 25 Q.B. D. 512, 519) adopted and applied.

The secretary of the company, on receipt from the plaintiffs of the transfers to them, gave an acknowledgment of the receipt of them for registration in favour of the transferees "subject to the approval of the directors," with a note appended that the

receipt must be returned to the company's office in exchange for the relative share certificates, which would be ready on a day named:—Held, that the receipts were not a recognition on behalf of the company of the plaintiffs' title, and did not bind the company to issue certificates on the day named.

Appeal from decision of Farwell, J.

In April, 1904, Peter Bennett was the registered holder of (amongst other shares) 1,500 preferred ordinary shares of 1l. each fully paid in the defendant company, and he had certificates for 500 and for 1,000 shares, dated respectively April 19, 1904. Bennett executed a transfer of the 1,500 shares to Messrs. Houselander & Madders for value. The transfer was, before execution by the transferees, taken to the company's office, and the secretary, on April 19, indorsed thereon a certification certifying that the certificates had been forwarded to the company's office, and the transfer so certified was returned to Houselander & Madders. The certification was in the usual form, partly written and partly printed, but the certificates were, as a fact, at the company's office, as Bennett had only just bought these shares, with others, and the certificates had not been actually sent out to him. The transfer was afterwards executed by Houselander & Madders, and had since been registered by the company, and they, or persons deriving title under them, were the registered holders of the shares. On April 22, 1904, after the certification and return of the transfer, the secretary of the company, having occasion to forward to Bennett certificates for other shares in the company, by mistake and in forgetfulness of the transfer to Houselander & Madders, enclosed in the letter to Bennett the certificates in his name for the 1,500 shares which he had transferred. The mistake was discovered before the end of April, and application was made to Bennett to return the certificates, which he promised, but never, in fact, did. On April 28, 1904, Bennett borrowed from the plaintiff T. W. Longman 200l. on a deposit of the certificate for 500 of these shares, and he executed a transfer of them into the

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name of the plaintiff W. Longman. On May 3 he borrowed further sums on a deposit of the certificate for the remaining 1,000 shares, and he executed a transfer of the shares into the name of T. W. Longman. The loans were not repaid on the due date, and the transfers were sent to the company's office with the certificates for registration, and the fee of 2s. 6d. for registration was paid in each case. On May 11 the secretary of the company gave an acknowledgment of the receipt of the transfer of 1,000 shares, and on May 12 an acknowledgment of the receipt of the transfer of 500 shares, the transferor being stated to be P. Bennett. In each case it was stated to be for registration in favour of the transferee "subject to the approval of the directors," which was in accordance with the company's articles, and at the foot there was this note: "This receipt must be returned to the company's office as above in exchange for the relative share certificate which will be ready on 8th prox."

The plaintiffs alleged (paragraph 12 of their claim) that after the lodging of the certificate for the 1,000 shares they contracted to sell 250 of these shares, but the transfers of them to the purchasers could not be carried out owing to the default of the company to transfer the shares, and they had in consequence been compelled to purchase other shares for delivery to their purchasers in lieu thereof, and had thereby sustained damage to the amount of 27l. 2s. 8d., which they claimed ought to be made good to them by the company. They brought this action against the company claiming registration of the transfers for 1,500 shares and delivery of certificates for the shares, and damages for the default of the company in registering the transfers and delivering the certificates; and if from any cause the company should be unable to register the transfers and deliver the certificates, then further damages to the amount of the value of the shares.

Farwell, J., held that the action failed, and must be dismissed. The plaintiffs appealed.

Bramwell Davis, K.C., and Ashton Cross, for the appellants.—The company

having certificated the transfers to Houselander & Madders had no right to put the certificates for the shares in the hands of Bennett, and they are liable in damages to the plaintiffs. Their act amounted to a representation that Bennett was entitled to deal with the shares, and the company are responsible to any person misled by that representation and not merely to Houselander & Madders or persons claiming under them. It is a case of estoppel by negligence within the fourth proposition laid down in *Carr v. London and North-Western Railway* [1875],¹ which was applied in *Coventry, Sheppard & Co. v. Great Eastern Railway* [1883]² and *Seton, Laing & Co. v. Lafone* [1887]³ under circumstances very similar to those of the present case. The company owed a duty to the world at large to retain the certificates, and their neglect to do so is the real or proximate cause of the plaintiffs' loss.

The plaintiffs have an alternative and distinct cause of action in respect of the parcels of shares sold in May and June, which they were compelled to buy in at a loss of 27l. These were sold after the express representation of the secretary that the plaintiffs' certificate would be ready on June 8. The plaintiffs were thus induced to think that everything was right, and there is no possible defence to this part of the claim—*Dixon v. Kennaway & Co.* [1900].⁴

The effect of certification is shewn by *Bishop v. Balkis Consolidated Co.* [1890]⁵ and *George Whitechurch, Lim. v. Cavanagh* [1901].⁶

Upjohn, K.C., and Sargant, for the respondents.—Under the articles of association of this company a shareholder is entitled to a certificate, which is to remain his until a transfer is duly executed by the transferee as well as the transferor, subject to this, that when he wants to get a transfer from himself registered he must deliver the certificate with the transfer. When the transfer to House-

(1) 44 L. J. C.P. 109, 114; L. R. 10 C.P. 307, 318.

(2) 52 L. J. Q.B. 694; 11 Q.B. D. 776.

(3) 56 L. J. Q.B. 415; 19 Q.B. D. 68.

(4) 69 L. J. Ch. 501; [1900] 1 Ch. 833.

(5) 59 L. J. Q.B. 565; 25 Q.B. D. 512.

(6) 71 L. J. K.B. 400; [1902] A.C. 117.

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lander & Madders was certificated it had not been executed by them. Whatever liability the company incurred in parting with the certificates to Bennett, it was one incurred towards Houselander & Madders and persons claiming under them alone and not to the world at large or to the plaintiffs.

Under section 31 of the Companies Act, 1862, a share certificate is only *prima facie* evidence of title. The duty of companies as regards certificates may be seen from what was said by Fry, L.J., in *Northern Counties of England Fire Insurance Co. v. Whipp* [1884]⁷ as regards the alleged duty of keeping title-deeds in security.

To make a person liable on estoppel by negligence the negligence must be in or immediately connected with the transaction itself. It must be the proximate cause of the loss—*Bank of Ireland v. Trustees of Evans' Charities* [1855],⁸ *Merchants of the Staple of England v. Bank of England* [1887],⁹ *Swan v. North British Australasian Co.* [1863],¹⁰ *Young v. Grote* [1827],¹¹ and *Carr v. London and North-Western Railway*.¹ Lord Esher says in *Seton, Laing & Co. v. Lafone*,³ when discussing the language used in *Carr v. London and North-Western Railway*,¹ that he should prefer the expression "real" rather than "proximate" cause. A representation to be actionable must be made under such circumstances as to induce a person to believe that he can act as he in fact does act, thereby altering his previous position—*Pickard v. Sears* [1837].¹²

The transaction here was between Bennett and the Longmans. There was no representation made by the company in that transaction, and no negligence on their part. The proximate and real cause of the money being advanced to Bennett was his improper use of the certificates, not the fact that the certificates had been returned to him.

The wharfinger cases have really no

(7) 53 L. J. Ch. 629, 634; 26 Ch. D. 482, 493.

(8) 5 H.L.C. 389, 409, 410.

(9) 57 L. J. Q.B. 418; 21 Q.B. D. 160.

(10) 31 L. J. Ex. 425; 32 L. J. Ex. 273, 277; 7 H. & N. 603; 2 H. & C. 175, 182.

(11) 5 L. J. (o.s.) C.P. 165; 4 Bing. 253.

(12) 6 Ad. & E. 469, 474.

bearing on this case. In all those cases there had been some statement or representation by the person held liable material to the particular transaction which brought the parties together—something put forward by the defendant to the plaintiff as the basis of his action in the same transaction—*Woodley v. Coventry* [1863],¹³ *Knights v. Wiffen* [1870],¹⁴ and *Coventry, Sheppard & Co. v. Great Eastern Railway*.²

The question is not so much whether there was negligence as whether there was that particular kind of negligence which will give the plaintiff a right of action, whether there was a breach of duty towards him—*Scholfield v. Londesborough (Earl)* [1896].¹⁵ In this case the company committed no breach of duty to the plaintiffs. Further, the plaintiffs have not sufficiently connected their loss with the sending of the certificate to Bennett to make the company liable.

Reliance was placed on the postscript to the receipts of May 11 and 12, but there is nothing to shew that the plaintiffs did in fact rely upon that, and the secretary had no authority to write that. The plaintiffs had notice of the company's articles, under which registration of shares was subject to the approval of the directors. A company, in permitting its secretary to certify transfers of shares, only authorises him to give receipts for the certificates received—*George Whitechurch, Lim. v. Cavanagh*.⁶ The secretary cannot bind the directors so as to deprive them of their discretion under the articles.

The certification on the original transfer had nothing to do with the plaintiffs. They had never heard of it before the action.

Bramwell Davis, K.C., in reply.—There are three questions: First, had the company a duty to the plaintiffs? Secondly, was there negligence? Thirdly, was that negligence the proximate cause of the loss? All three must be answered in favour of the plaintiffs. There is no evidence that Bennett was guilty of fraud; he might have made a mistake, and thought that he was entitled

(13) 32 L. J. Ex. 185; 2 H. & C. 164.

(14) 40 L. J. Q.B. 51; L. R. 5 Q.B. 660.

(15) 65 L. J. Q.B. 593; [1896] A.C. 514.

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to do what he did. The cases turn mainly upon the particular facts there, but *Coven-try, Sheppard & Co. v. Great Eastern Rail-way*² is the nearest case to this.

The company had a duty as to the issue of the certificates—*Balkis Consolidated Co. v. Tomkinson* [1893].¹⁶ They did not exercise ordinary care as to the issue of the certificates, and they are guilty of negligence. They put it in Bennett's power to represent himself as the owner of the shares, and that is the proximate cause of the plaintiffs' loss.

VAUGHAN WILLIAMS, L.J., referred to the nature of the claim in the action, and with regard to the matter referred to in paragraph 12 of the statement of claim said that in his opinion the case sought to be made upon it on the appeal had neither been alleged nor proved. He continued: With regard to the two receipts of May 11 and May 12, if the plaintiffs did rely upon the receipts as a recognition of their title and as a promise binding on the company that the share certificates would be given to them, they were, in my judgment, having regard to the terms of these documents, relying upon that upon which they had no right at all to rely. When one considers the course of business, it would be very wrong indeed to assume that a secretary, in giving a receipt of this sort, either intends to recognise in the way suggested the title of the person lodging the transfer, or to bind the company to issue at the date named a share certificate. It is plain that the opportunities for making such examination as would justify the giving of such a receipt cannot occur upon presentation of the transfers and the application for receipt; and even if the secretary in this case did himself intend to give a receipt which would so bind the company, in my judgment he had no authority to do anything of the sort.

I will now try to dispose of the rest of the case. The case is really based upon estoppel; and the alleged estoppel is said to arise from what happens in the course of what is called on the Stock Exchange

(16) 63 L. J. Q.B. 184; [1893] A.C. 396.

"certification." It is said that in the course of this certification there arose a duty from the defendant company towards the plaintiffs, and that the defendant company by their neglect of that duty, and by their conduct in carrying out the duty, caused the plaintiffs to alter their position by believing in a state of facts which has turned out not to be true, and that under those circumstances the defendant company ought to be estopped from denying that state of circumstances which the plaintiffs were led to believe.

With regard to certifications, I cannot state more concisely what the practice is than by taking the statement in Lord Lindley's judgment which appears in the case of *Bishop v. Balkis Consolidated Co.*⁵ He says¹⁷: "The practice of giving 'certifications' has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares where the seller's certificate of title does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but the seller produces his certificate and the transfer to an officer of the company, and he 'certificates' the transfer; and buyers and their brokers act on the faith of this 'certification' just as they would if the certificate produced to the company had been produced to and lodged with themselves. No fee is paid for a 'certification.' In every case the 'certification' must be read in connection with the transfer on which it is put. The object of the 'certification' is to enable the transferor to satisfy his transferee that he, the transferor, can make a good title to the shares mentioned in the transfer. This he can only do if he is himself the registered owner of the shares mentioned in the transfer, or if he has a transfer from the registered owner to himself, or to some one through whom he claims by a transfer or series of transfers. The 'certification,' therefore, to be of any use at all, must amount to a representation that the transferor has produced to the person certifying such documents as on the face of them

(17) 59 L. J. Q.B. 571; 25 Q.B. D. 519.

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show a *prima facie* title in the transferor to transfer the shares mentioned in the transfer; or, in other words, that the transferor has produced to the person certifying either what purports to be a certificate of the title of the transferor to the shares mentioned in the transfer or the equivalent of such a document, in other words, what purports to be a certificate of the title of some one else to those shares, and one or more documents purporting to transfer those shares from such person to the transferor."

[His Lordship then referred to the facts of the case, and continued:] The plaintiffs really say that they were induced to make advances to Bennett by reason of his possession of the certificates. They say that, having regard to the practice of the Stock Exchange with regard to certification, the certificates having once been lodged by Houselander & Madders and their transfers having been certificated, it was wrong for the company to return the certificates to Bennett at all, and that it was only in consequence of this wrongful return by the secretary of the company of the certificates to Bennett that Bennett has been able improperly to produce them to the plaintiffs and induce them to part with their money. I have no doubt, having regard to the evidence and to some admissions that were made on behalf of the defendants, that, according to the practice of the Stock Exchange, and of companies who make this certification for the purpose, really, of assisting in the dealings with shares on the Stock Exchange, when on a proposed transfer of shares a company has got certificates lodged with it, and has so certified on the accompanying transfer, it does, in practice, retain the certificates until the proposed transfer has been carried out, and then does not return the certificates which have been lodged, but cancels those certificates and issues fresh certificates to the transferee for the number of shares transferred, and also to the transferor for the balance of the shares not transferred, the company retaining these until they have proper information of the determination of the proposed transfer transaction between the transferor and the proposed purchaser. That is my view of the evi-

dence; and if I had only to deal with the question of the duty of the company towards Houselander & Madders—which we have not got to deal with at present—I should be disposed to say that there was a duty upon the company towards Houselander & Madders to retain the certificates and to deal with them in the way which I have described. But at present we have no evidence to lead us to suppose that either by the practice of companies in the certification of shares, or in the common recognition of that practice on the Stock Exchange, any duty arises on a company in respect of the retention of the certificates and the dealing with them after the certification of a transfer to any one else, excepting the transferees presenting the transfer and the certificate for the purpose of certification, and, of course, those claiming through them. In the present case it is said that immediately upon the lodging and retention of these certificates and the certification being completed there arose a duty by the company towards persons who might desire to become shareholders in the company. I can see nothing to support that proposition. As a matter of fact, in the present case all that is proved is that Bennett, being in possession of certificates which were properly issued to him by the company when he became a member of the company, improperly used these certificates, and so obtained advances from the plaintiffs upon the security of them. The plaintiffs had not any knowledge whatsoever of transfers having been presented for certification by Houselander & Madders, or of the fact of the certificates having been lodged with the company or of the return of those certificates by the company to Bennett. All they knew was that they found Bennett in possession of certificates which were genuine certificates and which were issued by the company. It is perfectly plain, therefore, that in no sense can the plaintiffs be said to have been parties to the original transaction of the presentation of the transfer and the lodging of these certificates for purposes of certification; nor can it be said that in any way the plaintiffs were parties to that certification.

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I do not think that the plaintiffs in any way contest the conclusions of fact at which I have arrived; but they say that, although that may be so, the company neglected their duty to retain the certificates, and their negligence is the real or proximate or direct cause of the loss which the plaintiffs have sustained. To put the conclusion at which I have arrived shortly, it seems to me that the answer to the plaintiffs' case is—first, that, there being admittedly no duty to the plaintiffs personally whatever, they have failed to establish any duty on the part of the company in respect of the retention of these certificates to the public or to any section of the public, or, to define the suggested section a little more closely, to persons desirous of becoming members of the company; and secondly, that, even assuming that any such duty of the company could be established towards persons desirous of becoming members of the company, it is not true that the returning of the certificates to Bennett was the proximate, direct, or real cause (whichever expression may be used) of the loss which the plaintiffs have sustained by having advanced money to Bennett upon the security of certificates which, as between Bennett and Houselander & Madders, Bennett was not entitled to deal with. It is quite plain that the mere return of the certificates to Bennett would have led to no loss to the plaintiffs whatever. What did cause the loss was the improper use of these certificates by Bennett when they came into his possession. For these reasons I think that the plaintiffs' case fails.

With regard to these cases of estoppel generally, it is necessary that the plaintiffs should prove that they have been misled either by word of mouth or by conduct, and, if by conduct, it must be by conduct in some transaction to which the defendants were party. For the reasons which I have given it seems to me that, as regards that, the case fails. But if that cannot be proved, then, to raise an estoppel, it must be proved generally that the defendants have omitted to do some act which it was their duty to do towards the plaintiffs, or the public, or some section of the public. In my opinion

there is no proof here of any misleading, nor of any neglect of duty towards the plaintiffs or towards any section of the public. The utmost that can be proved, according to my view of the case, is that there has been negligence, as admittedly there has been, in the custody of these certificates; but the mere fact of negligence in the retention of these documents is not sufficient to raise estoppel. It cannot be said since the decisions in *Bank of Ireland v. Trustees of Evans' Charities*⁸ and *Johnson v. Crédit Lyonnais* [1877]¹⁸ that mere negligence will raise an estoppel there must be more than that. There must, at all events, be negligence which is the real and immediate cause of the damage done. It will be remembered that Chief Justice Cockburn, in his judgment in *Swan v. North British Australasian Co.*,¹⁰ leaves it an open question whether or not mere negligence, irrespective of negligence of a duty towards the plaintiffs, might or might not raise some sort of estoppel when it is the real cause of the loss sustained by the plaintiffs. He says¹⁹: "It is to be observed that, in the case in the House of Lords to which I have referred"—*Bank of Ireland v. Trustees of Evans' Charities*⁸—"it was unnecessary to decide the larger question, whether negligence leading to a forgery by which another party was defrauded estops the party guilty of it from disputing the genuineness of the instrument. The absence of negligence immediately leading to the result was at once a sufficient ground on which to dispose of the case." So I say in the present case—there is absence of evidence of negligence immediately leading to the result complained of, and therefore the estoppel is excluded.

I think I have now dealt with all the matters to which I need refer in the present case. I think that the judgment of Mr. Justice Farwell ought to be affirmed, because the plaintiffs have not been misled by any statement or conduct of the defendants; because the defendants have not been shewn to have been negligent of any duty which they owed to the plaintiffs individually, or as members of

(18) 47 L. J. Q.B. 241.

(19) 32 L. J. Ex. 280; 2 H. & C. 192.

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a section of the public; and because the negligence which has been shewn in the custody of the certificates in question was not the immediate cause or the real cause which led to the loss by the plaintiffs.

ROMER, L.J.—I also think that the appeal fails, and I can give my reasons shortly.

With regard to the main case of the plaintiffs, in the first place I may point out that they do not and cannot rely, as a cause of action against the company, on the certification given to Houselander & Madders. That certification may have placed the company under special obligations to those gentlemen to whom it was given, or to those who claim under them, or had notice of the certification and relied on it; but the plaintiffs knew nothing whatever of the certification, and cannot base any claim upon it. The ground on which the plaintiffs claim to hold the defendant company liable is one of estoppel by what is said to have been culpable negligence on the part of the company in forwarding the certificates of the shares to Bennett after they had notice of the transfer to Houselander & Madders and after their recognition of that transfer by the certification.

I assume that there was negligence on the part of the company, in so forwarding the certificates which, as between the company and those persons who were entitled to rely on the certification, might have made the company liable to those persons; but, as I have pointed out, the plaintiffs are not such persons, and it appears to me to be pushing the doctrine of estoppel by negligence too far to say that in the present case, by forwarding the certificates to Bennett, or by allowing him to retain them after he received them, the company must be taken to have held out to the world at large, or to any person dealing with Bennett, that Bennett's title, both legal and equitable, to the shares in question was good. The certificates were true on the face of them. Bennett was in truth (as stated by the certificates) the registered holder and owner of the shares; and it is to be remembered that a certificate of shares

is not a negotiable instrument, nor is it a warranty of title on the part of the company issuing it—see (*inter alia*) *Shropshire Union Railways and Canal Co. v. Reg.* [1875]²⁰ and *Ottos Kopje Diamond Mines, Lim., In re* [1892].²¹ I may indeed, with regard to certificates, repeat what Lord Justice Fry said of title-deeds in *Northern Counties of England Fire Insurance Co. v. Whipp*,⁷ that title-deeds could not be regarded as being in the eye of the law “analogous to fierce dogs or destructive elements, where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person having their possession or control.”

I do not think that the plaintiffs were entitled, merely because they found the certificates in the hands of Bennett, to assume as against the company, without enquiry of the company, that there had been no dealings by Bennett with the shares, or that the company held out that the owner could give a good title to the shares. If the plaintiffs have suffered loss by their dealings with Bennett, it arose, to my mind, from Bennett's fraud, and from the plaintiffs taking upon themselves the risk involved in their accepting Bennett's title merely because he held the certificates, and not from any representation or breach of duty on the part of the company to or towards the plaintiffs.

With regard to the small subsidiary point as to the item of damage mentioned in paragraph 12 of the statement of claim, all I need say is that the special cause of action urged here was not pleaded; nor, as I understand, properly taken in the Court below.

I think that the whole appeal fails and should be dismissed with costs.

STIRLING, L.J.—I am of the same opinion.

[His Lordship referred to the facts, and continued:] Certification is not an act the performance of which is imposed on the company, either by any provision in the Companies Acts or in the

(20) 45 L. J. Q.B. 31; L. R. 7 H.L. 496.

(21) 62 L. J. Ch. 166; [1893] 1 Ch. 618.

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articles of association. It is therefore one which the company may see fit to do or may not do; but if the company do see fit to give a certification, then, as at present advised, I think that by that Act the company does undertake a duty to any person who deals with shares on the faith of the certification. If the plaintiffs had so dealt with these shares, it would have been necessary to define the extent and nature of that duty; but the plaintiffs knew nothing whatever of the certification, and did not act on the faith of it. Further, when the plaintiffs made their advances they knew nothing of the circumstances in which the certificates had been sent by the company to Bennett, and consequently they did not change their position by relying on the special circumstances in which the certificates came to Bennett's hands. What the plaintiffs did rely on was merely the certificates and the possession of them by Bennett. The certificates were in the ordinary form, under the seal of the company, and simply certified that Bennett was the registered holder of certain shares specified subject to the memorandum and articles of association. The statements in the certificates were perfectly accurate, for at the date Bennett was the registered holder of these shares. Then, as regards the possession of the certificates, by section 31 of the Companies Act a certificate is *prima facie* evidence of the title of a member to the share or shares specified; but it is only *prima facie* evidence, and a person who deals with another on the faith of only a *prima facie* title is always liable to find that another and better title may be brought forward. That is what took place here. The plaintiffs' title failed because Bennett had created a prior title in favour of Houselander & Madders, and was not in a position to confer a good title on the plaintiffs.

The case which is put forward on behalf of the plaintiffs is that the defendants were guilty of culpable neglect, and are estopped from disputing that the plaintiffs have a title to the shares. A title by estoppel may be created, no doubt, by negligence, but the limitations

on the rule are stated, and were very much considered in *Swan v. North British Australasian Co.*¹⁰ Mr. Justice Blackburn there states the rule. He refers to what had been stated by Baron Wilde in the Court of Exchequer, which was in these terms: "that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons to shew that state of facts did not exist." Then Mr. Justice Blackburn says, "This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy." In my judgment, not one of the limitations which Mr. Justice Blackburn there imposes on the application of the doctrine of estoppel by negligence is found satisfied in the present case. In the first place, the neglect—and I think there was neglect—which occurred in this transaction was not in the transaction with the plaintiffs; it was in the transaction with Houselander & Madders; secondly, the neglect was not the proximate cause of the plaintiffs' mistake, for the plaintiffs knew nothing of it, nor of the way in which the company had dealt with the certificates. Lastly, I think there was no neglect of duty to the plaintiffs, though there was a neglect of a duty owing to persons with whom the plaintiffs were not privy. I had intended with regard to that to refer to what was said by Lord Justice Fry in *Northern Counties of England Fire Insurance Co. v. Whipp*,⁷ but that has been already read, and I need not refer to it again.

I think, therefore, that the plaintiffs

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fail in establishing their case, and that the appeal should be dismissed.²²

Appeal dismissed.

Solicitors—Minton Slater & Co., for appellants;
Paines, Blyth & Huxtable, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.

BUCKLEY, J. }
1905. } ANDERSON, *In re*;
April 6, 7, 14. } PEGLER v. GILLATT.

Will—Estoppel—Purported Disposition of Realty—Incapacity to Dispose—Adverse Possession.

By her will a married woman gave certain real property (of which she was competent to dispose) to her husband for life, with remainder over. By a codicil she purported to devise in the same way certain other property (to which she had a good title but which she was not competent to devise). Her husband entered on both properties and remained in possession for more than twenty years:—Held, that those claiming under the husband were not estopped from denying the testatrix's power to dispose of the second property, and had a good title by adverse possession against her heir and those claiming in remainder under the codicil.

The principle of *Board v. Board* (43 L. J. Q.B. 4; L. R. 9 Q.B. 48) does not apply to the case of a person who has a good title to property but is not competent to dispose of it.

Paine v. Jones (43 L. J. Ch. 787; L. R. 18 Eq. 320) applied.

By an indenture dated February 17, 1871, being a settlement on the marriage shortly afterwards solemnised between William Anderson and Ann Anderson, certain property (hereinafter spoken of as the Litchurch property), which then belonged to Ann Anderson in fee-simple in possession, was conveyed to the use of
(22) *Rainford v. Keith* [1904] (*ante*, p. 156; [1905] 1 Ch. 296) may be referred to in this connection.

such person or persons as she should in writing appoint, and in default of appointment for her separate use during her life, and after her decease to the use of her brother, Edwin Johnson, during his life, and after his decease to the use of such person or persons, and upon such trusts as she, notwithstanding coverture, should by will or codicil appoint.

The deed did not contain any agreement for the settlement of other or after-acquired property.

At the date of the settlement Ann Anderson was absolutely entitled to certain other property (hereinafter spoken of as the Worksop property) in fee-simple in reversion expectant on the decease of Elizabeth Miller.

By her will dated April 29, 1871, Ann Anderson, in exercise of the power of appointment given her by the settlement, devised the Litchurch property to the use of her husband, William Anderson, for his life, and at his decease to her brother, Edwin Johnson, upon trust to sell the same and divide the proceeds amongst her three brothers, William, Frederick, and Edwin, and their heirs, share and share alike. She appointed Edwin Johnson sole executor.

Elizabeth Miller died November 5, 1872, and Ann Anderson thereupon became absolutely entitled in possession to the Worksop property.

By a codicil dated December 20, 1873, the testatrix, after reciting that since making her will she had come into absolute possession of the Worksop property (but having no testamentary power over it), purported to devise the same to the use of her husband, William Anderson, for his life, and at his decease to her brother, Edwin Johnson, upon trust to sell the same and divide the proceeds between her three brothers, William, Frederick, and Edwin, share and share alike. The codicil provided that in case any of her brothers should die in the lifetime of her husband, leaving issue, such issue should take the parent's share as well of the bequest in the codicil as of the bequest in the will; but in case any of them should die without issue his share of both bequests should go to the survivors.

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The testatrix died on May 29, 1882.

Her husband and her three brothers (William being her heir-at-law) survived her.

On her death William Anderson, her husband, entered into possession of both the Litchurch property and the Worksop property, and remained in undisputed possession till his death.

Her brothers all died in the lifetime of her husband.

The plaintiff Ann Elizabeth Pegler, daughter of Edwin Johnson, was the only surviving issue of her brothers.

Her brother William left a widow, to whom he gave all his real and personal estate. The defendant Jane Gillatt was her legal personal representative.

William Anderson died on December 8, 1903, having made a will, of which probate was granted to the defendant Mary Mason, as attorney for the executor, to whom he had devised his real estate.

Ann Elizabeth Pegler (and her husband) took out an originating summons against Jane Gillatt and Mary Mason for the determination of the question whether on the true construction of the will and codicil of Ann Anderson, and in the events which had happened, Ann Elizabeth Pegler was entitled in fee-simple in possession to both the Litchurch property and the Worksop property.

Buckmaster, K.C., and *Leeke*, for the plaintiffs.—Ann Elizabeth Pegler is entitled to the Worksop property as well as to the Litchurch property under the will and codicil of her aunt, Ann Anderson, as the sole surviving issue of Ann Anderson's three brothers. William Anderson, the husband of Ann Anderson, took under the will of Ann Anderson the Litchurch property for his life. Ann Anderson had power to dispose by will of the Litchurch property under her marriage settlement. But she was a married woman before January 1, 1883, and had no power to dispose by will of the Worksop property. William Anderson, having taken under the will what Ann Anderson was able to dispose of, could not have disputed that Ann Anderson had power to dispose of other property which was in fact not hers to dispose of, and those who

claim through William Anderson are estopped from denying that Ann Anderson made a valid disposition of the Worksop property—*Dalton v. Fitzgerald* [1897].¹ As was said by Mellor, J., in *Board v. Board* [1873],² a person cannot say a will is valid so far as it benefits himself, but invalid as to the rest. William Anderson's possession of the Worksop property must be treated as being under the will, and his possession was for the benefit of those claiming under the will. The Worksop property, therefore, as well as the Litchurch property, goes to Ann Elizabeth Pegler, who claims under the will.

Astbury, K.C., and *Sherrington*, for Jane Gillatt.—This defendant's interest is that of Ann Anderson's heir-at-law, and it is not disputed that she is barred by adverse possession.

Cann, for Mary Mason.—This defendant is entitled to the Worksop property. William Anderson, by being in possession from 1882 to 1903, acquired as against all the world a good statutory title to the Worksop property. It is admitted that those claiming under William Anderson have a good title against Ann Anderson's heir-at-law. The argument of the defendants in *Dalton v. Fitzgerald*,¹ before Stirling, J., is applicable to this defendant's case. The authorities divide themselves into two classes—first, cases where a testator has no title, but makes an effective devise, assuming the title to be good, such as *Board v. Board*,² and *Hawksbee v. Hawksbee* [1853];³ and secondly, cases where the testator has a good title, but does not make an effective devise, such as *Paine v. Jones* [1874],⁴ and *Stringer's Estate, In re; Shaw v. Jones Ford* [1877].⁵ In the latter class of cases a person who enters under the impression that he is taking under the will is not estopped thereby from setting up a title against the remaindermen. The present case falls within the second category, that to which *Paine v. Jones*⁴ belongs. The testatrix had a title, but no

(1) 66 L. J. Ch. 604; [1897] 2 Ch. 86.

(2) 43 L. J. Q.B. 4, 8; L. R. 9 Q.B. 48, 54.

(3) 23 L. J. Ch. 521; 11 Hare, 230.

(4) 43 L. J. Ch. 787; L. R. 18 Eq. 320.

(5) 46 L. J. Ch. 635; 6 Ch. D. 1.

ANDERSON, IN RE.

testamentary power. In *Paine v. Jones*⁴ Malins, V.C., distinguishes *Board v. Board*,² *Hawksbee v. Hawksbee*,³ and *Anstee v. Nelms* [1856].⁶ This defendant is entitled to the possessory title which William Anderson acquired by his possession from 1882 to 1903. The question is simply one of estoppel. It was suggested on behalf of the plaintiff that there was some sort of election involved in this case; but it now appears that election in the strict sense of the doctrine is not contended for, but only in the sense of what is said by Mellor, J., in *Board v. Board*.² It thus becomes unnecessary to refer to *Howells v. Jenkins* [1863].⁷ It was there held that there is no election if the property disposed of by the testator is not acquired by the beneficiary till after the testator's death. Under the old law, by which a testator could not by will dispose of lands acquired after the date of the will, if a will was insufficiently executed to pass realty no case of election arose, the will so far as it purported to affect realty being considered non-existent—*Sheddon v. Goodrich* [1803]⁸; and so, too, when the testator was incompetent to dispose of property by reason of infancy or coverture—*Hearle v. Greenbank* [1749],⁹ *Rich v. Cockell* [1804],¹⁰ and *Theobald on Wills* (6th ed.), pp. 111 and 112.

Buckmaster, K.C., in reply.—The argument for Mary Mason rests upon *Paine v. Jones*.⁴ But there were special circumstances in that case, which is a totally independent one. She can only escape from being precluded by *Dalton v. Fitzgerald*¹ by saying that *Paine v. Jones*⁴ lays down a principle and applies where the facts are partly, but not wholly, the same as there. Lopes, L.J., lays down a principle in *Dalton v. Fitzgerald*¹ which covers this case, and Mellor, J., does the same, though less distinctly, in *Board v. Board*.²

Cur. adv. vult.

April 14.—BUCKLEY, J., read the following judgment: At the date of her will on April 29, 1871, Ann Anderson,

who was married on March 9, 1871, was, by virtue of a power contained in her marriage settlement dated February 17, 1871, competent to dispose of the Lit-church property, and she made a testamentary disposition of it under which her husband William Anderson took a life estate. At the date of her codicil on December 20, 1873, Ann Anderson was entitled for an estate which had fallen into possession by the dropping of a life on November 5, 1872, to the Worksop property; but being a married woman, married before the Married Women's Property Act, 1882, she had no testamentary power over it. By her codicil she purported to devise it to her husband, the said William Anderson, for life, with remainders over, and confirmed her will. Ann Anderson died on May 29, 1882, and thereupon William Anderson entered into possession of both properties and so continued until his death on December 8, 1903. Under these circumstances Ann Anderson's heir does not dispute that he is barred as regards the Worksop property by adverse possession. The question is whether William Anderson's estate is entitled, or whether the gift of the Worksop property after William Anderson's death contained in Ann Anderson's codicil is to have effect as against William Anderson and those deriving title under him. Is it a true proposition that William Anderson entered under Ann Anderson's testamentary disposition, and that he and those claiming under him are estopped from saying that her testamentary disposition of Worksop was invalid because she had no testamentary power?

The plaintiff, who claims under the testamentary disposition, says that Mr. Justice Mellor's sentence in *Board v. Board*² applies—namely, "A person cannot say that a will is valid to enable him to take a benefit under it, but invalid so far as regards the interests of those in remainder who claim under the same will." *Board v. Board*² was a case of a testamentary instrument validly executed by a person who had no title to the property in dispute. Its principle does not, I think, apply to the case of a person who has a title but does not (because she

(6) 26 L. J. Ex. 5; 1 H. & N. 225.

(7) 32 L. J. Ch. 788; 1 De G. J. & S. 617.

(8) 8 Ves. 481.

(9) 3 Atk. 695, 714.

(10) 9 Ves. 369.

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cannot) devise it. An analogy is, I think, to be found in the cases as to election under the old law when a man could not dispose by will of lands acquired after the date of his will. In those cases it was held that if there was a will validly executed and expressing a clear intention to dispose of the after-acquired lands the heir was put to his election, but that if the will was insufficiently executed to pass realty or the testator by reason of infancy or coverture was incompetent to dispose by will no case of election arose—*Hearle v. Greenbank*⁹ and *Sheddon v. Goodrich*⁸; and see *Blakelock v. Grindle* [1868].¹¹ In *Hearle v. Greenbank*⁹ Lord Hardwicke says: "But suppose the execution of the power is bad, yet it is said the plaintiffs have an equity to compel the infant to let them take the real estate, for she shall not take both by the will, and against the will. In general this rule is right, and founded on proper premises but a wrong conclusion; for this purpose see the case of *Noys v. Mordaunt* [1706]."¹² (See also *Morris v. Burrowes* [1743].)¹³ "I am of opinion the infant in the present case is not to be compelled to make her election. For the instrument here being void as to the real estate, there is no instance where an infant has in such a case been compelled to make an election, for here is properly no will at all as to the lands. It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the statute of frauds and perjuries, is bad as to the real estate; and I should in that case be of opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate, before he could intitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute."

In a case like the present the question is not whether the same person can say

that a will is valid for his benefit but invalid in other respects, but whether he can say that a certain part of a testamentary disposition is a will and another part is not a will. To such a case the language of Mr. Justice Mellor does not in my opinion apply. *Paine v. Jones*⁴ is an authority which upon this point does not seem to have been affected by the subsequent decisions. In *Dalton v. Fitzgerald*¹ the decision of Vice-Chancellor Malins in *Paine v. Jones*⁴ is no doubt considerably shaken, but I cannot see that Lord Justice Lindley threw doubt upon it upon the question which I here have to decide. On the contrary, the observations of the Lord Justice upon Sir George Jessel's decision in *Stringer's Estate, In re; Shaw v. Jones Ford*,⁵ which immediately follow upon what he said as to *Paine v. Jones*,⁴ lead me to think that he did not intend his language to throw doubt upon *Paine v. Jones*⁴ in such a state of circumstances as the present. He seems to affirm an objection to the extension of the doctrine of estoppel to beneficiaries who do not dispute their testator's title, but do dispute that their testator made a valid disposition of property which was property of their testator.

In my judgment William Anderson and those who derive title under him are not, by reason of the fact that William Anderson under the will entered as tenant for life of the Litchurch property, estopped from denying that Ann Anderson made a good testamentary disposition of the Workstop property. It results that William Anderson's estate is entitled to the Workstop property. There is in any case no question of election, for the Workstop property was not the property of William Anderson.

Solicitors—Few & Co., for plaintiffs; Peacock & Goddard, agents for Henry Vickers, Son & Brown, Sheffield, for Jane Gillatt; J. H. Lee & Watts, agents for Whittingham & Williams, Nottingham, for Mary Mason.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.]

(11) 38 L. J. Ch. 247; L. R. 7 Eq. 215.

(12) 2 Vern. 581.

(13) 2 Atk. 627.

FARWELL, J. }
 1905. } EVAN PRICE, *In re*;
 March 31. April 1. } PRICE v. NEWTON.

Will—Construction—“Pecuniary investment”—Money on Deposit at Bank.

Money on deposit at a bank is not a “pecuniary investment” in ordinary parlance, and under ordinary circumstances will not pass under a bequest of “pecuniary investments” contained in a will.

Adjourned summons.

By his will dated June 30, 1888, the late William Evan Price gave (*inter alia*) “all his mortgages, debentures, and other securities for money, shares, stocks and pecuniary investments” to certain legatees upon certain trusts therein specified.

At the date of his death, on December 16, 1904, the testator had a sum of 5,750*l.* standing to his credit on deposit account at the Torrington branch of the National Provincial Bank, subject to a ten days’ notice of withdrawal.

The present summons raised (*inter alia*) the question as to whether this deposit of 5,750*l.* was, or was not, a “pecuniary investment” within the meaning of the above-mentioned gift.

Upjohn, K.C., and *K. G. Metcalfe*, for the summons.—“Investment” is used nowadays in a very loose sense; and money on deposit at a bank may fairly be considered a “pecuniary investment.” There is no decision on the exact point in question, though there are two or three somewhat analogous cases. Thus in *Wheeler, In re*; *Hankinson v. Hayter* [1904],¹ which followed the Irish case of *Mayne v. Mayne* [1896],² it was held that money on deposit at a bank withdrawable at fourteen days’ notice was not “ready money.” Again, in *Hopkins v. Abbott* [1875],³ it was decided that a banker’s deposit notes were not included in a bequest of “all bonds, promissory notes, and other securities for money . . . and all moneys due thereon.” Lastly, it was held in *Rayner, In re*; *Rayner v. Rayner* [1903],⁴

that “securities” in a will might sometimes, under the influence of the context, mean “investments,” though a question was raised as to whether the word, in the absence of some governing context, could at the present day be taken to include stocks and shares. The fact that money on deposit earns interest is really immaterial to the question at issue. The same was once true of current accounts.

[FARWELL, J., referred to *Wilks v. Groom* [1856],⁵ and *Perpetual Executors and Trustees’ Association of Australia v. Swan* [1898].⁶]

Jenkins, K.C., and *Howard Wright*, for the defendant.—Money on deposit at a bank is not a “pecuniary investment.” It is noticeable that in Order XXII. of the Rules of the Supreme Court there seems to be a distinction drawn between paying money in Court into the Bank of England (rule 13) and investing it in the various authorised investments (rule 17).

Simon, for another defendant having the same interest.—In *Cann v. Cann* [1884],⁷ trustees who had allowed trust moneys to remain too long at a bank on deposit were held liable for their consequent loss.

[He referred also to *Lewin on Trusts* (11th ed.), pp. 326, 327.]

FARWELL, J.—The testator was a solicitor; and he was a very old man when he made this will in 1888. I get no assistance in this case from the usual extrinsic circumstances, or from putting myself in his armchair, because, unfortunately, the subject-matter of this particular dispute was not in existence at the time that he made his will. Nor is there, again, any assistance to be derived from the natural inclination of the Court to avoid intestacy, because this is not a question between testacy and intestacy, but between two gifts in the same will. Nor is there any assistance to be derived from a man’s natural desire to provide for persons having a claim on him as compared with others, because in this case the contest is between the sons and daughters of his

(1) 73 L. J. Ch. 576; [1904] 2 Ch. 66.

(2) [1897] 1 Ir. R. 324.

(3) 44 L. J. Ch. 316; L. R. 19 Eq. 222.

(4) 73 L. J. Ch. 111; [1904] 1 Ch. 176.

(5) 25 L. J. Ch. 724; 3 Drew. 584.

(6) 67 L. J. P.C. 141; [1898] A.C. 763, 767.

(7) 51 L. T. 770.

EVAN PRICE, IN RE.

brother. I have, therefore, simply the will as it stands.

[His Lordship read the material provisions of the will, and continued:]

The question, then, is this: Is this sum of 5,750*l.* a "pecuniary investment" within the meaning of this will, so that it passes under the specific gift; or is it not to be so described, so that it falls into residue? In my opinion it is not a "pecuniary investment," and accordingly falls into residue. I think that no one, in ordinary parlance, when dealing with money on deposit account at his banker's at short call, and earning only the usual banker's interest, which is one per cent. below bank rate, would ever speak of such a deposit as an investment to be continued by his trustees, or even as an investment simply. It is difficult to dogmatise about matters of this sort; and I quite feel the force of the observation that people do nowadays use the words "invest" and "investment" in very odd collocations. But, first of all, to take the Rules of Court, it is clear that the rules distinguish between money on deposit and money invested. It is clear that Vice-Chancellor Kindersley, in *Wilks v. Groom*,⁵ distinguishes the case of investment, where investment is required, from the case of depositing with bankers. In the same way Lord Macnaghten, in *Perpetual Executors and Trustees' Association of Australia v. Swan*,⁶ in delivering the judgment of the Privy Council, and in dealing with a colonial statute authorising, in certain instances, money belonging to a trustee company to be placed with bankers on deposit, makes this general statement: "The framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security." The distinction, to my mind, is really plain. The money that is deposited with a man's banker is money that awaits investment—it is not, in fact, already invested. Whether or no it produces interest by being put on deposit account is, in my judgment, immaterial. I think there is great force in the observation made by counsel for the summons, that the fact that it earns interest cannot make it an investment, because it is quite within recent times—

there may be some banks that do it even now—that banks have allowed interest on a current account that exceeds a certain amount.

The result is that, in my opinion, this money falls into residue.

Solicitors—Kendall, Price & Francis, for summons; Harwood & Pusey; J. T. Rossiter, agent for E. B. Titley, Bath, for defendants.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.]

FARWELL, J. }
1905. }
March 23. }

TURNBULL, *In re*;
SKIPPER *v.* WADE.

Will—Legacies—Payment—Direction to Pay "free from duty"—Insufficient Estate—Duties Treated as Additional Legacies—Abatement—Settled Legacy—Revenue—Settlement Estate Duty—"Express provision to the contrary"—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5—Finance Act, 1896 (59 & 60 Vict. c. 28), s. 19, sub-s. 1.

Where legacies are given "free from duty," and the estate is insufficient to pay the legacies and the respective duties in full, the duty on each particular legacy is to be regarded as an additional legacy and added to the original legacy, and then both legacies must abate rateably.

A direction to pay legacies free from duty is "an express provision to the contrary" within the meaning of section 19, sub-section 1 of the Finance Act, 1896, and throws the burden of the settlement estate duty leviable in respect of a settled legacy upon the deceased's general estate. If the estate is deficient, the settlement estate duty must, like the legacy duty, be also treated as an additional legacy, and be added to the original legacy for the purposes of abatement.

Adjourned summons.

By her will dated June 28, 1893, Mary Elizabeth Turnbull, after appointing her husband and R. E. Cunliffe executors and trustees, and making certain specific and charitable bequests, bequeathed to her

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husband the sum of 50,000*l.*, and declared that if he should die before her such legacy should not lapse, but should vest in and in that event she bequeathed the same to his representatives to be dealt with as part of his personal estate, and as if he had died immediately after her. She bequeathed to her nephew Arthur Hilton Skipper, the plaintiff, the sum of 18,000*l.*; to his brother, the defendant Frank Maddox Skipper, the sum of 16,000*l.*; to the plaintiff, the defendant F. M. Skipper, and Harriet M. C. Skipper, the sum of 10,000*l.* upon the trusts therein declared in favour of her nephew John Chadwick Skipper during his life, and of his children after his death; to her husband, the plaintiff, and R. E. Cunliffe, the sum of 15,000*l.* upon the trusts therein declared in favour of her niece, the said Harriet M. C. Skipper during her life, and of her children after her death; and to various other legatees, some of whom were strangers in blood to the testatrix, legacies of smaller amount; and the testatrix declared that all the before-mentioned legacies should be paid "free from duty." All the residue of her moneys, property, and effects the testatrix bequeathed to trustees upon the trusts therein mentioned.

Her husband and R. E. Cunliffe predeceased the testatrix, who died on November 19, 1903, and letters of administration with the will annexed of her estate were granted to the plaintiff on January 20, 1904.

The defendants Wade and Seagrim were the trustees of the marriage settlement of one of the legatees, who was a stranger in blood to the testatrix, and whose legacy, in respect of which duty at the rate of 10 per cent. was payable, became subject to the trusts of such settlement. The defendants Dundas, Purves, and Knowles were the present trustees of Harriet M. C. Skipper's legacy, in respect of which legacy duty at the rate of 3 per cent. was payable, and the defendants Harvey and Rushbrooke were the executors and trustees of the will of the testatrix's husband.

The estate of the testatrix proved insufficient for the payment in full of the above-mentioned legacies free of duty,

and the plaintiff took out this summons for the determination (*inter alia*) of the following questions: Whether the amounts of the duties payable by virtue of the direction in the will that the legacies therein mentioned should be paid free from duty ought to be treated as legacies for the purposes of an abatement between the legatees, so that the legacies ought to abate in the proportion which the fund available for payment of legacies bore to the sum total of the legacies, and the duties payable in respect of them, and, if not, how and in what manner and proportions (*inter se*) the legacies ought to abate; and whether the direction that the legacies should be paid free from duty referred to legacy duty only, or whether such direction related also to settlement estate duty, and was an "express provision to the contrary" within the meaning of section 19, sub-section 1 of the Finance Act, 1896.¹

The Court considered the question of abatement first.

Maugham, for the plaintiff, stated the case.

Upjohn, K.C., and *R. J. Parker*, for the defendants, the trustees of Harriet M. C. Skipper's legacy.—The estate being insufficient to pay all the legacies in full, duty free, the legacies themselves must bear so much of their own duties as cannot otherwise be paid. In *Wilson v. O'Leary* [1874]² it was held that the gift of legacy duty out of the residuary estate failed *pro tanto*.

[*FARWELL, J.*—The Scottish case of *Lord Advocate v. Miller's Trustees* [1884]³

(1) Finance Act, 1896, s. 19, sub-s. 1: "The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

Sub-section 2: "The settlement estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow."

(2) L. R. 17 Eq. 419.

(3) 11 Ct. Sess. Cas. (4th Ser.), 1046; 21 Sc. L. R. 709.

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seems to cover the point. [His Lordship read the material part of the Lord Ordinary's judgment, and continued:] I shall follow the course adopted in that case, and regard the gift as being in effect two legacies. They should be added together, and then all must abate rateably.]

Jenkins, K.C., and *Beebe*, for the defendants Wade and Seagrim.—As there is not enough to pay the legacies and duty in full, the proper course is to pay the duty first and divide what is left among the various legatees—*Wilkins, In re; Wilkins v. Rotherham* [1884],⁴ in which *Farrer v. St. Catharine's College, Cambridge* [1873],⁵ was not referred to; and this earlier case is not consistent with Pearson, J.'s decision in *Wilkins, In re*.⁴ The legacy being given free of duty, the legacy duty ought to be paid out of the same fund as the legacy—*Noel v. Henley (Lord)* [1819].⁶

Butcher, K.C., and *Austen-Cartmell*, for the defendants Harvey and Rushbrooke.

A. H. Jessel, for the defendant F. M. Skipper.

FARWELL, J.—The legacies in question are given "free from duty." Of the legacies given, some bear duty at 10 per cent. and some at 3 per cent. The estate is insufficient to pay the whole amount. I have already read in the course of the argument, and will not read again, the passage from the judgment of the Lord Ordinary in *Lord Advocate v. Miller's Trustees*,³ which seems to me to express the true view with great accuracy. Of course, the Scottish decision is not binding on this Court, but it appears to me to be sense and justice, and I desire respectfully to adopt it.

With regard to the English authorities, there is first the case of *Noel v. Henley (Lord)*,⁶ where the Lord Chief Baron says, "The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the

same fund." In *Farrer v. St. Catharine's College, Cambridge*,⁵ Lord Selborne, dealing with a case where there was a deficient estate, and a direction that all the legacies were to be paid free of duty, held that a gift of legacy duty on a specific or pecuniary legacy was to be treated itself as a pecuniary legacy, and must abate accordingly. Of course, the amount of the duty necessarily diminishes as the original legacy diminishes, but, as I understand Mr. Justice Pearson's judgment in *Wilkins, In re*,⁴ although I agree with his statement of the principle to be applied, I venture to think that he did not work out his arithmetic aright according to that principle. It appears to me that he has not carried out what he says is the principle. He says, "I think the intention of the testator was that each annuitant should receive that exact proportion of his estate which she would have received if the estate had been sufficient to pay both the annuities in full"—that is, if the estate had been sufficient to pay both the annuities and the duty in full, for the duty is in itself either an addition to the legacy or an additional legacy, and must abate accordingly. Unfortunately, *Farrer v. St. Catharine's College, Cambridge*,⁵ does not appear to have been cited to Mr. Justice Pearson. The legacy duty, therefore, will be treated as an additional legacy in each case, and the legacies will abate rateably.

The Court then considered the question of the incidence of the settlement estate duty.

Upjohn, K.C., and *R. J. Parker*, for the trustees of Harriet M. C. Skipper's legacy.—The direction being that the legacies are to be paid free of duty, the settlement estate duty is payable out of general assets—*Pimm, In re; Sharpe v. Hodgson* [1904],⁷ followed by *Swinfen Eady, J.*, in *Cayley, In re; Audry v. Cayley* [1904].⁸ The direction is an express provision to the contrary within section 19, sub-section 1 of the Finance Act, 1896, and the Court will give effect to it notwithstanding

(4) 54 L. J. Ch. 188; 27 Ch. D. 703.

(5) 42 L. J. Ch. 809; L. R. 16 Eq. 19.

(6) 7 Price, 241, 253.

(7) 73 L. J. Ch. 627; [1904] 2 Ch. 345.

(8) *Ante*, p. 31; [1904] 2 Ch. 781.

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that the date of the will is anterior to the passing of the Finance Act, 1894, on the ground that it concerns the description of the subject-matter of the gift—*Bridger, In re; Brompton Hospital for Consumption v. Lewis* [1893],⁹ and *Rayer, In re; Rayer v. Rayer* [1903].¹⁰

Jenkins, K.C., and *Beebee*, for the defendants Wade and Seagrim.—There is no provision for the payment of this settlement estate duty, and the omission is itself tantamount to a contrary provision for the purposes of the Act. Under the principle of *Jones v. Ogle* [1872]¹¹ and *March, In re; Mander v. Harris* [1884],¹² the date of the will must be looked at. The testatrix meant these legacies to be free of legacy duty only, and the settlement estate duty falls on the specific fund.

Butcher, K.C., and *Austen-Cartmell*, for the defendants Harvey and Rushbrooke.—The words are “free from duty,” not “free from all duties,” and cover legacy duty only. They are not as wide as the words “without any deduction,” which in *Parker-Jervis, In re; Salt v. Locker* [1898],¹³ Kekewich, J., held to amount to an express provision to the contrary within the meaning of section 14, subsection 1 of the Finance Act, 1894, and which, in the case of a covenant in a settlement, were held to include settlement estate duty—*Maryon-Wilson, In re; Wilson v. Maryon-Wilson* [1900].¹⁴ There is not a sufficiently definite provision to the contrary in this case, and the settlement estate duty falls on the legacy. It is of quite a different nature from legacy duty, which varies in amount according to the relationship between the parties.

A. H. Jessel, for defendant F. M. Skipper.

FARWELL, J.—The testatrix in this case has declared that all the legacies shall be paid “free from duty.” Her will is dated June 28, 1893. The question I have to determine is whether the settlement estate duty, which is leviable under the Finance

Act, 1894, s. 5, and which by section 19 of the Act of 1896 is made payable out of the legacy which is settled unless the will contains an express provision to the contrary, is payable in this case out of the general estate under the direction contained in the will, or whether it is to be borne by the settled legacy? That depends on the question whether the will contains “an express provision to the contrary.” The first point taken is that this will is dated before the Finance Act, 1894; and it is said that I should have regard to that in construing the meaning of the word “duty.” I think the cases which have been cited establish that if it is a question of construction as regards the donee of the gift, as in *March, In re*,¹² the Act does not affect the meaning at all; but if it is a question of the description of the subject-matter of the gift, then section 24 of the Wills Act requires that “every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.” That, in the case of *Bridger, In re*,⁹ was applied so as to make a gift of such part of the testator's residuary trust estate as might by law be given to charitable purposes—namely, to a hospital—take effect with respect to a larger amount of property than it would have taken effect upon at the time the will was made by reason of the subsequent Act. In his judgment Lord Davey points out the distinction between the description of the property and the construction of the gift. Having regard to those decisions, and to the conclusion I have come to on the former part of the case, that a gift free from duty is in effect a legacy of the duty, I consider that *Bridger, In re*,⁹ governs this case, and I have to read the will, with reference to section 24 of the Wills Act, as though it had been made just before the death. Then I find the testatrix giving this settled legacy free from duty. I have extreme difficulty in seeing how I can spell out of that anything other than what it says—namely, that the legacy is to be paid free from duty. The settlement estate duty is charged upon the

(9) 63 L. J. Ch. 186; [1894] 1 Ch. 297.
 (10) 72 L. J. Ch. 230; [1903] 1 Ch. 686.
 (11) 42 L. J. Ch. 334; L. R. 8 Ch. 192.
 (12) 54 L. J. Ch. 143; 27 Ch. D. 166.
 (13) 67 L. J. Ch. 682; [1898] 2 Ch. 643.
 (14) 69 L. J. Ch. 310; [1900] 1 Ch. 565.

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legacy, no doubt, in a sense, but the executors have to pay it before they pay over the legacy, and they do so as a matter of practice. Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy. I cannot myself see any reason for saying that "free from duty" means free from one set of duties payable by the executors rather than from another set of duties payable by them. If the executors have to pay the duty before they hand over the legacy, they cannot pay over that legacy free from duty unless they have discharged the duty first. If they are going to pay it over less the duty, then they pay less than they are directed to pay. If they pay it over subject to duty, and if the property is charged with the duty, they do not pay it over free from duty. I can see no means by which I can restrict the generality of the word "duty." Mr. Justice Kekewich in *Parker-Jervis, In re*,¹³ where an annuity was to be paid "without any deduction whatsoever except in respect of income tax," has pointed out that it is not necessary to use the words "estate duty" in order to find an "express provision to the contrary," nor do I think it would be possible so to hold in the face of the other authorities. "Without any deduction" does not, of course, refer in express words to the settlement estate duty; but the Court of Appeal in *Maryon-Wilson, In re*,¹⁴ held that settlement estate duty had to be paid out of a testator's general estate under his covenant to pay a sum of money "without any deduction."

I cannot draw any distinction which is satisfactory to myself between the words "without any deduction" and "free from duty." The result is that I hold that the settlement estate duty in respect of the settled legacy is also payable out of the general estate, and must, like the legacy duty, be also treated as an additional legacy, and be added to the legacy for the purpose of abatement.

Solicitors—Busk, Mellor & Norris; A. Campbell Wade; Corbould, Rigby & Co.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

WARRINGTON, J. } SUDBURY CORPORATION
1905. } v. EMPIRE ELECTRIC
April 6. } LIGHT AND POWER CO.

Electric Lighting—Provisional Order—Assignability—Contract for Carrying out Provisional Order—Illegality—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 11—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19).

Section 11 of the *Electric Lighting Act, 1882*, deals with two classes of cases. The first part deals with cases where the local authority remains the party supplying the electricity, though it may contract for the execution of works or buy the electricity from some other person or company; the second part deals with cases of transfer by the local authority or some other company or person of the legal powers for supplying electricity. It is only to the second of these two classes that the prohibition against assignment without the consent of the Board of Trade applies.

A local authority to which a provisional order had been granted entered into a contract with an electric light and power company by which the company was to supply electricity to the district mentioned in the provisional order. The contract contained a large number of clauses, the effect of which was to place the company in the position of the corporation as regards powers and duties:—Held, that, the consent of the Board of Trade not having been obtained, the contract was rendered void by section 11 of the *Electric Lighting Act, 1882*.

The contract also contained a clause: "Nothing herein contained shall be deemed to constitute this contract as a lease or agreement for a lease, or to establish between the corporation and the company the relation of lessor and lessee, . . . or partners, or to constitute the company general agents for the corporation or to transfer to the company any powers, or to create any relationship between the corporation and the company which the corporation are prohibited from transferring or creating by the order and the *Electric Lighting Acts, 1882* and *1888*, and particularly by section 11 of the *Electric Lighting Act, 1882*, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement,

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without transferring or assigning any of their powers and duties under the order" :—
Held, that as the agreement as a whole did transfer or assign powers and duties under the order, the clause was inoperative.

In the year 1900 the plaintiff corporation obtained a provisional order for supplying electric light to their district. This order received Parliamentary confirmation on June 25, 1900. The plaintiffs were unable to obtain a loan from the Local Government Board, and were therefore not themselves in a position to work the order. On June 25, 1902, the time limited by the provisional order for the completion of the works expired. On May 30, 1904, the agreement sued upon was entered into. The consent of the Board of Trade to this agreement was not obtained. On January 30, 1905, the provisional order was revoked.

The agreement of May 30, 1904, was made between the corporation of the one part and the defendant company of the other part, and contained the following material provisions :

" 1. The company will at their own sole cost and charges within six calendar months next after the date of these presents commence to construct erect provide and equip all necessary works, and provide and lay and fix all necessary things, for the manufacture supply and distribution of electricity within the area of supply defined in the order, and will well and efficiently complete the same in all respects in accordance with the said order, the Electric Lighting Acts, and the regulations for the time being of the Board of Trade, not later than twelve calendar months next after the date of commencement of the said works (hereinafter called 'the date of commencement of supply') and from that date, and until the purchase by the corporation hereinafter mentioned or the determination of this agreement under the powers or in the circumstances herein mentioned, will manufacture distribute and supply electricity for to and within the said area of supply, and the several persons companies and bodies who shall be entitled to the same, for use therein, and will during the continuance of this agreement, and until such purchase,

continue such manufacture distribution and supply and in all the said matters aforesaid and in all other respects as between the company and the corporation carry out the provisions of the said order as fully as if the company were the undertakers thereunder, except as in this agreement is otherwise provided.

" 2. The company are to provide a sufficient and competent staff of engineers clerks servants and workmen and are to be responsible for the efficient working of the undertaking, and for the fulfilment of the duties imposed upon the corporation by the order, the Electric Lighting Acts, and the regulations of the Board of Trade for the time being.

" 3. The company shall, whilst they manufacture and supply electricity in the said area under this contract, be entitled for their own benefit to the income and receipts to be derived from the installation and supply of electricity within the said area of supply. If it shall be necessary to take legal or other proceedings for the recovery of such revenue or receipts the same shall at the request and expense of the company be taken by the corporation. Any moneys received by the corporation in respect of electricity supplied by the company under this contract shall be held by the corporation to the use of and be paid to the company subject nevertheless to the deduction of any costs and expenses incurred in respect thereof or due to the corporation in respect of any other matters under this agreement.

" 4. The company shall pay all costs charges and expenses whatsoever, of and in connection with the manufacture supply and distribution of electricity within the said area, and of the collection and recovery of the revenue and receipts arising from the sale of electricity, and all rates taxes assessments outgoing duties charges impositions and liabilities whatsoever, it being the true intent and meaning of these presents that (subject to the provisions of clauses 8 and 9 hereof) the corporation are not by reason of these presents, or of anything herein contained, done or omitted hereunder, to be under any obligation to pay any money whatever, or to incur any liability to any one, and are to be in the same position as

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regards pecuniary liability as fully and effectually as if the order could be, and had been, lawfully transferred to the company with the consent of the Board of Trade, and the corporation had been discharged from all liability thereunder."

"8. The company agree for the period of five years from the date of commencement of supply, or the determination of the present agreement between the Sudbury Gas Light and Coke Co. and the corporation, expiring at 1st Aug., 1904, which ever shall last happen, to supply and the corporation agree for the same period to take electricity to all existing and future public street lamps. The electric current so to be taken by the corporation shall be sufficient to keep, and the company shall supply, one-third of the public lamp posts with quarter Ampère Nernst lamps, and the remainder of the public lamp posts with 16 candle power lamps, which by the terms of this clause are to be supplied with electric current, and maintained in accordance with the above standard, between sunset and 11 p.m. on week days, and between sunset and 10 p.m. on Sundays, to be calculated as 1300 lighting hours per annum, unless and until such arrangement is modified by further agreement. The company shall supply electricity to, and light and extinguish such lamps, and repair maintain and clean the lamps shades coverings and fittings and things (but not including lamp posts) appertaining thereto, at the price of 2 $\frac{1}{2}$ per lamp per annum, to be paid quarterly by the corporation to the company. If the corporation desire to keep the same alight for a longer period they shall pay on a similar calculation. . . .

"9. The corporation agree to instal the electric light in all present and future public and municipal buildings (except the Technical Institute) erected, and to be erected or acquired, by them within a period of five years, and to take electricity for the lighting thereof from the company at a price not to exceed sixpence per unit.

"10. The price to be charged by the company for lighting purposes is not to exceed sevenpence per Board of Trade unit and for power it is not to exceed fourpence

for each Board of Trade unit. The company shall have the option of charging by any other system allowed by the order and the Board of Trade provided that the charge under such other system shall not exceed the charges above mentioned. . . .

"11. The company shall issue and enforce upon their customers the usual regulations in respect of conditions of supply and house wiring so as to insure regularity and continuity of supply. These regulations shall be mutually agreed upon between the company and the corporation and in case of difference settled by arbitration in manner herein provided."

"14. With respect to the breaking up of streets, restrictions on breaking up private streets, and above ground works, and the alteration of the position of pipes and wires under streets, the company shall in all respects observe and be subject to the provisions of the order, the Electric Lighting Acts, and the Acts incorporated therewith, and all regulations made and required to be observed from time to time by the Board of Trade, the Postmaster-General, and the corporation, in the same manner and with the same duties liabilities and consequences as if the company and not the corporation were undertakers under the said order. The company will indemnify the corporation against any compensation damages penalties fees. expenses and costs to which the corporation may become liable, or be compelled to pay, by reason of any act neglect or default of the company in the premises. And with respect to the matters that are to be determined or required by two Justices under section 9 of the Gas Works Clauses Act, 1847, the same are to be determined and required by arbitration in manner hereinafter provided. The penalties expenses and payments in respect of the premises which the company would be liable to be ordered to pay to the corporation, if the company and not the corporation were the undertakers, shall be determined and assessed by arbitration in manner hereinafter provided, and paid to the corporation on demand. The company may require the corporation to give any notices which the undertakers

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are required to give in the premises. Provided that where the giving of any such notice may in the opinion of the corporation result in the corporation being liable for any payment compensation expense penalty or costs, the company will deposit a sum of money with the corporation sufficient to cover the same before the corporation can be required to give such notice.

"15. When the corporation are the givers of the notice under section 16 of the schedule to the Electric Lighting Act, 1899, they may, before complying with a requisition under that section, require the company to deposit with the corporation the sum of 50*l.*, which shall remain as a security to the corporation for the repayment to them of the expense to be incurred by them in complying with the said requisition. The corporation shall render to the company weekly accounts of expenditure incurred by them in the breaking up and reinstatement of streets for the purposes of the company's works, and the company shall pay the amount of each such account to the corporation within 21 days after the receipt thereof. The company however may elect to do all reinstatement work themselves, in which case such reinstatement must be carried out to the satisfaction of the Borough Surveyor. Upon completion of all works to which any such requisition relates the said deposit or security shall if the company so require be repaid or returned to the company. While any such repayment is in arrear, the corporation may recoup themselves out of the said deposit, or by realising or enforcing such security, and they shall not be bound to commence or continue any work while any such payment is so in arrear, or the deposit for the time being is less than 30*l.*"

"18. The company are at all proper times to be prepared to comply, and when called upon to do so by the corporation or the Board of Trade they are to comply, with section 9 of the Electric Lighting Act, 1882, and the schedule to the said Act, and clause 6 of the schedule to the Electric Lighting Clauses Act, 1899, in all respects as if they were the undertakers under the order. If the corporation

as undertakers under the order have to prepare and publish the annual statement required by section 6 of the Electric Lighting Act, 1882, and to comply with the other provisions of the Electric Lighting Acts, 1882 and 1899, and the regulations of the Board of Trade relating to accounts, and the audit examination and publication thereof, the company will, within the time required by the said Acts, prepare the said statement in the form required by the Board of Trade, and give to the corporation and the auditor or auditors whose duty it is to audit and examine the same, all necessary assistance and information and access to their books and vouchers until the said audit is complete."

"22. The company shall conduct and manage the said business of manufacture distribution and supply so as not to cause any injury loss damage or nuisance or annoyance to persons or property whether in the neighbourhood of the works or otherwise, and so as not to render the corporation liable to an injunction or order."

"26. The corporation hereby authorise the company to give, if necessary, in the name of, and as agents for, the corporation all notices which by the order are authorised or required to be given to public and local authorities, and to persons companies and consumers, for the purpose of, and in accordance with, the order. If any notice has to be served by or through the corporation, the company shall draw up the same and all necessary plans and forward the same to the corporation, and the corporation will then serve the same accordingly, and the company will pay any expense incurred by the corporation in relation thereto.

"27. Nothing herein contained shall be deemed to constitute this contract as a lease or agreement for a lease, or to establish between the corporation and the company the relation of lessor and lessee (except as to the agreement for a lease of the said site of the central station) or partners, or to constitute the company general agents for the corporation, or to transfer to the company any powers, or to create any relationship between the corporation and the company which the

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corporation are prohibited from transferring or creating by the order and the Electric Lighting Acts, 1882 and 1888, and particularly by section 11 of the Electric Lighting Act, 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement, without transferring or assigning any of their powers and duties under the order."

The last clause empowered the corporation to purchase the undertaking and the goodwill of the company.

The action was brought to recover damages for breach by the defendants of a stipulation contained in clause 7 of the said agreement to enter into a bond in the sum of 2,000*l.*, secured as therein mentioned, for the carrying out of the provisions of the agreement. The defendants pleaded (*inter alia*) that the agreement having been entered into by the plaintiffs without the consent of the Board of Trade, as required by section 11 of the Electric Lighting Act, 1882,¹ was null and void.

E. P. Hewitt and Edward Farrer, for the plaintiffs.—The agreement of May 30, 1904, is not a transfer or divesting of the rights of the corporation, but leaves the corporation the undertakers as regards outsiders. It contains provisions for indemnity, it being intended that for a period of time covered by the agreement the defendant company should do the work and supply the electric energy. It was imperative to come to some such agreement as this, owing to the inability of the corporation to raise the necessary capital on loan. It is for those who

(1) Section 11 of the Electric Lighting Act, 1882, enacts: "Any local authority who have obtained a license, order, or special Act for the supply of electricity, may contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply, or for the supply of electricity within any area mentioned in such license, order, or special Act, or in any part of such area; but no local authority, company, or person shall by any contract or assignment transfer to any other company or person or divest themselves of any legal powers given to them, or any legal liabilities imposed on them by this Act, or by any license, order, or special Act, without the consent of the Board of Trade."

allege the invalidity of the agreement to make good their assertion. The agreement is not within the second part of section 11 of the Electric Lighting Act, 1882.¹

[They also referred to the Electric Lighting Clauses Act, 1899.]

Cave, K.C., Roll, and Tyldesley Jones were not called upon to argue on behalf of the defendants.

WARRINGTON, J.—This is an action brought by the Corporation of Sudbury against the Empire Electric Light and Power Company to recover damages for breach of an agreement dated May 30, 1904. The defence is that the agreement was an illegal agreement, and one into which the corporation were prohibited from entering by section 11 of the Electric Lighting Act, 1882.

Now in the year 1900 the Corporation of Sudbury were promoting a provisional order intended to confer upon them the power of lighting their borough by electricity. The Electric Clauses Act, 1899, contains in its schedule regulations and provisions which, prior to that time, were usually inserted in electric lighting orders; and there is one point which comes up in every part of these regulations, and that is the distinction between cases in which the local authority is the undertaker, and cases in which persons other than the local authority are undertakers. This is a distinction which is prominent throughout in the schedule to the Electric Lighting Clauses Act, 1899. I need not go through it in detail, but it comes constantly throughout the regulations so made. It is clear, therefore, that Parliament, in dealing with these matters draws a strong distinction between a class of cases in which the local authority itself undertakes the duty of lighting its town or district, and where that duty is undertaken for its profit by some other person or corporation. I will read section 11 of the Act of 1882, on which it all turns.

The first part deals with one, and one only, of the classes of cases which I have mentioned—namely, those in which the local authority is the undertaker. [His Lordship read the section, and continued:] As I have said, the first part of that

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section 11 refers to one of the two classes; the second part of that clause refers to both classes of provisional order. Now, first consider what is the meaning of the first part, which refers to the local authority only. What is it it empowers them to do? It first describes the person to whom authority is to be given as the "local authority who have obtained a license, order or special Act for the supply of electricity." That means an order for the supply by itself to its district of electricity, and it enables that authority to "contract with any company or person for the execution and maintenance of any works needed for the purposes of such supply"—that is, for the supply by the local authority. It is still the local authority which is the person supplying electricity. It is the person to contract for the execution and maintenance of works enabling the local authority to carry out their undertaking of supplying electricity. That is the first thing. The next sentence relates to a different matter. It may be that the local authority may not find it convenient themselves to construct generating stations and so forth. In that case they may make contracts with other persons for the supply of electricity. That only means that the local authority, who are the undertakers, may buy the electricity in bulk, or in some other way, according to the terms of the contract, from the outside person or company. That seems to me to be all that the first part of the section authorises. The second part of the section, which, as I have pointed out, deals not only with local authorities, but with both classes to whom provisional orders may be granted, prohibits the undertakers by any contract or assignment from transferring to another company or person, or divesting themselves of any legal powers given to them, or any legal liabilities imposed on them by the Act, without the consent of the Board of Trade. Now take the case of a local authority. It seems to me that that means that the power which the provisional order gives to the local authority of itself supplying the district with electricity is not, without the consent of the Board of Trade, to be put into the hands of any other company or person.

I come now to the facts of this particular case. The Sudbury Corporation got their order, and it was confirmed by Act of Parliament on June 25, 1900. They could not, or were unwilling to, carry out the supply to the borough themselves; and after considerable delay, on May 30, 1904, they made the agreement in question. That agreement recites that the corporation, being the local authority, have obtained a provisional order, and that it was confirmed. Then that "In pursuance of the powers granted in that respect by section 11 of the Electric Lighting Act, 1882, the corporation have power to contract with the company for the execution and maintenance of the works needed for the purposes of the supply of electricity within the area mentioned in the order, and for the supply of electricity therein, on the terms and conditions hereinafter contained." They follow the exact words of section 11. Whether they have the power to contract for the things which they there mention "on the terms and conditions hereinafter contained," is just what I have to determine. They suggest that they have, but that is the question I have to settle. Then the agreement provides this: that the company are, within a certain date, to "commence to construct erect provide and equip all necessary works, and provide and lay and fix all necessary things for the manufacture supply and distribution of electricity within the area of supply," and to complete the same in accordance with the order, the Act, and the regulations of the Board of Trade within a certain period. Then "from that date, and until the purchase by the corporation hereinafter mentioned, or the determination of this Agreement under the powers or in the circumstances herein mentioned, will manufacture distribute and supply electricity for to and within the said area of supply, and the several persons companies and bodies who shall be entitled to the same, for use therein, and will during the continuance of this Agreement, and until such purchase, continue such manufacture distribution and supply, and in all the said matters aforesaid and in all other respects, as between the company

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and the corporation, carry out the provisions of the said order as fully as if the company were the undertakers thereunder, except as in this agreement is otherwise provided." By the terms of that, if there were nothing else in the agreement, it seems to me plain that not only is the company to construct the necessary works and supply the electricity, but they are to carry on the business. They are to do that which the provisional order authorised the corporation to do. That is made clear as we go on. I will pass over clause 2, which is with regard to the staff. Then clause 3 is somewhat important. [His Lordship read the first part of the clause, and continued:] Then apparently realising that they might be unable to treat themselves as regards third persons as the undertakers, the clause goes on to provide that if legal proceedings are required the corporation shall take them, but that the moneys that may be received by the corporation in respect of electricity supplied by the company under this agreement "shall be held by the corporation to the use of and be paid to the company subject nevertheless to the deduction of any costs and expenses incurred in respect thereof or due to the corporation in respect of any other matter under this agreement." Then comes clause 4, which is a very important clause. [His Lordship read clause 4, and continued:] Now, if words mean anything they mean that as between these parties the corporation intended to transfer or to do that which would have the same effect (perhaps that is the better way of putting it) as a transfer with the consent of the Board of Trade.

Then we come to clause 5, which I need not read. Clause 6 deals with the consideration that has to be paid. Then there is clause 7, which relates to the giving of a bond, which really is the clause which gives rise to this action. I need not read it now. Then in clauses 8 and 9 there are provisions as to the supply of electricity for public purposes. Clause 9 perhaps may be important. [His Lordship read it, and continued:] So there again the corporation—in respect of their public buildings, which, if they carried out the order themselves, they would supply,

of course, by themselves—contract with the company to pay for that supply. [His Lordship read the material part of clause 10, and continued:] There again the provisional order, and the regulations under it, provide that the undertakers were the persons to charge, and one cannot help seeing that when a provisional order is granted to a local authority, Parliament, in confirming that order, is giving to the public body the discretion as to the amount which shall be charged—of course, within certain definite limits; but under this agreement the discretion is transferred to the company. It is the company who are to charge the price for the electricity—of course, within the legal limits—but still it is at the discretion of the company to fix the price within those limits. [His Lordship read clause 11, and continued:] That, again, is another matter, which is a matter left to the discretion of the undertakers. The regulations under which the electricity shall be supplied are by this agreement left to the company to fix, subject, no doubt, to the consent of the corporation, and to the fixing, if the corporation and the company do not agree, by a third person agreed on between the parties. Clauses 12 and 13 I need not trouble about. Clause 14 refers to the breaking up of streets. I do not propose to read it. It is enough to say that clause 14 treats the company as the undertakers and the corporation as the persons having control of the streets, and puts it into the power of the company to require the corporation to give any notices which may be required. Clause 15 is an endeavour to reconcile the provisions of this agreement with the regulations made under and incorporated in the Electric Lighting Clauses Act—regulations which refer to cases in which persons other than the local authority are the undertakers. It is an endeavour to apply that part of those regulations to this agreement, again treating, for the purposes of this agreement, the company as the undertakers, and the corporation as the local authority and opposed to the undertakers. Then, again, there are provisions in clause 18 with regard to the preparation of accounts. That is another

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attempt to apply to this transaction the regulations incorporated in the Electric Lighting Clauses Act, which refer to the case where the undertakers are not the local authority.

Then there are a number of clauses of details which are not of importance. Clause 22, however, perhaps is. [His Lordship read the clause, and continued:] Again treating the business as being that of the company, and not of the corporation, clause 26 is also of importance. [His Lordship read the clause, and continued:] There, again, any power which the corporation have of giving notices is by the clause transferred to the company. The corporation is purely ministerial; it cannot help itself. It has bound itself to give any notices or serve any plans the company think necessary. Clause 27 is an attempt by the parties to get out of the difficulty which the whole tenor of the agreement has created. [His Lordship read clause 27, and continued:] That is what is most relied on by the plaintiffs. It seems to me, if you take the agreement as a whole, and see that it does transfer or assign powers and duties under the order, it is impossible to give any effect to a statement by the parties that nothing shall be deemed to do so. If the agreement does it, it does it. That clause is merely a statement that as between the parties themselves, so far as they are capable of contracting, it shall not be treated as transferring or assigning any of their powers or duties. If the agreement in fact does it, I do not think I can give any effect to the declaration that they do not intend to do it.

The agreement is a very long one. I think there is nothing else I need refer to except the last clause, and only to the provision that the corporation may after a 'certain time compulsorily purchase not only the buildings, machinery, lines, plant, and so on, but the goodwill of the business. If anything were wanted to confirm the remarks which I made on the first clause of the agreement, it is supplied by the last clause. It is obvious that the idea of both parties was to transfer the entire business of supplying electricity to the town of Sudbury from the corporation which had obtained Par-

liamentary powers to light their district to the company who were independent contractors, and to do so without the consent of the Board of Trade.

It seems to me plain that the agreement is one prohibited by section 11 of the Electric Lighting Act, 1882. That makes it unnecessary for me to consider any further question.

Solicitors—Belfrage & Co., agents for W. Bayly Ransom, town clerk, Sudbury, Suffolk, for plaintiffs; Le Brasseur & Oakley, for defendants.

[Reported by A. E. Randall, Esq.,
Barrister-at-Law.]

BUCKLEY, J. } SWANSEA CORPORATION
1905. }
May 4, 5, 11. } NATIONAL TELEPHONE CO.

Telephone—Rival Systems—Right to Intercommunication—Telegraph Act, 1899 (62 & 63 Vict. c. 38), s. 3.

Where an action is brought to obtain telephonic intercommunication under the Telegraph Act, 1899, between the systems of two licensees of the Postmaster-General, the Court may indicate that a certain way of carrying out intercommunication is the proper one, leaving it to the parties to determine how, as matter of working and with or without modifications as the exigencies of business require, it can be carried into effect, and can decide that a particular way of carrying out intercommunication is not the proper one, but will not direct particular works to be done or order facilities for intercommunication to be given in any defined or exhaustive form.

Defendants, who were licensees whose licence had been extended in respect of an exchange area under the provisions of section 3 of the Telegraph Act, 1899, and who were requested by the plaintiffs, who were subsequent licensees for the same exchange area, to provide intercommunication with their system, contended that for the purpose of such intercommunication the plaintiffs should duplicate the junction lines already existing between the central and subsidiary telephonic exchanges of the

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defendants:—Held, that this contention was unreasonable, and not justified by the Act.

The general scope and effect of the Telegraph Act, 1899, as regards telephonic intercommunication, considered.

Before September, 1902, the National Telephone Co., Lim., had, under a non-exclusive licence from the Postmaster-General, established a system of public telephonic communication in the Swansea exchange area.

In September, 1902, the Postmaster-General, under the Telegraph Act, 1899,¹

(1) Telegraph Act, 1899, s. 3, sub-s. 1: "Where an existing company have before the passing of this Act, under a licence from the Postmaster-General, provided a system of public telephonic communication in any exchange area, and it is proposed to grant a new licence to a local authority or to another company to provide public telephonic communication in the same exchange area, or any part thereof, then, if the existing company consent to it being made a condition of their licence—(a) that they will not give favour or preference to any person whomsoever within the area specified in the new licence, and will not, within that area, as a condition of giving a service, require from any person the grant of any facility except for the purpose of supplying telephonic communication to that person; and (b) that their charges shall not, within the area specified in the new licence, exceed the maximum rates or fall below the minimum rates authorised in that behalf by the Postmaster-General within that area, it shall be a condition of the grant of the new licence, that where it is proved to the satisfaction of the Postmaster-General that the existing company have incurred or contracted to incur, in the area specified in the new licence, material expenditure in laying down underground wires, and have by agreement with any local authority within that area acquired powers for that purpose, those powers shall continue for the period specified in the new licence for the duration thereof. . . ."

Sub-section 4: "Where a local authority or a new company, under a licence from the Postmaster-General, provides a system of public telephonic communication in the whole or any part of an exchange area in competition with an existing company licensed by the Postmaster-General before the passing of this Act, then, if the existing company consent to it being made a condition of their licence—(a) that they will not give favour or preference to any person whomsoever within the whole of the exchange area in question, and will not, within that exchange area as a condition of giving a service, require from any person the

granted a new licence to the Swansea Corporation to provide telephonic communication over the same area. At the same time, also under the Act, he granted to the company an extension of its then licence for a period such as to call into operation section 3, sub-section 5 of the Act.

In November, 1903, the corporation had established and then opened their system.

On January 1, 1904, the corporation made a request to the company for intercommunication within sub-section 5 of section 3.

Correspondence ensued between the corporation and the company, the latter raising various contentions against complying with the request, the ultimate contention being embodied in a letter from the company to the corporation dated September 20, 1904.

grant of any facility except for the purpose of supplying telephonic communication to that person; and (b) that their charges shall not within the whole of the exchange area in question exceed the maximum rates and (where the company are empowered by agreement with the local authority to lay underground wires) shall not fall below the minimum rates authorised in that behalf by the Postmaster-General within the area specified in the new licence, the licence of the existing company shall within the whole of the exchange area in question be extended and continue for the period specified in the new licence of the local authority or new company for the duration of such new licence. . . ."

Sub-section 5: "If the licence of an existing company is, under the provisions of this section, extended in respect of any exchange area for a period of not less than eight years beyond the term existing at the passing of this Act, the company shall, at the request of any other licensee of the Postmaster-General providing public telephonic communication in the whole or any part of that exchange area, and under such circumstances and on such terms and conditions as may, within six months from the passing of this Act, be prescribed by an order of the Postmaster-General, made with the approval of the Treasury, afford all proper facilities for the transmission of telephonic messages between persons using the system of the company (either in the whole or in part of the exchange area, as the Postmaster-General may prescribe) and persons using the system of such other licensee, provided that the licensee so requiring intercommunication shall in any such case afford similar facilities."

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The corporation had exchanges at Swansea, the Mumbles, Morriston, and Skewen.

The company had a central exchange at Swansea, and subsidiary exchanges at eleven or twelve places, among them being the Mumbles and Morriston.

The contention of the company contained in the letter of September 20, 1904, was that the company required that the corporation should provide junction circuits to directly connect the corporation's exchange in Swansea with the company's exchange in Swansea, and with each of nine of the company's subsidiary exchanges in different parts of the area—in other words, that every line running from Swansea to a subsidiary exchange should be duplicated—and junction circuits to connect the two exchanges of the corporation and the company respectively at the Mumbles and at Morriston.

The corporation had laid lines from its Swansea exchange to a point closely adjacent to the company's exchange.

On November 3, 1904, the corporation commenced this action against the company, seeking—first, a declaration that under, and by virtue of, the Telegraph Act, 1899, s. 3, sub-s. 5, and of an order of the Postmaster-General made under it, and in the events which had happened, the corporation was entitled to be afforded by the company all proper facilities for “restricted intercommunication” within the meaning of the order between the respective telephonic systems of the corporation and the company, and that the company was bound to connect the telephonic junction lines which had been laid by the corporation with the central switchboard in the company's telephone exchange in Swansea, and thereby to afford to the corporation's subscribers the same facilities for intercommunication as were thereby given by the corporation to the company; and secondly, to have it determined what further works ought to be done, and by whom, for securing intercommunication between the respective telephone systems, as contemplated by section 3, sub-section 5 of the Act and the order, and how the costs of all works done or to be done for securing such intercommunication ought to be borne.

Buckmaster, K.C., and *R. J. Parker*, for the plaintiffs.—The plaintiffs seek restricted intercommunication between persons using their system and persons using the defendants' system. It is a question of the construction of sub-section 5 of section 3 of the Telegraph Act, 1899. It was the intention of the Act that, where there are two rival systems in one area, it shall be possible to connect the systems and give to the subscribers of one system the facilities of the subscribers of the other system.

Danckwerts, K.C., *Astbury, K.C.*, and *Gaine*, for the defendants.—There is no desire to prevent the carrying out of the true intention of the Act. Under it provision is made for the Postmaster-General to lay down within six months of its passing the terms and conditions of intercommunication. If he lays them down, the parties are bound by them; if he does not, then either the terms and conditions must be arrived at by agreement between them, or, if they do not agree, the only course is to refer to the Court to say whether the terms offered by the proposing party are in accordance with the Act or not. There is the statutory right to intercommunication, but how the intercommunication is to be carried into effect is another matter to be settled in one or other of those three ways. This being the first case under the Act, authority can only be adduced by way of analogy, such as cases under the Railway Traffic Act—*South-Eastern Railway v. Railway Commissioners* [1881]² and *Broune and Theobald on Railways* (3rd ed.), p. 405. All that the Court can do is to say whether what is proposed is a compliance with the Act or not; it cannot define a particular mode of compliance and direct that to be carried out.

[BUCKLEY, J.—What if no proposal is made?]

There is the power to order one to be made.

[BUCKLEY, J.—But if none is, nevertheless, made?]

There is punishment for contempt.

[BUCKLEY, J.—Or if impossible proposals are always made?]

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The arm of the Court is long enough to deal with a company in such a case. It cannot order the defendants to do a particular thing; all it can do is to say whether what they propose is reasonable or not. An Act must be construed as at the moment when it was passed. If the Postmaster-General had done his duty by laying down some criterion as to what are "proper facilities," or by saying how some criterion was to be arrived at, there would never have been any trouble. But he has, on the contrary, deliberately left the matter open, and the only remedy is, at most, an action for damages against the party failing to agree.

[BUCKLEY, J.—It seems to me the question which I have to determine, concisely put, is whether the defendants were right or not in requiring what they did in their letter of September 20, 1904.]

The obligation is to give proper facilities, not between the defendants' system and the plaintiffs' system, but between a customer of the one system and a customer of the other.

[BUCKLEY, J.—A company having a system is to give facilities for transmission of messages between customer and customer.]

But the question has to be approached from the position of having the personal element—the customer—in view. The defendants are right, and what they are willing to give is right.

Buckmaster, K.C., in reply.—The form of order which the plaintiffs ask is a declaration that by virtue of the Act they are entitled to be afforded all proper facilities for intercommunication between persons using their system and persons using the defendants' system, and that the defendants have failed to afford them those facilities; and they ask for an order directing the defendants to give such proper facilities within a certain time. There should be a declaration that in the opinion of the Court the junction of exchanges at the Mumbles, Swansea, and Morriston would afford such proper facilities, and also that in the opinion of the Court it would be proper that the expenses of making such connections should be borne equally between the plaintiffs and the defendants. Then there

should be liberty to apply in case further connections become necessary.

*South-Eastern Railway v. Railway Commissioners*² does not affect this case.

Cur. adv. vult.

May 11.—BUCKLEY, J.—This, I am told, is the first case in which application has been made to the Court to construe or enforce the Telegraph Act, 1899, with reference to intercommunication between competing telephonic systems within the same area. As the matter is one of considerable public importance, I reserved my judgment with a view to expressing as clearly as I am able the view which I take of the Act and of the remedies available for its enforcement.

Section 3 of the Telegraph Act, 1899, contemplates a state of circumstances in which an existing company, enjoying a non-exclusive licence from the Postmaster-General, has provided a system of public telephonic communication in an exchange area, and it is proposed to grant another licence to the local authority, or to another company, to provide public telephonic communication in the same area. Subject to certain conditions being complied with, sub-sections 1 and 4 give the existing company certain benefits—the former a benefit in respect of underground wires, and the latter a benefit by way of extension of the terms of its existing licence. Then follows sub-section 5, upon which the question in this action arises. It is a sub-section in favour of the new licensee. It provides that, if the licence of the existing company is, under the Act, extended for a certain substantial time (not less than eight years), the new licensee shall have the benefit of a certain option. The new licensee can, by request addressed to the existing company, require the existing company to afford all proper facilities for the transmission of telephonic messages between persons using the system of the existing company and persons using the system of the new licensee, provided that the new licensee so requiring intercommunication shall in such case afford similar facilities. The sub-section provides that these facilities shall be afforded under such circumstances and on such terms and conditions as may

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within six months from the passing of the Act be prescribed by an order of the Postmaster-General.

It is obvious that, if a right to intercommunication arises, many questions may present themselves as to the terms which may be fair as between the existing company and the new licensee in the matter. I may instance the following: First, the question as to how the expenses of connecting the two systems are to be borne between the two companies, or by one and which of them; secondly, the question who is to do the work of making the connections—whether each company can call on the other to do the necessary work on its own land, or can without trespass go upon the land of the other for the purpose of doing the work itself; thirdly, the question whether, as between the two undertakings, the one ought to make to the other any and what payment for the advantages arising from intercommunication to their respective customers. The one undertaking might be of extensive mileage, with a large number of exchanges, having a complicated reticulation of junctions between them, and a large staff of clerks. The other might be of very small dimensions in all these respects. It is not self-evident that intercommunication would in justice be given without providing for a payment to be made by the one undertaking to the other. As to all this and other like matters which might be suggested the Act is silent. If they are to be provided for it must be by the order which the Postmaster-General had power to make. It was, I think, competent to him to have dealt with all these under the words “terms and conditions.” He might probably have dealt with other matters under the words “under such circumstances.” The defendants argued that under one or other of those expressions the Postmaster-General could have done more, and could have determined what are proper facilities, and that he ought to have done so; and further (for the argument was actually carried to this length), that, inasmuch as he has not done so, I cannot determine, and no authority can determine, what are proper facilities, and that the parties must agree

amongst themselves as to what they are, and, failing agreement, the Act breaks down. I do not accede to the argument or any part of it. The Postmaster-General could by his order determine the circumstances under which, and the terms and conditions upon which, proper facilities shall be afforded. But the Act does not remit it to him to say what proper facilities are, and the statutory right cannot be a right to that which the parties agree. That is equivalent to saying that there is no statutory right, for either party could in that case defeat the statute by refusing to agree. Within the six months the Postmaster-General did make an order within the Act of Parliament. Its effect, for any purpose relevant to the matter before me, is only this—that by article 1 it provided that the new licensee must have a certain number of subscribers before it could demand intercommunication, and by article 4 provided for certain terminal charges which might be made by the old company and the new licensee respectively, and by article 5 that the new licensee who requested the facilities should satisfy the Postmaster-General that he had complied with article 1. The order did not deal in any way with any of the questions which I have said above would seem to require adjustment as between the two undertakings.

A system of public telephonic communication comprises and includes, I think, at least the following factors: First, one or more exchanges, at which, by means of switchboards, any particular subscriber can be put into communication with any other subscriber; secondly, where there is more than one exchange, junction or trunk lines running between the exchanges; thirdly, a staff of persons at each exchange to control the switchboards and make the communications; and fourthly, separate lines from what is called a station (that is to say, a customer's residence or place of business) to the exchange which is nearest to that place. The proper facilities mentioned in sub-section 5 are facilities for the transmission of telephonic messages between the customers using the one system and the customers using the other system;

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and those must be, I think, proper facilities for using all such of the several component parts of the system which I have described as are in a proper course of the business appropriate for the transmission of the messages. If intercommunication is established, then the customer of company A is to have proper facilities for using all those parts of the system of company B which are appropriate for the purpose of communicating telephonically with the customer of company B. It is singular, no doubt, that if undertaking A be a large one, with extensive mileage, a number of exchanges, a large staff employed, and the like, and company B an undertaking small in all those respects, the Act and the order made under it should have entitled B to call upon A for intercommunication without providing for any payment to be made by B to A for the advantage. I see, however, two grounds upon which this may not be unreasonable. First, when the customer of company A and the customer of company B enjoy the benefit of telephonic communication, it may be said that each enjoys equally the reciprocal advantage of hearing from and speaking to the other. The customer of company A has the right, as between him and his company, to use all the appropriate wires and other parts of the system of company A; the customer of company B has the like right as regards the wires and other parts of the system of company B. The intention of the Act and order may be, and I think is, that when the statutory right of intercommunication has arisen each of the two customers shall be entitled to converse over the aggregate mileage, over some part of which each has, by contract with his company, the right of communication. Whether this be so or not, it seems to me that the Act and order have created the right, and that, if the right to intercommunication has arisen and intercommunication has been established, the right of the customer of company B is to have proper facilities over every part of the system of company A just as much as if he were a customer of company A. Secondly, it is noticeable that the new licensee need not request intercommunication unless he desires it,

so that no consideration necessarily arises as to whether it would be fair that that company should receive a payment, and that the existing company only becomes bound to give intercommunication upon request, if it has availed itself of the right within sub-section 4 of having the term of its licence extended, so that no consideration necessarily arises as to whether it would be fair that that company should receive a payment. In other words, each company may, if so minded, so conduct itself as that intercommunication under the Act will not result, so that it cannot be said that anything unfair is being imposed upon either company if it does result. Having said thus much upon the Act of Parliament, I pass to a statement of the facts of this case.

The relevant facts are that the defendants had before September, 1902, established a system of public telephonic communication in the Swansea area, and that in September, 1902, the Postmaster-General granted a new licence to the plaintiffs over the same area. At the same time the Postmaster-General, again under the Act, granted the defendants an extension of their then existing licence for a period such as to call section 3, sub-section 5, into operation. In November, 1903, the plaintiffs had established and then opened their system. On January 1, 1904, they made a request for intercommunication within section 3, sub-section 5. They had at that time the number of subscribers required to satisfy article 1 of the order of the Postmaster-General. Before February 2, 1904, they had, within article 5 of the Postmaster-General's order, satisfied him as to that fact, and the defendants, by a letter of February 2, 1904, were informed by the Postmaster-General that he was so satisfied. That the corporation had the requisite number of subscribers is not now in dispute; but I must say something further as to it, because it goes to the question of costs. By a letter of August 8, 1904, the defendants waived any objection based upon their allegation that the facts were not as above stated, and by another of September 1 they repeated that they were prepared to accept the Postmaster-General's certificate as to the fact. Not-

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withstanding this, by paragraph 6 of the defence they denied it. It is only by reason of the fact that at the Bar their counsel again admitted it that the plaintiffs have been relieved from calling evidence to prove it. The defendants upon the correspondence raised various other contentions, to which I need not refer beyond saying that I am satisfied, as indeed Mr. Gaine admitted in the box, that the defendants desired to raise every objection which could be (Mr. Gaine says, legitimately could be) put forward to prevent the plaintiffs from obtaining the intercommunication which they had a right to request, and requested, under the Act. The defendants had received the benefit of the extension of their licence, but intended to put every obstacle (they say, legitimate obstacle) in the way, to prevent the resultant benefit to the new licensee of obtaining intercommunication. With one exception these objections are not now relied upon. The remaining contention is that upon which arises the whole question which I have to decide in the action. That contention is as follows: The defendants have a central exchange at Swansea and eleven or twelve subsidiary exchanges. After a contention which varied from time to time, and which is to be found in its several forms in letters from the defendants of March 7, August 10, September 1, and September 20, 1904, the defendants, by their last contention, as stated in the letter of September 20, required that the plaintiffs should provide junction circuits to directly connect the plaintiffs' exchange in Swansea with the defendants' exchange in Swansea, and with each of nine of the defendants' subsidiary exchanges in different parts of the area, and junction circuits to connect the two Mumbles exchanges and the two Morriston exchanges. A reference to Plan A, which for the purpose of illustration has been used in the course of these proceedings, is the shortest way of conveying what this contention involves. There existed already junction or trunk lines running from Swansea—that is, from the defendants' exchange in Swansea—to each of these subsidiary exchanges. The defendants say that there must be duplicate junction or

trunk lines from Swansea (that is, from the plaintiffs' exchange in Swansea) to each of these same subsidiary exchanges. In other words, they contend that every line running from Swansea to a subsidiary exchange must be duplicated by laying another junction or trunk line from Swansea to the same point. To make plain that which follows, I must state that the defendants discriminate between the case in which, after intercommunication is established, the originating call comes from a customer of the plaintiffs, and that in which it comes from a customer of the defendants. They say that when a customer of the plaintiffs makes the originating call, the plaintiffs must perform upon their own trunk lines the whole service of the message until it reaches that exchange of the defendants which is nearest to the station of the customer to whom the call is addressed, and they say that they are willing to accept the like obligation when the originating call is made by the defendants' customer. I fail to find any justification in the Act of Parliament, or founded upon reason or good sense, for this contention. On the contrary, it seems to me to be directly in contravention of that which the Act of 1899 intended to secure. The object is not to duplicate the systems so that each of the two undertakings shall have junction or trunk wires running to every exchange in the area, but that the customer of each company shall use the trunk line of the other company running to the customer of the other company whom he wishes to address. A concrete instance will probably most readily convey the contention put forward. The plaintiffs have a junction or trunk line from Skewen to Swansea. The defendants have a junction or trunk line from Swansea to Pontardulais. Assuming the plaintiffs' exchange at Swansea to be connected with the defendants' exchange at Swansea, I understand the Act to mean that the plaintiffs' customer at Skewen is to have from the defendants all proper facilities for the transmission of his telephonic message to Pontardulais, and for that purpose to have the use of all the appropriate parts of the defendants' system. The defendants say,

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"No, you are not entitled to use our trunk line from Swansea to Pontardulais; the only part of our system which you shall use for the purpose of this message shall be our exchange at Pontardulais, our staff at that place, and the subscriber's separate wire from that place to his house." There are, however, other parts of the defendants' system appropriate for use for telephonic communication from Skewen to Pontardulais—namely, the defendants' exchange at Swansea, the defendants' staff at Swansea, the defendants' trunk line from Swansea to Pontardulais. The defendants say, "No, you have no right to use any of these for the purpose of this message; you, the plaintiffs, must bring the communication on your own wires to our Pontardulais exchange, and you cannot require anything more from us than that we should from that point send it on to our subscriber." The contention is extravagant and directly in destruction, as it seems to me, of that which the Act intended to give.

But, further, say the defendants, "Our junction or trunk lines are now fully occupied"—meaning by that expression that at the busiest hour of the day they can carry no heavier load—and of course it is desirable that the system shall be competent to deal with the busiest hour of the day without congestion. This is a matter to which consideration is due, I think, in the sense that an obligation to give proper facilities does not necessarily involve that the servient company shall, at a moment's notice and without reasonable time to adjust itself to the new demand, accept and deal with a large addition of traffic. But except in this sense the consideration is not relevant. The defendants are bound to give to every intending customer within the area telephonic communication on proper terms. Their undertaking is one which, from its nature, requires extension by increase in the trunk lines as traffic develops. The effect of the Act is to introduce to the defendants, and to require them to provide for, additional customers who are entitled to service by virtue of the provisions of the Act; and, if the defendants' lines are insufficient to carry the load, then I apprehend it is their business, after, of course, a suffi-

ciently reasonable margin of time, to provide the lines necessary for its transmission, just as much as it would have been their business so to provide for any new customers of their own. The Act nowhere contemplates that the new licensee shall, to the extent of any deficiency in the system of the existing company to meet the new traffic, increase for the existing company the capacity of the system of the existing company. Moreover, the defendants' lines are not congested in the sense that they cannot bear a heavier load at times other than the busiest hour of the day. There is plenty of margin at other times, and if intercommunication were established at once there would be a reasonable possibility of dealing with the additional traffic, not necessarily as speedily as is desirable, but nevertheless to the advantage of the customers; and by degrees the service could be improved, when by increase in the number of lines the congestion, which I will assume would at first result at the busiest hour, could be removed. Eighty-five per cent. of the plaintiffs' traffic is in Swansea, and a junction between the Swansea exchanges would at once give the means of dealing with this without raising any question of trunk lines being congested. Throughout the arguments addressed and evidence adduced by the defendants there has run a fallacy which was continually repeated—namely, that they are being called upon to do something for the plaintiffs' customers to the injury of their own customers. When intercommunication is established the increased facilities enure not for the plaintiffs' customers only, but for the defendants' customers equally. The latter are able to enjoy a facility which they could not enjoy before—namely, that of communicating telephonically with persons lying outside the defendants' service. In the events which have happened, the defendants' customers are entitled as much as the plaintiffs' customers to the benefit of intercommunication. Every conversation which takes place by way of intercommunication is a conversation to which a customer of the defendants is necessarily a party, and of which he has the benefit.

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Many months ago the plaintiffs, at their own expense, laid from their Swansea exchange to a manhole closely adjacent to the defendants' Swansea exchange junction lines, said to consist of 217 pairs, for the purpose of connecting the two exchanges at Swansea. The defendants refused to connect them. The plaintiffs on August 31, 1904, offered further to make connections at each place at which the two undertakings have sub-exchanges closely adjacent to each other—namely, at Mumbles and at Morriston; and they also offered to connect any further sub-exchanges which the plaintiffs might provide in other parts of the area where the defendants already had an exchange, if the defendants on their part would do the like. The defendants did not accede. Their letter of September 20, 1904, to which I have already referred, constituted, in my opinion, a refusal to give intercommunication except upon the terms there stated. And that refusal was repeated by Mr. Gaine in the box. On November 3, 1904, the writ was issued.

The question for determination is whether the defendants have refused to afford proper facilities. In my opinion they have. But "then," say the defendants, "the remedy of the plaintiffs, if any, is only in damages; they cannot have an order that the defendants do afford proper facilities." They so contend upon two grounds—first, that this Court cannot determine what proper facilities are; and secondly, that, if it can, an order to afford facilities would involve that the Court should enforce the performance of a continuous act. As to the former of these, it may well be that the Court could not order a definite number of junction lines to be laid, or a staff of a defined number to be employed, or the business to be conducted in a particular way, or anything of that kind. But the Court may, in my judgment, indicate that a certain way of carrying out intercommunication is the proper one, leaving it to the companies to determine how, as matter of working, it can be carried into effect, and negatively the Court can interfere by determining, as I have in the former part of this judgment, that a particular way of carrying out inter-

communication is not the right one. This is a course familiar in many cases that might be adduced. In cases of nuisance, for instance, the Court does not take in hand the conduct of the business which is causing the nuisance and continuously supervise it and ensure that it be so carried on as that there shall not be a nuisance. The Court grants an injunction, indicates sometimes for the benefit of a defendant the course which, upon the report of an expert referee, the Court thinks may be adopted to abate the nuisance, and gives the defendant an opportunity to take that course. He may take it with or without modifications, or refuse to take it if he likes, but if he does refuse the Court holds the means of compelling him. So here, I do not propose to order the defendants to give facilities in any defined or exhaustive form, but I will indicate what I think upon the evidence they at least ought to do; and if they do not in that way, with or without such modifications as the nature of their business requires, give proper facilities, I shall have the means of enforcing the order. The details, no doubt, must be left to those who have the conduct of the undertaking, but the powers of the Court are not rendered nugatory if the defendants will not apply their minds so to conduct their undertaking as to give effect to the plaintiffs' statutory rights. As regards the second, I am not pressed with the contention. The defendants do not come here to say that they refuse to give intercommunication. On the contrary, Mr. Gaine has said in the box that if he cannot legitimately support any of the objections which he has raised, he is prepared to comply with the defendants' statutory obligation to give intercommunication.

The question between the parties is not whether intercommunication shall be given, but how it shall be given. Upon the evidence before me, I think that proper facilities include the establishment of junctions between the following exchanges of the plaintiffs and defendants respectively—namely, first, between the two exchanges at Swansea; secondly, between the two exchanges at the

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Mumbles; and thirdly, between the two exchanges at Morriston; and I think that the cost ought to be borne equally by the parties. The proper incidence of the cost has not been disputed before me. The order which I propose to make will not involve that the Court shall intervene to enforce the continuous doing of a succession of acts. The order will enforce the establishment of intercommunication. Under the instruments which govern the defendants they are bound, as between themselves and the Postmaster-General, not to give favour or preference to any person whomsoever as a customer of the company. They must serve the customers of the plaintiffs, who under the Act become entitled to facilities for transmission of their messages, as much as the customers of the defendants themselves. The Court may safely leave it to the Postmaster-General to ensure that the obligations of the service shall be observed after the intercommunication has been established. The judgment which I pronounce is as follows: I declare that under section 3, sub-section 5 of the Telegraph Act, 1899, and the order, and in the events which have happened, the plaintiffs are entitled to be afforded by the defendants all proper facilities for restricted intercommunication within the meaning of the order between persons using the defendants' system and persons using the plaintiffs' system; and I declare that the defendants have improperly refused to give such proper facilities. There will be an order that the defendants do give such proper facilities, and there will be liberty to apply. The defendants must pay the costs of the action. Under the liberty reserved either party can apply to the Court; and, if the defendants are really in any difficulty as to the connections which they ought to make or the facilities they ought to give, they can come to the Court under this liberty and not leave the matter to be determined in the most inconvenient way—namely, by a motion for sequestration. I may say for their guidance that, as at present advised, I think that junction circuits at the three places which I have named and facilities for using them will be, for the present at any rate, a compliance with the

order; and experience will best shew whether anything and what further is required.

Solicitors—Sharpe, Parker, Pritchards, Barham & Lawford, agents for John Thomas, town clerk, Swansea, for plaintiffs; W. E. L. Gaine, for defendants.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.]

[IN THE CHANCERY DIVISION AND
IN THE COURT OF APPEAL.]

JOYCE, J.

1905.

Feb. 17, 18, 24.

March 9, 16, 18.

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

April 12.

JONES &
ROBERTS,
In re.

Solicitor — Lien of Town Agents for Country Solicitors — Bankruptcy of Country Solicitors — Taxation of Country Solicitors' Bill by Client — Right of Country Solicitors to Production of Documents.

Country solicitors owed their London agents more than 100l. for general agency business, which included the agency charges in a bill of 24l. owing to the country solicitors from their client E. The country solicitors became bankrupt, and their trustees delivered a bill of costs to E., who obtained an order of course to tax the same against the trustees, the order being obtained through the London agents, who were acting in the matter as agents for another firm of country solicitors. The London agents were afterwards changed, and ceased to act in the matter. In the course of the taxation it became necessary for the trustees to produce documents in the hands of the London agents on which they claimed a lien for their general agency charges, and the Taxing Master directed the trustees to issue a subpoena, on which the London agents attended and refused to produce the documents on the ground of their lien:—Held, by JOYCE, J., that the London agents were not bound to produce the documents at the instance of the country solicitors or their trustee except upon payment of the whole

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of their general agency charges, and that it made no difference that the London agents had acted in obtaining the order for taxation on behalf of E.

An appeal from this decision was settled by the London agents delivering the documents to the trustee upon his undertaking to pay to them the whole amount received from E., less the costs of taxation.

Motion.

Robbins, Billing & Co. acted as town agents for Jones & Roberts, a firm of country solicitors, in various matters, including certain business in which one Edwards had retained Jones & Roberts as his solicitors.

Jones & Roberts became bankrupt; and on August 25, 1904, the trustee in bankruptcy delivered to Edwards the bill of Jones & Roberts, amounting to about 24*l*. The total amount of the agency charges of Robbins, Billing & Co. against Jones & Roberts was about 125*l*.

On October 15, 1904, Robbins, Billing & Co., on behalf of Edwards, obtained the usual order of course to tax this bill, containing the usual directions for the petitioner and solicitors to produce before the Master all books, papers, and writings in their custody or power respectively. In obtaining this order, Robbins, Billing & Co. were in fact acting not under a retainer from Edwards, but as agents for a firm of solicitors, R. O. Jones & Davies, of Blaenau Ffestiniog, who were then acting for Edwards; but the fact that they were only agents was not known to the trustee in bankruptcy till later.

On November 15, 1904, R. O. Jones & Davies changed their London agents, and Robbins, Billing & Co. ceased to act further in the matter of the taxation.

In the course of the taxation it became necessary to have produced certain documents in the hands of Robbins, Billing & Co. on which they claimed a lien. These documents comprised receipts for counsel's fees and other disbursements made by Robbins, Billing & Co., all of which items would be disallowed on taxation unless the receipts were produced, and the Taxing Master directed the trustee in bankruptcy of Jones & Roberts to issue a subpoena *ad testificandum* and *duces*

tecum, which such trustee accordingly did.

S. Billing, a member of the firm of Robbins, Billing & Co., appeared upon these subpoenas, and declined to produce the papers, claiming a lien for all costs due to him from Jones & Roberts for general agency business.

The trustee in bankruptcy then moved the Court for an order that the respondent S. Billing, a member of the firm of Robbins, Billing & Co., might be ordered, notwithstanding the lien claimed by him or his firm, to produce before the Taxing Master all the documents in the possession of himself or his firm which might be necessary for the purpose of obtaining a taxation of the bill of costs delivered by the trustee to Edwards, and in particular the documents mentioned in the writ of subpoena; and that the respondent might be ordered to do and concur in doing all things necessary to enable the appellant to obtain taxation and payment, and to deliver up the said documents on payment pursuant to the directions in the order for taxation; and that it might be declared that the respondent had waived his lien (if any) on the said documents; or alternatively, if the same was not waived, that such lien was confined to the proportion of the said bill which was due to the respondent or his firm, and that the respondent might be ordered to pay the costs.

P. F. Wheeler, for the trustee in bankruptcy.—The London agents are not entitled to prevent the lay client from getting the country solicitors' bill against him taxed, and thus to prevent the country solicitors from being paid. Still less are they entitled to refuse to produce the documents when production is demanded by the trustee in bankruptcy of the country solicitors—*Toleman & England, In re; Bramble, ex parte* [1880].¹ The lien cannot be asserted when the production of the documents is necessary for the purpose of doing justice to creditors—*Hawkes, In re; Ackerman v. Lockhart* [1898].² Further, by acting for the lay client in obtaining the order to

(1) 13 Ch. D. 885.

(2) 67 L. J. Ch. 284; [1898] 2 Ch. 1.

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tax, which directs production, they have waived their lien, and cannot now insist on it. The costs must be arranged according to the equities of the parties, and the lien, if any, is only upon the balance under such arrangement—*Taylor v. Popham* [1808].³

Younger, K.C., and *A. Macpherson*, for the London agents.—The country solicitors themselves could not have obtained an order for production of the documents without satisfying the London agents' claims against them, so that the applicant, to succeed, must establish that he has a higher right as their trustee in bankruptcy. But he has no such higher right "unless it is given by some express provision of the bankrupt law"—*per James, L.J.*, in *Newitt, Ex parte; Garrud, in re* [1881].⁴ The present application is not made in bankruptcy, and there is no such express provision applicable to this case. The lay client can only recover the documents in the possession of the London agent on proof that he has paid the country solicitor's bill against him—*Waller v. Holmes* [1860]⁵; and the trustee in bankruptcy of the country solicitors must, to obtain production of them, discharge the whole bill of the London agents against the country solicitors, since the London agents have a lien against the country solicitors for all moneys due from them—*Lawrence v. Fletcher* [1879]⁶; and the country solicitors could not have the part of the London agents' bill which relates to one matter taxed—*Johnson & Weatherall, In re* [1888].⁷ As to the cases cited on the other side, *Toleman & England, In re; Bramble, ex parte*,¹ does not apply here, and *Hawkes, In re*,² applies only to third parties against whom there is no lien, and Vaughan Williams, L.J., pointed out in that case that administration and other representative actions such as that case are treated as a special class. There is no representative action here. The solicitor of a company which is being wound up can assert his lien on docu-

ments which come into his hands before the presentation of the petition—*Capital Fire Insurance Association, In re* [1883].⁸

P. F. Wheeler, in reply.—Costs due to the country solicitors are payable to their trustee in bankruptcy on the principle of *Baker v. Abbott* [1897]⁹; and the trustee is entitled to the order asked for, that he may be able to obtain payment. *Hawkes, In re*,² is strictly applicable to the present case; the rights of creditors intervene here just as they did in it. In *Capital Fire Insurance Association, In re*,⁸ the liquidator asked for the documents to be handed over. I ask only for their production, to which I am entitled even though it renders the lien valueless—*South Essex Estuary Reclamation Co., In re; Paine & Layton, ex parte* [1869].¹⁰

Cur. adv. vult.

March 18.—*Joyce, J.*—Jones & Roberts were solicitors in the country. Robbins, Billing & Co. were the town agents of Jones & Roberts. Edwards employed Jones & Roberts in the country as his solicitors, and there were certain matters in which Robbins, Billing & Co. acted as town agents for Jones & Roberts concerning the country client.

Jones & Roberts became bankrupt, and Edwards, wanting his papers, and acting through Robbins, Billing & Co. as his proper solicitors, obtained as against the bankrupt solicitors or their trustee in bankruptcy the usual order for the taxation of the bill of costs of Jones & Roberts. That order provided for the taxation in the usual way, and that they should produce before the Master all books, papers, and writings in their custody, or power relating to the matters thereby referred to, or any of them.

In the proceedings on the taxation it became necessary to have certain papers in the hands of Robbins, Billing & Co., the town agents of Jones & Roberts, and a subpoena *ad testificandum* and *duces tecum* was issued and served upon Robbins as to certain papers specified required for the taxation. Robbins appeared upon his subpoena and declined

(3) 15 Ves. 72.

(4) 51 L. J. Ch. 381, 384; 16 Ch. D. 522, 531.

(5) 30 L. J. Ch. 24; 1 J. & H. 239.

(6) 12 Ch. D. 858.

(7) 57 L. J. Ch. 306; 37 Ch. D. 433.

(8) 53 L. J. Ch. 71; 24 Ch. D. 408.

(9) 32 L. J. N.C. 249; W. N. (1897), 38.

(10) 38 L. J. Ch. 305; L. R. 4 Ch. 215.

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to produce the papers, claiming a lien for costs due to him from Jones & Roberts, including, among other things, costs which were chargeable against Edwards, the country client.

If there had been no bankruptcy of Roberts, and the country solicitor had been the respondent on the order for taxation, and had issued a subpoena and served it upon Robbins, then, in the absence of special circumstances, none of which exist in the present case, I take it to be clear that the town agent was not bound to produce unless his lien were satisfied or secured. It was contended on behalf of the applicant on the authority of *Hawkes, In re*,³ that the production being required for the purpose of getting in a debt due to the bankrupt, and so indirectly for the purpose of administering the bankrupt's estate, Robbins was bound to produce. But I think when you look into the case of *Hawkes, In re*,³ and the other cases that were cited, no real authority for such a contention can be found; and that argument, in my opinion, fails.

Then it is said that the lien of Robbins, Billing & Co., the town agents, had been waived by the fact that they were the solicitors acting for Edwards, the lay client, in obtaining the order to tax, but no authority has been cited to me for this proposition, and I do not follow the reasoning by which it was sought to arrive at that conclusion. I think it would very much astonish some of the large agency firms in London if they were told that they lost their lien against the country solicitor by the mere fact of acting as solicitors for the lay client in another matter and obtaining an order to tax. Therefore I hold that there is nothing in that point.

Now, Robbins, Billing & Co. having given notice to the lay client of their lien, it appears to me that Robbins, Billing & Co. have as against the country solicitor a lien on the documents which they hold of the country client for the whole amount due from the country client to the country solicitor. That is stated in all the text-books, and is referred to in *Daniell's Chancery Practice* (7th ed.), p. 1693, and *Cordery on Solicitors* (3rd ed.), pp. 359,

360, supports that proposition. I am of opinion that there is nothing in *Taylor v. Popham*³ conflicting with this. The point is that in that case the applicant was the client himself and not the country solicitor. The whole thing was clearly stated, in my opinion, in the case of *Lawrence v. Fletcher*.⁶

Early in the case I urged upon the parties that by consent some order ought to be made by which the lien of the town agents or their rights should be preserved, but the taxation proceed, and the payment of the amount due from the country client be obtained. The town agents offered, if their lien or rights were preserved as to the amount coming from the country client, to allow, as against the town agent, the costs and expenses without deduction of the taxation, and to allow those to be retained by the trustee in bankruptcy. On the other hand, the trustee in bankruptcy of the country solicitor offered to make an arrangement to preserve the lien of the town agents, but only to the extent of the particular charges contained in the bill, which were for work done by the town agent for the lay client through the country solicitor. Having regard to the cases which I have referred to and to the statements in the text-books, this offer, in my opinion, falls short of what the town agents are entitled to insist upon. Therefore with reluctance I must refuse this motion, and considering the offer made on behalf of the town agents (rather late, I admit) I must refuse it with costs.

The trustee in bankruptcy appealed.

Norton, K.C., and *P. F. Wheeler*, for the appellant.—On general principle the lien cannot be set up as against any party to the taxation, and it is immaterial whether the present application is made by the trustee or by Edwards—*Hawkes, In re*,³ *per Lindley, L.J.*, and *Rigby, L.J.* Edwards by taking out the common order has himself demanded the documents, and after that it is a mere matter of form and procedure whether the subpoena was issued by the trustee or by Edwards. The right of the London agents is to stop payment by Edwards, not to refuse to produce the documents. The broad principle on which we desire to rest the

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appeal is that the London agent has no higher right than the country solicitor. Secondly, the taxation proceedings are in the nature of administration, and it is well settled that a solicitor cannot set up his lien so as to impede a pending administration. Thirdly, the order for taxation was in this case obtained by the London agents themselves, and they must be taken to have waived their lien.

[They also referred to *Fowler v. Fowler* [1881],¹¹ *Hope v. Liddell* [1855],¹² *Bramble, Ex parte*,¹ *Vale v. Oppert* [1875],¹³ *Lavrenco v. Fletcher*,⁶ and *Waller v. Holmes*.⁵]

Younger, K.C., and *A. Macpherson*, for the respondents.—The right of the trustee in bankruptcy is no higher than that of the country solicitors would have been—*Newitt, Ex parte*; *Garrud, in re*,⁴ *per James, L.J.*, and *Lambert v. Buckmaster* [1824].¹⁴ The subpoena was issued by the trustee in bankruptcy and not by Edwards, and it is clear that a solicitor is not bound to produce documents on which he has a lien on a subpoena by the client against whom the lien exists—*Kemp v. King* [1842]¹⁵ and *Hawkes, In re*,² *per Lindley, L.J.*, and *Vaughan Williams, L.J.*

The right of the London agents as against the country solicitors or their trustee is to retain the documents till the satisfaction of their whole agency bill, and the country solicitors could only tax the whole bill under the Solicitors Act, 1843, s. 37—*Storer & Co. v. Johnson & Weatherall* [1890].¹⁶ The right of the London agents as against Edwards is not so high. There is no privity between them; but the Court has always protected the London agent's lien to the extent of the indebtedness of the client to the country solicitors; and if the present application were being made by Edwards he would not be entitled to delivery or production except on the terms of paying the amount due on his bill to us. In the Court below we offered, and we repeat the offer here, to treat the present application as if it were made by Edwards, and to deliver these documents to the trustee

upon his undertaking to pay to us the amount of Edwards's bill less any costs of taxation.

Norton, K.C.—The question is whether the right of the London agents to intercept the costs coming from Edwards extends to Edwards's whole bill, or only to such part of it as consists of agency charges and disbursements.

[*PER CURIAM*.—*Waller v. Holmes*⁵ shews that it extends to the whole bill, and under the circumstances the trustee has no interest whatever in these costs.]

The offer was then accepted; and the Court, without expressing any opinion upon the other questions raised in argument, made no order except that the appellant should pay the costs of the appeal.

Solicitors—*Jacques & Co.*, agents for *W. T. Jones, Bangor*, for appellant; *Robbins, Billing & Co.*, for respondent.

[*Reported by Warwick H. Draper and A. Cordery, Esqs., Barristers-at-Law.*]

KEKEWICH, J.
1905.
March 20. April 7. } ANDREW'S TRUST,
May 16. } *In re*;
CARTER v. ANDREW.

Trust—Fund Subscribed "for or towards the education of B.'s children"—Surplus—Resulting Trust—Division among Adult Beneficiaries.

A fund having been subscribed to defray the educational expenses of certain children, various sums had been spent out of their father's estate, to which they were entitled equally, upon their education and maintenance during their minorities. Upon a summons taken out by them when all of full age asking for a division of the remaining subscribed fund proportionate to the respective expenditure on each child,—Held, that there was no resulting trust in favour of the subscribers, and that the children were not entitled to be recouped the expenditure upon them respectively, but that the balance of the fund belonged to the children absolutely, and must be equally divided between them.

Sanderson's Will, In re (26 L. J. Ch. 804; 3 K. & J. 497), distinguished.

(11) 50 L. J. Ch. 686.

(12) 24 L. J. Ch. 691; 7 De G. M. & G. 331.

(13) 44 L. J. Ch. 579; L. R. 10 Ch. 340.

(14) 2 L. J. (o.s.) K.B. 93; 2 B. & C. 616.

(15) 2 Moo. & R. 437.

(16) 60 L. J. Ch. 31; 15 App. Cas. 203.

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Summonstaken out by these seven children of the late Right Rev. Joseph Barclay, first Protestant Bishop of Jerusalem, who were all infants at their father's death in 1881 but were now of full age, asking for a declaration that a fund of subscriptions collected in that year by the late Canon Barrington for the education of the applicants, and now valued at 1,140*l.*, and represented by seven shares of 80*l.* each (20*l.* paid) in the London and County Banking Co., and a sum of 460*l.* 4*s.* accumulated dividends thereon, ought to be divided among them in proportion to the amounts by which their respective fortunes under their father's will had been diminished by payments for their respective education and maintenance, or, in the alternative, between whom and in what shares and proportions the fund ought to be divided.

The only evidence of the precise object of the fund was a copy of a letter written by Canon Barrington in August, 1889, to Mr. J. S. Key Moss, one of the trustees of the fund, stating, "I beg to say with regard to the money which I collected from my friends for or towards the education of Bishop Barclay's children that it was by no means intended for the exclusive use of any one of them in particular nor for equal division among them but as deemed necessary to defray the expenses of all and that solely in the matter of education. It was paid into the London and County Branch Bank at Hertford at which I gave instructions to answer the draft of Mr. Andrew to whom I gave the authority personally. Whether he invested it in stock I do not know, feeling as I did that it would be wanted for current expenses whether of Lucia or Joseph and the others in turn."

The eldest son of the bishop had a life interest in certain Irish real estate under his father's will, and during his minority the income thereof had all been expended on his education and maintenance; a further sum of 562*l.* 5*s.* 11*d.* had been expended on the same objects by A. A. Andrew, one of the trustees of Bishop Barclay's will, out of his own moneys. The six other children had received in respect of their education and maintenance out of their father's residuary estate,

to which they were entitled in equal shares, various sums ranging from 779*l.* to 11*l.*, amounting in all to 2,431*l.*

Martelli, for the applicants.—There is no resulting trust in favour of the subscribers, but the children are entitled to the fund which was subscribed for their benefit by relieving their own small fortunes of the expenses of education. As large sums exceeding the amount of the fund were paid for their education and maintenance out of their own fortunes, they ought to be recouped out of this fund in proportion to such expenditure; the purpose of the subscribers has not failed, but can be satisfied in this way. *Abbott Fund, In re; Smith v. Abbott* [1900],¹ at first sight seems to be a very similar case, but is distinguishable. Here the subscribers never intended to get their money back, but subscribed it for the children of their deceased friend, who are still living and can benefit by a gift which is absolute—*Sanderson's Will, In re* [1857].²

M. D. Warmington, for a representative subscriber, was instructed to support the application, as the subscribers did not wish to have their money back, but was desired by the Court to argue in favour of a resulting trust.—So far as the money has not in fact been expended upon the purpose mentioned in Canon Barrington's letter—namely, "the education of the children"—the trust, being for a specific purpose, has failed, and there is a resulting trust—*Abbott Fund, In re*.¹ The purpose of the fund has long since been fulfilled. This is not like the cases of funds subscribed for friendly societies, in which the Court has held that the donors have no right to have their money back again.

A. J. Spencer, for A. A. Andrew, a trustee of the fund and also of the will.—It was believed that the fund was subscribed for the benefit of the eldest son only, as he did not share in the residuary estate of his father; but it is impossible now to contend that, in face of the letter which is the only evidence of the trust. This fund should be divided among the applicants, and I am entitled to be

(1) 69 L. J. Ch. 539; [1900] 2 Ch. 326.

(2) 26 L. J. Ch. 804 3 K. & J. 497.

ANDREW'S TRUST, IN RE.

recouped out of the eldest son's share for my own outlay of 562*l.* 5*s.* 11*d.*

W. Howland Jackson, for *J. S. Key Moss*, the other trustee of the fund.—I severed because *A. A. Andrew* originally contended for a trust of the whole fund in favour of the eldest son, and also made the personal claim to be recouped. The fund belongs absolutely to all the applicants, and should be divided between them.

L. Ryland, for the trustee in bankruptcy of one of the sons, supported the application.

Martelli, in reply. — The expression "wanted for current expenses" in Canon Barrington's letter shews that the purpose was not strictly confined to education. The fair construction is that the fund was meant for education and maintenance by way of supplementing the residuary estate.

Cur. adv. vult.

KEKEWICH, J. — The material facts gathered from the affidavits are as follows: Bishop Barclay died on October 22, 1881, leaving seven infant children. A provision for these children was raised by some of his friends. The only evidence of the precise objects of that provision is found in a letter of Canon Barrington, the contents of which are proved by a copy. According to that letter, written in August, 1889, Canon Barrington himself collected the money subscribed, and he states that it was collected "for or towards the education of Bishop Barclay's children, that it was by no means intended for the exclusive use of any one of them in particular nor for equal division among them but as deemed necessary to defray the expenses of all and that solely in the matter of education." How much money was expended on these objects is not known, but there still remains a sum invested in seven shares in the London and County Banking Co., Lim., and there are also available the accumulated dividends on those shares. The Court is asked to determine how these shares and dividends ought to be dealt with, all the children being still alive and, of course, of full age.

The summons is framed on the footing that the children are entitled to be

recouped out of this fund the moneys spent on their maintenance and education out of what came to them under their father's will. They were entitled to some fortune under that will, and apparently it was in part applied in their maintenance and education. If the proposed plan were adopted, each child would take, not an equal share of the fund, but such a share as would represent the amount expended on his or her education out of the father's estate. The children are all content that this should be done. If they are masters of the fund it can of course be done by agreement, but the Court is asked to decide whether that is right or not, and it is necessary that the point should be decided.

The proposed mode of division is supported by reference to the judgment of Vice-Chancellor Wood in *Sanderson's Will, In re.*¹ There the property had been given by will "to pay and apply the whole or any part of the rents, issues, and profits . . . for and towards [the] maintenance, attendance, and comfort" of John Sanderson, an imbecile; and as a matter of fact all that was necessary for his maintenance, attendance, and comfort was supplied out of the income of the trust property, so that no such question arose as is here suggested. But in the course of the argument the Vice-Chancellor enquired whether John Sanderson had been maintained in any way out of his own property, and in his judgment he thus states his reason for his enquiry: "I think he had a clear right to have this fund applied for all purposes requisite for his maintenance, attendance, and comfort. If, therefore, he had been left to his own funds for his maintenance, attendance, and comfort, I apprehend there would have been a clear right on the part of his personal representatives to have that fund recouped. Part of the personal estate of the intestate, whom they represent, having been applied for his maintenance, attendance, and comfort, when another fund ought properly to have been applied for that purpose, they would have had a right to say, recoup the fund that has been so improperly applied out of the fund which was given for that specific purpose."

I should certainly be disposed to follow

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without hesitation the *dictum* of the Vice-Chancellor if I saw my way to apply it; but I do not see my way, because the equity that is thus asserted would only arise as against a stranger, and unless I first decided that apart from such equity the fund belonged to other persons there would be no ground for it. Can the fund be said to belong to other persons? If there are any such, they must be the original subscribers to the fund and their legal personal representatives. I have been referred to *Abbott Fund, In re*,¹ but it is absolutely different from the case now before the Court. There a fund had been raised for the maintenance and support of two distressed ladies, and on the death of the survivor there was still money in the hands of the trustees. Mr. Justice Stirling held that there was a resulting trust of this balance for the subscribers. He did not think that the ladies ever became absolute owners of the fund, and probably no one reading the case is likely to differ from that conclusion. Here I am dealing with different facts, including the fact that the children are still alive, and I do not think myself much guided, and certainly not in the slightest degree bound by the authority of *Abbott Fund, In re*.¹

It seems to me that the guiding principle is to be found in several authorities examined by Vice-Chancellor Wood in *Sanderson's Will, In re*,² and the judgment of the Vice-Chancellor in that case, from which one passage may be usefully cited: "there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be." Here the only specified object was the education of the children. But I deem myself entitled to construe "education" in the broadest possible sense, and not to consider the purpose exhausted because the

children have attained such ages that education in the vulgar sense is no longer necessary. Even if it be construed in the narrower sense, it is, in Vice-Chancellor Wood's language, merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner (they all being then infants) most useful. Therefore I am prepared to hold that there is no resulting trust, and that the shares and accumulated dividends belong to the children, and the only remaining question is in what proportions do they take. The letter states that the fund was not subscribed for equal division, but was intended to "defray the expenses of all as deemed necessary," and apparently the trustees of the fund exercised their discretion in dividing the money so far as it was divided at all. But there is no longer room for discretion, and I think the only safe course is to hold that the children are entitled to what remains in equal shares. The costs must first be paid, and then the residue will belong to the children equally, the trustee in bankruptcy of one of them to take his share.

The eldest son was entitled, under his father's will, to some Irish property. The rents of that property were applied by the defendant A. A. Andrew for education, and otherwise for the benefit of that eldest son. They were not sufficient for the purpose, and the defendant claims that there remains due to him in respect of expenditure out of his own moneys the sum of 562*l.* 5*s.* 11*d.* I understand that there is no objection to his being paid the sum out of what will now be coming to the eldest son, and the order may provide for that without my deciding whether he is or is not entitled to it as a matter of right.

Solicitors—Gush, Phillips, Walters & Williams, for applicants; Stephenson, Harwood & Co., for the subscriber; H. Lovibond & Co. and Minet, Harvie & May, for trustees; Cameron, Kemm & Co., for trustee in bankruptcy.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.]

JOYCE, J.
1905.
Feb. 28. March 1, 2, 7. }
April 5. } HEATH v.
DEANE.

*Manor—Rights of Common—Quarry—
Right to Get Stone—Freehold and Copy-
hold Tenants—Evidence—Court Rolls.*

The copyhold tenants of a manor may by custom have a right of common to get stone and sand out of the lord's waste to be used by them on their respective tenements within the manor, and there is no legal objection to the existence of a similar right in the freehold tenants. Such a right is not unreasonable, and the court rolls may be given in evidence of its existence. The lord cannot inclose against such a right of common; and the fact that an amercement rent was at one time paid in respect of the quarry from which the stone was taken cannot affect the tenants in respect of the right in question.

Action for an injunction to restrain the defendant from removing stone and sand from the plaintiff's quarry and from otherwise trespassing on the plaintiff's property.

The site of the quarry, or the rights of the lord in the quarry, were in 1879 conveyed to the predecessor in title of the plaintiff discharged from all such rights of common as the lord could release or discharge.

By indenture of November 27, 1894, certain hereditaments, of which the quarry in question formed part, were conveyed to the plaintiff. The plaintiff, so it was alleged, had been in undisturbed possession ever since.

In July, 1902, the defendant got and carried away stone and sand from the quarry, and the plaintiff thereupon commenced this action.

The defendant pleaded that the quarry was parcel of the waste of the manor; that he was possessed of copyhold and freehold tenements within the manor, and that from time immemorial the tenants of the manor had had certain rights of common, one of which was the right to dig, get, and carry away stone, gravel, and sand for all necessary uses, to be spent and used upon their respective tenements within the manor, but not elsewhere. The defendant

also pleaded that he and his predecessors in title had from time immemorial enjoyed as of right and without interruption the rights claimed by him in respect of his freehold tenements; and he counter-claimed for an injunction restraining the plaintiff from inclosing the quarry or interfering with the rights of common.

The plaintiff by his reply alleged that the stone taken was not required to be spent or used on the defendant's tenements within the manor, and that the quarry had long since been inclosed and therefore discharged from all rights of common.

The manor of Norton-in-the-Moors, in the county of Stafford, was an ancient manor of which there were two lords—one of the freeholds and one of the copyholds. The court rolls of the copyhold court contained a record of a court of survey held on September 16, 1695, which, after referring to the commons and waste grounds of the manor, continued: "and as well the lords tenants as the copyholders and freeholders of and in the manor have a right of common therein for depasturing thereon with all sorts of commonable cattle and also that as well the said copyholders as the said freeholders have a right of . . . and liberty of and in the said commons and waste grounds for the getting of stone, gravel, sand, peats, clods, clay, marl, soil, earth, ferns or gorse for all necessary uses to be spent and used on their respective tenements in the said manor but not elsewhere." Some of the presentments which dealt with the getting of stone by tenants contained the words, "The Lord agreeth thereto." The records also shewed that at very many of the courts numbers of people were presented and amerced for getting stone to be used outside the manor.

Hughes, K.C., and P. F. S. Stokes, for the defendant.—We claim a right to take stone and sand both for copyhold tenants by custom and for freehold tenants by prescription—Warrick v. Queen's College, Oxford [1871].¹ The evidence of witnesses as to the exercise of the right is unimportant where you have ancient

(1) 40 L. J. Ch. 780; L. R. 6 Ch. 716.

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records like the presentments in this case. The fact that the lord agreed to the right two hundred years ago does away with the necessity for proving the reasonableness of the custom. The custom, however, is reasonable—*Seton's Judgments* (6th ed.), p. 599, and *Betts v. Thompson* [1871].² There is no law that a custom must be reasonable, though a custom will not be implied if unreasonable. A custom may be good, however unreasonable, if it is agreed to by the lord and the tenants—*Salisbury (Marquis) v. Gladstone* [1861],³ where *Wilson v. Willes* [1806],⁴ upon which the plaintiff relies, was cited. Freehold tenants of a manor can prescribe—*Warrick v. Queen's College, Oxford*,¹ and *Portland (Duke) v. Hill* [1866].⁵ Those cases shew the reasonableness of the custom. *Wilson v. Willes*⁴ was totally different from this case. There the taking of turf destroyed the right of pasture. Here the only way of using the stone is by getting it. The case of *Shakespear v. Peppin* [1796]⁶ turns principally upon pleading, but it implies that there is no objection to a custom to dig gravel. It is clear on the evidence that there was no inclosure of the quarry and that it was never rated.

Younger, K.C., and *E. P. Hewitt*, for the plaintiff. — The defendant contends that if the lord assents to a custom the custom is good, however unreasonable. That is an agreement, and he must shew that the parties to it are in a position to make it. The presentment does not purport to be an agreement, and is not evidence. It does not relieve the defendant from shewing the reasonableness of the custom. The presentment is bad because it alleges a right of common in the freehold tenants by custom, whereas they can only claim by grant or prescription. The custom as proved is unreasonable. A custom to take an unlimited amount of stone from a common cannot be upheld—*Wilson v. Willes*⁴ and *Att.-Gen. v. Mathias* [1858].⁷ In the present

case the custom claimed is too wide, and therefore bad.

Cur. adv. vult.

April 5.—*JOYCE, J.*—This is an action of trespass or alleged trespass upon a quarry at Ball Edge, in the manor of Norton-in-the-Moors in the county of Stafford, by taking stone and sand therefrom. The quarry, with the surrounding lands, was undoubtedly open waste of the manor in the year 1839, and for some time afterwards. The site, or rather the rights of the lord in the site of the quarry were in 1879 conveyed to the predecessor in title of the plaintiff discharged from all such rights of common as the lord could release or discharge. The defendant is a freeholder and also owner of a copyhold tenement within the manor, and in 1902 took stone from the quarry for use upon his freehold tenement in exercise of an alleged right of common. The plaintiff thereupon brought an action of trespass. The defendant justifies under his alleged right of common, and counterclaims for an injunction against any interference by the plaintiff with the exercise of such right.

Now there are very commonly in almost every manor large rights by custom or otherwise over the waste for the benefit of the tenants, such as cutting timber for repairs, quarrying stone, digging sand, and the like, as was pointed out by Vice-Chancellor Wood in *Portland (Duke) v. Hill*,⁵ where it was recognised to be a good custom for the tenants to dig in the waste for coal for their own consumption. The copyhold tenants of a manor may by custom be entitled to such a right of common as is claimed in the present case. Freehold tenants ordinarily have a right of common of pasture over all the waste lands of the manor, and they may also have a right of common to quarry stone or take sand, when it exists or is to be found upon the waste, to be used or expended upon the freehold tenement. There is no legal objection that I am aware of to the existence of such a right.

The rolls of a court baron or of a customary court are evidence between the

(2) L. R. 6 Ch. 732.

(3) 34 L. J. C.P. 222; 9 H.L. C. 692.

(4) 7 East, 121.

(5) 35 L. J. Ch. 439; L. R. 2 Eq. 765.

(6) 6 Term Rep. 741.

(7) 27 L. J. Ch. 761; 4 K. & J. 579.

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lord and his copyholders or free tenants. They are the public documents by which the inheritance of every tenant is preserved, and the records of the manor court, which was anciently a court of justice, relate to all property within the manor.

In modern times—in fact since the year 1700—the ancient manor of Norton has in some way been divided or partitioned, it is said, between co-parceners. Of such divisions instances are mentioned in various cases referred to in the note to page 10 of *Elton on Copyholds*, and in particular the case of *Cattley v. Arnold* [1858].⁸ But the rolls of this ancient and undivided manor contain a rather remarkable entry of September 16, 1695. [His Lordship referred to that and other entries in the court rolls, and continued:] As to whether it is true or not that the freehold tenants of a manor cannot claim a right of common to take stone from the waste except by prescription, and that evidence of reputation is not admissible in proof of such a right, reference may be made to the discussion in *Warrick v. Queen's College, Oxford*,¹ both in the Court below and in the Court of Appeal, and to Sir Roundell Palmer's explanation there given of Baron Parke's decision or dictum in *Dunraven (Earl) v. Llewellyn* [1850].⁹ Reference may also be made to *Evans v. Merthyr Tydfil Urban Council* [1898].¹⁰ But whether this is so or not, I am of opinion that the entry upon the court rolls of the manor which I have read is admissible and good evidence on behalf of the freeholders of the existence of a right of common in them to take stone from the waste of the manor, and from this quarry at Ball Edge, for use upon their freehold tenements. Moreover, at the very least I think this entry is under the circumstances tantamount to an admission by the lord of the rights specified in the presentment with respect to the rights of common of the freeholders and copyholders.

There are a series of subsequent entries in the rolls of the divided manor of persons being amerced from

time to time for taking stone from the waste to be used elsewhere than in the manor. It is true that there are other entries of amercements for taking stone from the waste without its being mentioned that it was taken for sale or use outside the manor; but I do not doubt that the offence consisted in the taking of stone otherwise than for use upon a tenement within the manor, although the mention of this circumstance was often omitted, I suppose by inadvertence or carelessness.

Moreover, evidence has been adduced of numerous instances of the exercise of the alleged right within living memory and in quite recent times, and this without any let or hindrance of any kind until the year 1902, the date of the occurrences which resulted in the institution of the present action. This, then, is not a case in which the Court has to determine whether the existence of, and a legal origin for, a right can and ought to be presumed from evidence merely of instances of acts done within living memory. In such cases no doubt the right asserted must, in order to be admitted, be not unreasonable—*Salisbury (Marquis) v. Gladstone*.³ I do not, however, consider the right of common asserted by the defendant in the present case to be unreasonable; but it is not, under the circumstances, very material whether it is reasonable or not. It is certainly not a very unusual right. The freeholders of a manor may properly claim by prescription a right to cut turf or get gravel out of the lord's waste, and when the freeholders have in fact exercised such a right for many years the Court will try to find a legal origin for it. For, in the words of Chief Baron Pollock in *Gibson v. Doey* [1857],¹¹ "It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong." Again, in *Penryn Corporation v. Best* [1878]¹² Lord Justice Bramwell said, "It is a most convenient thing that every supposition, not wholly irrational, should

(8) 4 K. & J. 595.

(9) 19 L. J. Q.B. 388; 15 Q.B. 791.

(10) 68 L. J. Ch. 175; [1899] 1 Ch. 241.

(11) 27 L. J. Ex. 37; 2 H. & N. 615.

(12) 48 L. J. Ex. 103, 107; 3 Ex. D. 292, 299.

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be made in favour of long continued enjoyment." In the present case it is under the circumstances impossible to hold that no such right of common as that claimed on behalf of the freeholders ever existed.

But on behalf of the plaintiff, the owner of the site of the quarry, it has been urged that the right of common to take stone and sand from the quarry has been extinguished by adverse possession or non-user, or something of the kind. In my opinion no such contention has been established. The quarry has never been inclosed—that is, has never been effectually fenced all round. Upon the evidence there has never been any interruption of the general right claimed, or any exclusion or other possession either by the plaintiff or any of his predecessors in title inconsistent with the exercise of the right of common claimed. It is well settled that, though the lord may under certain circumstances inclose against a right of common of pasture, that cannot be done against a right of common of turbary or against such a right of common as is proved to have existed in the present case. The quarry has never been assessed to any rate, but it is alleged that prior to the conveyance in 1879 an amercement rent was paid to the lord in respect thereof. It is not clear that that was really the fact; but, even if such a rent was paid, that could not affect the rights of the tenants of the manor in respect of the right of common in question, though it might possibly do so in respect of the right of common of pasture.

The result is that the action fails. There must be judgment for the defendant upon the claim and the counter-claim, and the plaintiff must pay the costs.

Solicitors—Stow, Preston & Lyttleton, agents for Hollinshead & Moody, Tunstall, for plaintiff; Riddale & Son, agents for Heaton & Son, Barslem, for defendant.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }

1905.

April 7, 13. }

PRICE v. JOHN.

Rentcharge—Release of Part of Hereditaments Charged—Concurrence of Owner of the other Part—Extinguishment—Apportionment—Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 10.

A wife was entitled to certain real property, out of which her husband was entitled to a rentcharge. Subsequently she made a voluntary settlement of a moiety of this property; and she and her husband concurred to "grant release dispose of and confirm" this moiety, "and all the estate right title interest property claim and demand whatsoever of them," the said husband and wife, "or either of them in to and out of the same premises":—Held, that this concurrence on the part of the husband operated to release the moiety granted from all liability in respect of the rentcharge, but had not the effect of conveying the whole rentcharge, or any part of it, to the grantees of the settlement.

Drew v. Norbury (Lord) (9 Ir. Eq. 171) and Johnston v. Webster (24 L. J. Ch. 300; 4 De G. M. & G. 474) distinguished.

Held also, that the unsettled moiety remained liable for the whole of the rentcharge.

Mrs. Ann Williams was the owner in fee-simple of a certain interest in the mines and minerals under the farm and lands of Hendrewen, in the parish of Ystradfydwg, in the county of Glamorgan, subject to a rentcharge of 70*l.* a year in favour of her husband, David Evan Williams.

By a voluntary indenture of settlement dated December 29, 1868 (hereinafter called "the settlement"), the husband and wife concurred in settling one moiety of this interest upon certain trusts therein more particularly specified. No mention was made in this deed of the rentcharge, but the husband and wife were therein expressed to "grant release dispose of and confirm" the moiety, "and all the estate right title interest property claim and demand whatsoever of them," the

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said husband and wife, "or either of them in to and out of the same premises." This settlement was duly acknowledged by Mrs. Williams.

The husband, David Evan Williams, died on April 1, 1902; and the wife, Ann Williams, died on April 18, 1883.

A question having arisen between the devisees of the rentcharge under the will of the husband and the ultimate possessors in fee-simple of the unsettled moiety of the interest in the mines and minerals that had continued to belong to the wife, as to the present incidence of the rentcharge, this action was commenced by the former for a declaration (*inter alia*) that they were entitled to a rentcharge of 70*l.*, or, alternatively, to a rentcharge of 35*l.*, upon the unsettled moiety.

R. J. Parker, for the plaintiffs.—The effect of the settlement was to release the moiety settled from the rentcharge, since the person entitled to the rentcharge was a consenting party to the settlement. As to the other moiety, since this belonged to a party who concurred in and confirmed the release of the first moiety, it remained liable, in her hands, for the whole of the rentcharge, not merely for a proportionate part of it—Law of Property Amendment Act, 1859, s. 10,¹ and *Booth v. Smith* [1884].²

J. G. Wood, for two of the defendants.—The result of the settlement, on its proper construction, is this—that the husband, the owner of the rentcharge, who is expressed to "grant release dispose of and confirm" the moiety settled, "and all [his] estate right title interest property claim and demand whatsoever" in the same, must be taken to have actually conveyed his rentcharge of 70*l.*, or, at any rate, one half of it, to the

grantees of the moiety under the settlement—*Drew v. Norbury* (Lord) [1846]³ and *Johnston v. Webster* [1854].⁴ The plaintiffs accordingly are entitled, at most, to one-half of the rentcharge, or possibly even to no rentcharge at all.

April 13.—SWINFEN EADY, J., delivered a written judgment.—The question is, what was the legal effect of the settlement upon the rentcharge of 70*l.* charged upon and issuing out of the hereditaments thereby conveyed and other hereditaments? It is not disputed that the hereditaments thereby conveyed were released from all liability in respect of the charge.

It was contended on behalf of the first two defendants, either that the whole rentcharge of 70*l.* passed to the grantees of the voluntary settlement, or that a moiety of it passed to them, leaving only a moiety charged on the remaining hereditaments.

Before the Law of Property Amendment Act, 1859, a person having a rentcharge, by releasing his right in part of the land charged, extinguished the whole rent—18 *Viner's Abridgment*, 504. The effect of the settlement, which was executed since the Act, was to release from the rentcharge the part of the hereditaments comprised in the deed, but not to extinguish the whole rentcharge. Upon a release of a portion of hereditaments charged with a rentcharge, if the persons entitled to the remaining hereditaments have not concurred in or confirmed the release, their rights are not affected under the statute; and accordingly it was held in *Booth v. Smith*² that the remaining hereditaments in such a case will be subject only to a proportionate part of the whole rentcharge. But in the present case the persons entitled to the remaining hereditaments did concur in and confirm the release, and, as regards Mrs. Williams, by deed duly acknowledged; so that they are not entitled to the benefit of that portion of section 10 of the Act beginning "without prejudice nevertheless . . ." Their rights are governed, therefore, by the earlier words

(3) 9 Ir. Eq. 171, 177.

(1) Law of Property Amendment Act, 1859, s. 10: "The release from a rent-charge of part of the hereditaments charged therewith, shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

(2) 53 L. J. Q.B. 425; 14 Q.B. D. 318.

(4) 24 L. J. Ch. 300, 303; 4 De G. M. & G. 474, 488.

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of the section—that the release shall operate only to bar the right to recover any part of the rentcharge out of the hereditaments released. The remaining hereditaments remain liable, therefore, to the whole of the rentcharge without apportionment. This, in my opinion, is the legal effect of the transaction, and probably was also the intention of the parties, so far as can be gathered from the settlement. The deed contains no reference to the rentcharge, or to the release of it, or any part of it; and it may well be that the husband was willing to concur in the deed and release the hereditaments comprised in it, being satisfied that the remaining hereditaments were a sufficient security for the whole rentcharge, as, indeed, I understand they were and are.

After concurring in the settlement and conveying all his estate and interest in the hereditaments conveyed, the husband could not have afterwards contended successfully that he retained any charge upon, or interest in, the land conveyed; and the two cases of *Drew v. Norbury* (Lord)³ and *Johnston v. Webster*,⁴ cited by counsel for the defendants, support this view; but they are not any authority for the proposition contended for by him, that all, or some part of, the rentcharge of 70*l.* actually passed by way of grant to the grantees under the voluntary settlement. The effect of that deed is to release the hereditaments conveyed from all, and every part of, the rentcharge; but not to grant all, or any part of, the rentcharge to the grantees. It remained vested in the grantor; and his right to enforce it against the remaining hereditaments charged by it was not affected by that deed.

There must be a declaration accordingly, and the defendants must pay the costs of the action.

Solicitors—Sharpe, Parker, Pritchards, Barham & Lawford, agents for Jeffreys & Powell, Brecon, for plaintiffs; J. Clement Brown, agent for C. Valentine Pegge, Neath, for defendants.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

WARRINGTON, J. } APPLETON, FRENCH
1905. } & SCRAFTON, LIM.,
May 3. } In re.

Company—Winding-up—Examination under Section 115 of Companies Act, 1862 (25 & 26 Vict. c. 89)—Costs of being Represented by Solicitors and Counsel—"Proceeding in the Supreme Court"—Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 5.

An examination of witnesses under section 115 of the Companies Act, 1862, is a "proceeding in the Supreme Court" within the meaning of the Judicature Act, 1890, s. 5, and therefore the Court has jurisdiction to order the person procuring the examination to pay the witnesses examined under that section their costs, including the costs of being represented by solicitors and counsel, in addition to their expenses.

At a meeting of the shareholders of Appleton, French & Scrafton, Lim., held in January, 1898, it was resolved that the company should be wound up voluntarily, and by an order of the Court made on February 9, 1898, the voluntary winding-up was ordered to be continued under the supervision of the Court, and Mr. Edwin Waterhouse, was appointed liquidator.

On August 7, 1899, a summons was taken out by Robert and Henry Adams, Lim., as a creditor of the company, and John Thomas Wilson and others as contributories, for—first, the discharge of Mr. Edwin Waterhouse from his office of liquidator; secondly, that the applicants might be at liberty without giving any indemnity to the liquidator to issue in his name a summons under section 10 of the Companies (Winding-up) Act, 1890, against the directors of the company for damages for alleged misfeasance; and thirdly, for leave to examine such persons as they might be advised under section 115 of the Companies Act, 1862.

An order was made on this summons on February 7, 1900, authorising the applicants to examine J. W. Watson, A. H. Appleton, and others, under section 115 of the Companies Act, 1862, and to apply for leave to take proceedings under section 10 of the Companies

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(Winding-up) Act, 1890, after the examination had been concluded.

A summons was issued on October 29, 1900, requiring Watson, Appleton, and others to attend for examination under section 115. This examination took place on November 15, 16, and 17, 1900, when Watson and Appleton were examined as to certain alleged acts of misfeasance by them. At the examination Watson and Appleton were represented by solicitors and counsel.

On July 31, 1902, Robert and Henry Adams, Lim., and J. T. Wilson issued a summons against Watson and Appleton and others for an order declaring that the respondents were liable to contribute to the assets of the company two several sums of 14,934*l.* 17*s.* 5*d.* and 37,821*l.* 17*s.* 6*d.* as compensation for misfeasance, and for the payment by the respondents of the said sums to Mr. Edwin Waterhouse, as liquidator of the company, with interest and costs.

On July 28, 1904, the summons was dismissed with costs.

The costs of the misfeasance summons were taxed and paid.

Watson and Appleton were paid the usual expenses and allowances for persons attending as witnesses, and now took out a summons asking that Robert and Henry Adams, Lim., and J. T. Wilson might be ordered to pay them their costs incurred in connection with their examination before the Court on November 15, 16, and 17, 1900, and being represented thereat by solicitors and counsel.

Sargant, for the applicants. — The Court has jurisdiction to order the respondents to pay the costs of the applicants. In *Buckley on the Companies Acts* (8th ed.), p. 348, it is said: "The witness is entitled to be attended at his examination by his counsel and solicitor. It is conceived that if he be a mere witness, and not a person between whom and the party summoning him any litigation is pending, he will not be entitled to the costs of employing a solicitor or counsel." In this case the examination was for the purpose of ascertaining whether there were grounds for litigation between the parties and litigation actually took place.

There can be no question as to jurisdiction since the Supreme Court of Judicature Act, 1890, s. 5,¹ which was passed in consequence of the construction placed on the Judicature Acts and Rules of the Supreme Court, 1883, Order LXV. rule 1, in *Mills's Estate, In re* [1886].²

An examination under section 115 is a proceeding in the Supreme Court within the Judicature Act. A person examined under section 115 of the Companies Act, 1862, is entitled to the assistance at his examination of counsel and solicitors—*Breechloading Armoury Co., In re* [1867].³ In the case of *Waddell, Ex parte; Lutscher, in re* [1877],⁴ which was a case under the Bankruptcy Act, 1869, it was held that a person was not entitled to his costs of being represented by solicitors and counsel where he was examined privately and with a view to obtaining information only, and not with a view to taking proceedings against him. In the present case the examination was obtained with a view to taking misfeasance proceedings against the persons examined, and they should be allowed the costs of being represented by solicitors and counsel.

Martelli, for the respondents.—The applicants are only entitled to be paid their expenses as witnesses. It is submitted—first, that the Court has no jurisdiction to order the respondents to pay these costs; and secondly, that if there is jurisdiction this is not a case where it should be exercised. An examination under section 115 of the Companies Act, 1862, is not a proceeding in the Supreme Court within section 5 of the Judicature Act, 1890¹—*Greys Brewery Co., In re* [1883].⁵

If the order asked for is made in this

(1) Supreme Court of Judicature Act, 1890, s. 5: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid."

(2) 56 L. J. Ch. 60; 34 Ch. D. 24.

(3) L. R. 4 Eq. 453.

(4) 6 Ch. D. 328.

(5) 53 L. J. Ch. 262; 25 Ch. D. 400.

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case, the effect will be that every witness under section 115 will ask for the costs of solicitors and counsel. The section was only intended for the purpose of obtaining information from persons who are bound to give it, and, it is submitted, bound to give it gratuitously. These costs are not costs of litigation. The Supreme Court of Judicature Act, 1890, does not apply. If it does, it only deals with costs of litigation, and they have been taxed and paid. If there is jurisdiction, this is not a case where it should be exercised, for the examination took place more than five years ago, and these costs ought to have been applied for before.

WARRINGTON, J.—This is an application by certain directors of a company against whom a misfeasance summons was issued, asking that they may be allowed, in addition to the costs of that summons, which have been taxed and paid, the costs incurred by them in connection with their examination under section 115 of the Companies Act, 1862. Now the questions which I have to decide are—first, whether the Court has jurisdiction to allow these costs; and secondly, whether, assuming there is jurisdiction, the Court ought, in the particular circumstances of this case, to allow the costs.

As regards the jurisdiction, the question depends upon section 5 of the Supreme Court of Judicature Act, 1890. [His Lordship read the section.] It seems to me that, as regards the jurisdiction, the only question to be considered is whether an examination under section 115 of the Companies Act, 1862, is a proceeding in the Supreme Court. If it is a proceeding in the Supreme Court, then I have jurisdiction to deal with the costs of and incident to that proceeding and have power to determine by whom they are to be paid. Section 115 of the Companies Act, 1862, provides that in a winding-up the Court may "summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the

company"; and that "if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed," the Court may cause him to be "apprehended, and brought before the Court for examination." The section makes no other provision as to the costs incurred in the examination, and therefore there is "no express provision of any statute" subject to which the question of costs is to be dealt with.

On August 7, 1899, the respondents to the present application, together with other persons, issued a summons for—first, the discharge of Mr. E. Waterhouse from his office as liquidator; secondly, that the applicants might be at liberty, without giving any indemnity, to issue against the directors a summons under section 10 of the Companies (Winding-up) Act, 1890; and thirdly, for leave to examine such persons as they might be advised under section 115 of the Companies Act, 1862. On that summons, on February 7, 1900, an order was made that the present respondents should be at liberty to examine the present applicants and others under section 115 of the Companies Act, 1862, and that summonsees should issue accordingly, and giving the applicants liberty to apply for leave to take such proceedings under section 10 of the Companies (Winding-up) Act, 1890, after the examination had been concluded, as they might be advised. The examination took place on November 15, 16, and 17, 1900, the present applicants having the assistance and protection of solicitors and counsel. On July 31, 1902, the two respondents to the present application issued a misfeasance summons against the present applicants. The claim made against the present applicants was for a sum of over 50,000*l.*, and was therefore a matter of great importance. The summons came on for hearing on July 20, 1904, but no one appeared to support it, and it was dismissed with costs. I now have to decide whether the present respondents, having put the applicants to expense by examining them in order to support the misfeasance summons, ought to pay the applicants' costs.

Now as regards the jurisdiction to

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order the costs to be paid. In my judgment, the summons of August, 1899, the order for examination made under it, the summons issued in consequence of that order, and the examination of witnesses which took place, are all "proceedings in the Supreme Court." If they are not, I do not know what they are, and, in my judgment, it is impossible to describe them in any other way. It is contended that, in saying that, I am saying something which is contrary to the judgment of Mr. Justice Chitty in *Greys Brewery Co., In re*.⁵ In my judgment, I am doing nothing of the kind. That case arose on the question whether creditors of the company who, under rule 60 of the General Order of November, 1862, were entitled to attend proceedings before the Judge, were entitled to be present at an examination under section 115 of the Companies Act, 1862, and it was held by Mr. Justice Chitty that the examination was not a proceeding within rule 60. He says: "it appears to me that I should be misreading the general language of the 60th rule if I said that it gave a right to every creditor to attend in this very particular and exceptional proceeding. . . . I think, although there is a technical argument upon the 60th rule, that, upon the true reading of it, this is not such a proceeding as is mentioned there; and a distinction arises to my mind from the very nature of the proceeding under the 115th section." One must read in connection with that passage what the learned Judge had previously said—namely, that "the examiners' office is not a public office, and that the public have no right to attend." The meaning of the judgment is that, looking at the nature and object of an examination under section 115, that examination may be a proceeding, although it is not a "proceeding before the Judge" within the meaning of the 60th rule. It is not, in my judgment, an authority against the view which I have taken, and I think that it is a "proceeding in the Supreme Court" within the meaning of section 5 of the Judicature Act, 1890.

Having jurisdiction to make the order asked for, ought I, in the exercise of my discretion, to determine that the costs

ought to be paid by the respondents? I desire to say in the strongest terms that what I am going to do in this case is not to be used as a precedent in any other case. Counsel for the respondents has argued that, if I make the order asked for, witnesses can always come forward and ask for orders for payment of their costs. I intend to lay down no such general rule, and I only make the order now under the particular circumstances of this case. The first summons asked for leave to examine witnesses and leave to issue a misfeasance summons, and the examination was asked for for the express purpose of establishing a case in support of the misfeasance summons. I agree that ordinarily persons examined under section 115 of the Companies Act, 1862, as in bankruptcy, merely as witnesses, would not be entitled to be paid, out of the assets of the company or otherwise, their costs of employing solicitor or counsel. I have been referred to the case of *Waddell, Ex parte; Lutscher, in re*,⁴ and nothing that I say is intended as a departure from what was laid down by the Court of Appeal in that case. Both Lord Justice James and Lord Justice Cotton there guarded themselves from deciding the case with which I have to deal. Lord Justice James said: "This is not the case of a man who is charged with having property in his possession belonging to a bankrupt and is summoned to give evidence respecting it. In such a case it might possibly be said that there was a litigation between him and the trustee, and that he was entitled to be protected by counsel." And Lord Justice Cotton said: "Really the only question is, to what a witness, not being a person against whom any allegation is made with regard to the bankrupt's property, or against whom any proceeding is intended to be taken, but who is examined as a mere witness because it is supposed he can give evidence with regard to property which was at some time or other in the possession of the bankrupt, is entitled as his reasonable expenses." I have here the very case to which Lord Justice James and Lord Justice Cotton allude—namely, the case of a person against whom allegations were made with respect to the

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company's property, and against whom proceedings were intended to be taken. On the whole, I think I should be exercising my discretion wrongly if I did not make the respondents liable for the costs which they put the applicants to by examining them with a view to taking misfeasance proceedings against them. I therefore make the order asked for.

Solicitors—Crump, Sprott & Co., agents for Archer, Parkin & Co., Stockton-on-Tees, for applicants; Jacksons & Elwell, agents for James Inskip & Co., Bristol, for respondents.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} MELLOR
ROMER, L.J.	
STIRLING, L.J.	
1905.	
May 11, 12. June 6.	v. WALMESLEY.

*Seashore — Foreshore — Conveyance —
Parcels — Land Situate on the Seashore —
Bounded by the Seashore — Accretion —
Plan — Evidence — Deceased Surveyor —
Entries in Note-book — Professional Duty
— Admissibility.*

In 1864 the predecessor in title of the defendants conveyed to the predecessors in title of the plaintiffs a piece of land described as being situate on the seashore, and bounded "on or towards the west by the seashore," and on the other sides by boundaries as to which there was no dispute, and more particularly delineated in the plan drawn on the back of the conveyance. There was a strip of land intervening between the western boundary of the land conveyed as shewn on the plan and what was there defined as seashore. Since 1864 the sea had gradually receded and left uncovered a considerable amount of land on the west side of the property as delineated on the plan. The question was as to the property in and rights over this piece of land:—Held, that "seashore" in the conveyance meant that portion of land adjacent to the sea which was ordinarily

and *prima facie* vested in the Crown with its special rights and obligations; and declaration made that the plaintiffs as owners of the land conveyed in 1864 were entitled to free access and egress to and from the sea from and to their premises.

Held, by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., that the defendants were estopped from saying that any part of the land on the western boundary of the land conveyed as described on the plan was anything else than seashore.

Held also, by VAUGHAN WILLIAMS, L.J., that the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the land and the house which the evidence shewed it was contemplated by all parties should be built thereon, as land and a house facing on the sea and having the seashore as a boundary.

Held, by ROMER, L.J., that, as between the grantor and the grantees, the foreshore at the date of the conveyance was fixed as coming up to the western boundary of the land described in the conveyance, and the land in dispute must be held to be an accretion subsequent to the deeds, and accordingly land which had become the property of the plaintiffs.

Decision of SWINFEN EADY, J. (73 L. J. Ch. 756; [1904] 2 Ch. 525), affirmed with a variation in the order.

A surveyor had been employed in 1864 by a local board to survey ground comprising the property in question for the purpose of a drainage scheme. He had at the time made in his note-book, for the purpose of his report, entries of certain levels and other figures, and these entries were afterwards used by him in making his report. He was now dead:—Held, that the entries were admissible in evidence to shew the line to which the bi-monthly spring tides flowed at the date of the conveyance.

Decision of SWINFEN EADY, J., on this point reversed.

Appeal from decision of Swinfen Eady, J. (73 L. J. Ch. 756; [1904] 2 Ch. 525).

The following statement of facts is taken from the judgment of Vaughan Williams, L.J.: The respective plaintiffs,

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James Mellor and John Mellor, and John Brown, complain that the defendants by erecting a post and rail fence have interfered with and obstructed the plaintiffs James Mellor and John Mellor and the plaintiff John Brown in their respective access or egress to or from the sea from or to the plaintiffs' premises respectively. The plaintiffs claim—first, a declaration that the plaintiffs' said respective premises are respectively bounded on the west side thereof by the seashore; second, a declaration that the plaintiffs respectively as owners of the said respective premises are entitled to free access and egress to and from the sea from and to the said premises respectively; third, an order for the removal of the fence; fourth, an injunction against the erection of such fence or other erection or otherwise committing any trespass upon the said premises respectively; fifth, an injunction restraining the defendants from obstructing free access or egress to or from the sea from or to the said premises respectively. The defendants allege that they erected the fence to prevent encroachments of the plaintiffs respectively on the land of the defendants. The plaintiffs by their replication say that the defendants are estopped from denying that at the date of the respective indentures the premises comprised in and conveyed by the said respective indentures immediately adjoined and were bounded on the west side thereof respectively by the seashore. The plaintiffs claim under conveyances from Nicholas Blundell, and the defendants by divers mesne assignments are the assignees of the estate of Nicholas Blundell. The conveyance to the predecessor of the plaintiffs Mellor runs as follows: "All that piece of land situate on the seashore at Blundellsands, in the township of Great Crosby, in the county of Lancaster, and measuring in front thereto 93 yards or thereabouts, on the eastern boundary 93 yards or thereabouts, and running in rear or depth backwards on the north and south sides thereof respectively 77 yards or thereabouts, and containing in the whole 7,161 superficial yards or thereabouts, be the said several dimensions and admeasurements respectively a little more

or less, which said piece of land is bounded on or towards the south by other land of the said Nicholas Blundell, on or towards the east by an intended new road of 15 yards in breadth, to be called Burby Bank Road, on or towards the north by Blundellsands Road, and on or towards the west by the seashore, which piece of land hereinbefore expressed to be hereby granted is more particularly delineated in the plan drawn on the back of these presents and marked with the letter 'A.'" The plan shows a rectangular piece of land with the exact dimensions given in the parcels figured upon it, and also shews a small strip some ten feet in width intervening between the land and what is called "sea coast" on the plan.

The words of the respective conveyances to the plaintiffs were not identical, but there was no substantial difference between them. Since the date of the conveyances the sea had gradually and by imperceptible degrees receded and left uncovered by the sea a quantity of land on the west side of the premises as delineated on the plan.

The question was as to the property in and rights over the piece of land so left uncovered.

At the trial the defendants tendered, as evidence to shew that a thick black wavy line on the plans on the conveyances represented the line to which the bi-monthly spring tides flowed at the date of the conveyances of 1864, a note-book containing levels and other figures entered at that date by Mr. Taylor, an engineer who had contracted with the Great Crosby Local Board to make a survey and take levels for the purpose of a drainage scheme in the district in which the property in question was situated, and who was now dead. Mr. Grandison, who was then Mr. Taylor's pupil, had made the plans and sections at the time from the note-book, but he was unable to verify the figures.

Swinfen Eady, J., refused to allow the entries in Mr. Taylor's note-book to be given in evidence, on the ground that they were not records of fact made in the discharge of a professional duty at the time when the facts recorded took place, within the rule in *Price v.*

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Torrington (Earl) [1703].¹ On the merits, he held that by the two conveyances the grantees acquired all the land of the grantor between the Burby Bank Road and the seashore, and the western boundary of their land remained what it was on the day of the grant—namely, the seashore, taking “seashore” in its strict legal sense, as signifying that portion only of the land adjacent to the sea which was alternately covered and left dry by the ordinary flux and reflux of the tides; and the accretion to the land, therefore, belonged to their successors.

The defendants appealed.

Levett, K.C., and *Leigh Clare*, for the appellants.—The learned Judge was wrong in refusing to admit as evidence the memoranda made by the deceased surveyor. They were, in substance, a declaration made by him in the ordinary course of business and in the discharge of his professional duty, and are therefore admissible in evidence—*Stephen's Digest of the Law of Evidence*, art. 27 (6th ed.), p. 36, and *Price v. Torrington (Earl)*.¹ They are entries of facts.

Neville, K.C., and *W. C. T. Wilson*, for the respondents.—The surveyor was not in the service of the board. He was only employed for the special occasion. Records of fact which it is the duty of a person to make are admitted in evidence—*Price v. Torrington (Earl)*¹ and *Smith v. Blakey* [1867]²—but these entries were not made in the performance of any duty owing by the surveyor to the board. All that he had to do for them was to make a plan. These entries were made for the surveyor's own information.

[ROMER, L.J.—It was his duty to make a plan, and he could not do that unless he kept these measurements.]

VAUGHAN WILLIAMS, L.J.—We think that this evidence ought to be admitted. In *Doe d. Patteshall v. Turford* [1832]³ Lord Tenterden recognised that not only the ultimate performance of a duty ought to be recorded, but that the facts necessary for the performance of that duty ought also to be recorded. These entries were made

(1) 1 Salk. 285; 2 Sm. L.C. (11th ed.), 320.

(2) 36 L. J. Q.B. 156; L. R. 2 Q.B. 326.

(3) 3 B. & Ad. 890.

by the surveyor at the time of making his survey, and were used by him afterwards for the purpose of making his report. The making of them was therefore a step taken in obtaining the ultimate result which it was his duty to record, it being also his duty to record the steps taken for that purpose.

Levett, K.C., and *Leigh Clare*.—As regards the merits of the case, “seashore” is a word of no definite or technical meaning; and in any case it is ambiguous, as it may mean any one of three things. It may mean the shore bounded by the equinoctial spring tides, the bi-monthly spring tides, or the ordinary or neap tides—*Moore's Law of the Foreshore* (3rd ed.), p. 392; *Hale de Jure Maris*, p. 25, and *Reg. v. Gee* [1859].⁴

As regards the alleged discrepancy between the plan and the parcels, if there is a clear description of the property in the parcels and then there is a plan which does not agree with that, the plan may be rejected; but if the parcels are defined by the plan that cannot be so, and that is the position here. In *Horne v. Struben* [1902],⁵ which was relied upon below, the plan was not part of the parcels. The principle is clearly put there. *Roberts v. Karr* [1809],⁶ *Espley v. Wilkes* [1872],⁷ and *Furness Railway v. Cumberland Co-operative Building Society* [1884]⁸ were cases of land abutting on a road or street, and they turned upon the ground of there being a right of access to the road; but there is no right of way over a foreshore—*Blundell v. Catterall* [1821]⁹ and *Brinckman v. Matley* [1904].¹⁰

[ROMER, L.J.—Land is not situate on the seashore in the strict sense of the word. Does it not mean adjacent to, or with a right of access to the sea—a sea-side residence, using the word in the popular sense? Could not the grantee in that case say that it must be taken strictly against the grantor?]

(4) 1 E. & E. 1068.

(5) 71 L. J. P.C. 88, 89; [1902] A.C. 454, 458.

(6) 1 Taunt. 495, 503.

(7) 41 L. J. Ex. 241, 243; L. R. 7 Ex. 298, 303.

(8) 52 L. T. 144.

(9) 5 B. & Ald. 268.

(10) 73 L. J. Ch. 642; [1904] 2 Ch. 313.

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'Sir George Jessel, in *Taylor v. St. Helens Corporation* [1877]¹¹ seems to have thought that the old rule of construing a grant most strongly against a grantor was no longer in force.

The word "seashore" here must be read in the popular sense as denoting a seaside residence; but there is nothing here to shew that the grantees had any right over the sands, and that distinguishes the case from the cases where there was a right of way over a road, or to a river—cases such as *Lyon v. Fishmongers' Company* [1876]¹² and *Att.-Gen. of Straits Settlements v. Wemyss* [1888].¹³ *Scrutton v. Brown* [1825]¹⁴ was a case of land between high and low water mark. The line which we shew to be the ordinary spring-tide high-water mark was on the plan, and was clear to the parties. What the plaintiffs really claim is not merely a right of access to the seashore, but the actual soil outside their boundary. This land was to be building land, and it could not have been intended that land that was sometimes covered by the sea should be included in the grant.

[ROMER, L.J., referred to the definition of "seashore" in *Stroud's Judicial Dictionary* (2nd ed.), and in *Webster's Dictionary*, and to *Micklethwait v. Newlay Bridge Co.* [1886].¹⁵]

Neville, K.C., and *W. C. T. Wilson*, for the respondents.—A man who has conveyed land situate on the seashore, and bounded by the seashore, is not entitled afterwards to say that he did not do so because his plan was not consistent with that. The answer is that he said that the land was bounded by the seashore, and it must be so taken against the grantor. "Seashore" has a definite meaning in law—*Moore's Law of the Foreshore* (3rd ed.), pp. 378, 392, 674, and *Att.-Gen. v. Chambers* [1854]¹⁶; and a man who has used it in a legal document cannot be heard to say that he did not mean it to have that meaning. It is equivalent to "foreshore," and means the strip of the

shore which lies between the limits of the ordinary high and low water marks; and when land is granted bounded by the seashore it must mean that—*Hall on the Seashore*, by Moore (3rd ed.), p. 683. If "seashore" does not mean that, the boundary on that side should have been other land belonging to the vendor. On the appellants' view there is no boundary on that side. If land is granted with a boundary which may fluctuate, the grantee's property must increase or decrease as the boundary alters. If the grantor had remained in possession he would have got the accretion caused by the sea retiring, and his purchasers must be in the same position—*Scrutton v. Brown*.¹⁷

The grantor cannot be heard to say that the land does not abut on the seashore—*Roberts v. Karr*,⁶ *Espley v. Wilkes*,⁷ and *Low v. Bouverie* [1891].¹⁸

If "seashore" is taken in its proper legal meaning there is no ambiguity, and where it is clear from the words of a grant what passed it is immaterial what is put upon the plan—*Horne v. Struben*.⁵

Levett, K.C., in reply.—The substantive description of the property must be looked at. "On the seashore" cannot refer to a line. The words here mean that the land is bounded by a line on the other side of which is the seashore. That would be the same if it were described as bounded by other land, or by a road—the other land or road would be on the further side of the line. Why should a different interpretation be applied in one case from that applied in another?

Cur. adv. vult.

June 6.—VAUGHAN WILLIAMS, L.J., read the following judgment. He stated the facts with regard to the conveyances as above set out, observing that in substance the principal question actually tried in the action was whether the piece of land intervening between the western wall of each of the plaintiffs premises and the sea belonged to the plaintiffs or to the defendants. He continued: It

(11) 46 L. J. Ch. 857, 859; 6 Ch. D. 264, 270.

(12) 46 L. J. Ch. 68; 1 App. Cas. 662.

(13) 57 L. J. P.C. 62; 13 App. Cas. 192.

(14) 4 B. & C. 485.

(15) 33 Ch. D. 133.

(16) 23 L. J. Ch. 662; 4 De G. M. & G. 206.

(17) 4 B. & C., at pp. 498, 505.

(18) 60 L. J. Ch. 594, 601; [1891] 3 Ch. 82, 105.

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was not disputed in this case that in such a case the land so gained goes to the person to whom the land belongs to which the accretion is adjacent. But the question in this case principally argued was, what is the western boundary of the plaintiffs' land in these conveyances? There was a great deal of argument as to the meaning of the word "seashore" by which the land conveyed is said to be bounded on the west; and it was said that the intention of the grantor, to be gathered from the language used in the deeds, was to convey the land to the Burby Bank Road on the east and the seashore on the west, otherwise the western boundary would have been described not as the seashore, but as other land of the grantor. The defendants contended that a thick black line on the plan on the conveyances was the high-water mark of ordinary spring tide, and that the line of high water at ordinary tide was 400 feet away. Mr. Justice Swinfen Eady says that the defendants were unable to prove the line of ordinary high water at ordinary spring tide. I cannot agree. I think that the rejected evidence came within the doctrine of *Price v. Torrington (Earl)*,¹ and, being admissible, sufficiently proved the line of high water at ordinary spring tide. The learned Judge then goes on to say that even if the defendants had proved this line it would not have been of much assistance for explaining the plan and reconciling it with the parcels of the deed, as there was still the intervening strip of ground to explain, and then goes on to say: "I am of opinion that the deed contains an adequate and sufficient definition, with convenient certainty of what was intended to pass by it—namely, all the land between the Burby Bank Road and the seashore, or foreshore, in the strict and legal sense and meaning," that is to say, as limited by the line of the medium high tide between the springs and the neaps; and then he says that where the deed contains such an adequate and sufficient definition an erroneous statement as to dimensions or quantity or any inaccuracy in the plan will not vitiate that definition, and decides that by the two conveyances the grantees acquired all the land of the

grantor between Burby Bank Road and the seashore—that is, the foreshore—and that the western boundary of their land remains what it was on the day of the grant—namely, the seashore. I cannot, however, agree with the learned Judge that the present case is one in which the undoubted rule that, where you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case—to use the words appearing on page 247 of *Sheppard's Touchstones*—are "an essential part of the description" and not "an accumulative description" in a case where there is in the first place a sufficient certainty and demonstration.

But, although I think that that which was conveyed by the respective conveyances is that which is described by the dimensions, and do not think that the defendants are estopped from denying that the premises conveyed were bounded as a matter of conveyance on the west side by the seashore—that is, the foreshore—yet I do think that the predecessor in title of the defendants, having stated in the conveyance that the land conveyed is situate on the seashore and is bounded towards the west by the seashore, is estopped from saying that the whole of the land intervening between the western boundary as described by the dimensions and plan and the sea is anything else than seashore. I think that to allow the defendants so to say would be to allow them to derogate from the grant of their predecessor in title; and I think that the right of the plaintiffs might also be put in another way. I think that by reason of

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the words "on the seashore" and "bounded on the west by the seashore" the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the piece of land and the house, which the evidence shews it was contemplated by all parties would be built on the plot conveyed, as land and a house facing on the sea, and having the seashore as a boundary. And I think the defendants ought to be restrained from doing anything on the land the subject of the accretion or the land to which it has accrued which would prevent the plot in question, with the house on it, from being on the seashore, and bounded on the west by the seashore.

In so far as the right of the plaintiffs is based on estoppel, it seems to me that this right is supported by the judgment in *Roberts v. Karr*,⁶ in which case the land conveyed was described as abutting on a road, and the defendant did not claim any interest in the road on which he was said to have trespassed; but nevertheless he held a verdict, which he had obtained at the trial, on the ground that the plaintiff, having said in a lease granted by him that the land abutted on the road, could not be allowed to say that the land on which it abutted was not the road. This, I think, is sufficient to entitle the plaintiffs to an injunction. But I am inclined to think, having regard to the observations of the Judges in *Birmingham, Dudley, and District Banking Co. v. Ross* [1888],¹⁹ one might base the right of the plaintiffs on an implied covenant or obligation on the part of the predecessor of the defendants to do nothing to prevent the land conveyed from being land "on the seashore" and "bounded on the seashore."

In substance the plaintiffs succeed, and a declaration must be made in accordance with the second claim of the plaintiffs as above stated. It will probably not be necessary to grant an injunction, but liberty must be reserved to apply for an injunction if necessary.

ROMEY, L.J., read his judgment.—This case turns upon what is the true construction and effect of the deeds of conveyance from the defendants' predecessor in title to the predecessors in title of the plaintiffs. The grantor by these deeds granted the lands described in them as being "situate on the seashore" and having certain measurements "in front thereto" and as being bounded on the west (the frontage to the sea), not by any other land of the grantor, but "by the seashore." And, on the construction of the deeds as a whole, as between the grantor and grantees, I come to the conclusion that the term "seashore" meant that which belongs to the Crown, or those claiming through the Crown, with its special rights and obligations, and which is not subject to all the ordinary rights of tenure of the owner of dry land, and presumably does not belong to the owner of land adjacent to the sea. I think that after those deeds were executed the grantor could not assert as against the grantees that he retained land which separated the lands conveyed from the sea.

The term "seashore" is a phrase known to the law, and certainly as between the Crown and owners of land adjacent it means that which belongs to the Crown and which is often now described as the foreshore. In *Chitty on the Prerogatives of the Crown* it is stated at p. 207, "The King is also, by his prerogative, the *prima facie* owner of the shores, (that is the land which lies between high and low water mark, in ordinary tides)." And in *Att.-Gen. v. Chambers*¹⁶ Lord Chancellor Cranworth, dealing with the argument that the term "seashore" would include land covered by extraordinary tides, observed that "land covered only by these extraordinary tides is not what is meant by the seashore." And in *Scrutton v. Brown*¹⁴ Mr. Justice Bayley at p. 496 said, "Then comes the word shore, which denotes that specific portion of the soil by which the sea is confined to certain limits," and at p. 498, "The Crown by a grant of the seashore would convey, not that which at the time of the grant is between the high and low water marks, but that which from time to time shall be between these two termini." And in Lord Chief Justice Hale's treatise

struction and effect of the deeds of conveyance from the defendants' predecessor in title to the predecessors in title of the plaintiffs. The grantor by these deeds granted the lands described in them as being "situate on the seashore" and having certain measurements "in front thereto" and as being bounded on the west (the frontage to the sea), not by any other land of the grantor, but "by the seashore." And, on the construction of the deeds as a whole, as between the grantor and grantees, I come to the conclusion that the term "seashore" meant that which belongs to the Crown, or those claiming through the Crown, with its special rights and obligations, and which is not subject to all the ordinary rights of tenure of the owner of dry land, and presumably does not belong to the owner of land adjacent to the sea. I think that after those deeds were executed the grantor could not assert as against the grantees that he retained land which separated the lands conveyed from the sea.

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De Jure Maris it is said, "The shore is that ground that is between the high water and low water mark. This does *prima facie* and of common belong to the King, both in the shore of the sea and the shore of the arms of the sea." It is true that later on it is said that "there seem to be three sorts of shores, or *littora marina*, according to the various tides," which he proceeds to mention (*Moore's Law of the Foreshore*, 3rd ed. pp. 378, 392), but I think he was there considering other systems of jurisprudence and not what is meant by seashore according to English law; and I may observe in passing that no one of these three sorts of shores would avail the appellants in the present case by enabling them to say that the grantor must be taken to have conveyed by reference to that particular sort of shore. In *Wharton's Law Lexicon* (I am quoting from the 6th edition, at p. 873) the term "seashore" is defined as "the space of land between high and low water mark" (7th ed. p. 755). And other dictionaries could be cited to the same effect. Certainly in the grants I have to consider there is nothing which would enable me to say that a different meaning should be given to the term "seashore," and (as I have said) from the conveyances as a whole I feel convinced that its meaning as between the grantor and grantees was what I have above stated.

Indeed, how is it that the appellants seek to induce the Court in the present case to construe the deeds in their favour? They cannot say that the parties at the time the deeds were executed knew that the lands conveyed did not run down to the foreshore. It is not suggested that by merely looking at this low-lying shore, where a small difference of tide would make a large difference in the amount of land covered by the sea, and where admittedly at certain tides the sea covered even part of the lands conveyed, it could be ascertained that the land did not run down to the seashore in its strict sense. What the appellants seek to do is to prove that if a long course of careful observations and measurements were made the result would or might be to establish, if a question arose as between the Crown as owner of the foreshore and

the owner of the land adjacent, that the foreshore did not come up to the west boundary of the lands conveyed to a substantial degree, and they then proceed, treating this as if it were a fact established at the date of the grants to the knowledge and within the contemplation of the parties to the deeds, to argue that the deeds must be construed on that footing. But it appears to me that this view is a fallacious one, and that the respondents were quite right in refusing to embark into evidence on such a point and in relying on their deeds. In my opinion, the conclusion to be arrived at is that the grantor never contemplated that he had remaining immediately after the deeds were executed any lands or rights in lands to the west of the lands conveyed. The present contention on the part of the appellants is, to my mind, the result of an after-thought, when circumstances had changed. Now, the effect of the deeds being what I have above stated, it follows that the plaintiffs are entitled to relief in this action. As between the grantor and the grantees, the foreshore at the date of the deeds was fixed as coming up to the western boundary of the lands described in the grants. It appears that now the foreshore is not coming up to that western boundary, and that the land between that boundary and the foreshore is not claimed by the Crown as part of the foreshore, and it is this land which forms the subject of this action. Under these circumstances, the land in dispute must, as between the grantor and grantees, be held to be an accretion subsequent to the deeds, and accordingly to be land which has become the property of those claiming under the grantees. It cannot be an accretion to the grantor or those claiming under him, for after the deeds were executed he had, as against the grantees, no land there to which there could be accretion, or in respect of which he could claim any right to the land in dispute.

I think, therefore, the appeal should be dismissed with costs. My brethren think there should be an alteration in the form of the judgment as drawn up. Although that is not my view, the alteration will, of course, be made; but I think

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that should make no difference in the question of costs, as the appellants have in substance failed.

STIRLING, L.J., read his judgment.—I agree with Mr. Justice Swinfen Eady and my brethren in thinking that *prima facie* the word "seashore" in the plaintiffs' conveyances means that portion of the land adjacent to the sea which is ordinarily and *prima facie* vested in the Crown, subject to the rights of the King's subjects of fishing and navigation. Regard being had to the evidence which was held inadmissible by Mr. Justice Swinfen Eady, but was admitted by this Court, it must be taken that in fact there was between the western boundary of the land conveyed to the plaintiffs, as shewn on the plans contained in the conveyances, and the seashore as there defined, a strip of land of considerable width. If the boundary had been a road or an inland river, this strip, if vested in the defendants' predecessor in title, would *prima facie* have passed by the conveyance, notwithstanding that the measurements of the plots would exclude it—*Beckett v. Leeds Corporation* [1872]²⁰ and *Micklethwait v. Newlay Bridge Co.*¹⁸ But there is no case which decides that that rule applies to a conveyance of land bounded by a tidal river or by the seashore. Indeed, the case of *Att.-Gen. of Straits Settlements v. Wemyss*¹³ seems to point the other way. There the dispute arose between the Crown and a Crown lessee of land bounded by the sea. It was held in the Colonial Courts that the foreshore did not pass by the lease; and from this there was no appeal, nor was there any suggestion in the argument before the Privy Council that this part of the decision was wrong. What was held both in the Colonial Courts and by the Privy Council was that the lessee had as such a right to use the foreshore and the accretions to it for access to the sea. I am not satisfied, therefore, that the conveyances were effectual to pass the strip of land to the predecessors in title of the plaintiffs.

I think, however, that, as between the original grantor and grantees, the grantor could not claim to use the strip which

remained vested in him for any purpose which would prevent the grantees from having as free and effectual access to the sea over that strip as if it had been actually seashore vested in the Crown. The conveyances were made in order that the grantees might erect seashore residences on the plots conveyed, to the enjoyment of which free access to the sea, so far as the grantor could give it, would in ordinary course be expected by the grantees. The plots are described as bounded on the south by other land of the vendor, but on the west by the seashore. That appears to me to shew that it was intended that the plots should have sea frontages, and that it was not the meaning of the parties to the deeds that the grantor should, as between himself and the grantees, be treated as retaining an interest in the land on the west which would interfere with the grantees' access to the sea. In my judgment, therefore, the grantor and the defendants as his successors in title are precluded from setting up as against the plaintiffs that the land to the west of the boundary shewn in the plans on the conveyances is not "seashore" in the strict legal sense, so as to interfere with the plaintiffs' access to the sea. For this I think that the case of *Roberts v. Karr*,⁶ followed and approved in *Eopley v. Wilkes*,⁷ is an authority. I think, therefore, that relief ought to be given on the basis of the decision in *Att.-Gen. of Straits Settlements v. Wemyss*,¹³ which I understand to mean that the plaintiffs are entitled to free and unrestricted access to the sea from every part of their frontages over every part of the strip of land now in question. I am unable, however, to see that the conveyances contain averments of that precise and certain character which would estop the defendants from claiming any legal interest in this strip of land.

Appeal dismissed and order varied.

Solicitors—Sharpe, Parker, Pritchards, Barham & Lawford, agents for Payne, Frodsham & Bewley, Liverpool, for plaintiffs; Rowcliffes, Rawle & Co., agents for Weld & Thomson, Liverpool, for defendants.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

LORD HALSBURY, L.C.
VAUGHAN WILLIAMS, L.J.
STIRLING, L.J.

1905.

March 8, 9, 10. April 19.]

ROBERTS,
In re;
ROBERTS v.
ROBERTS.

Compromise—Mistake—Will—Legal Rights—Counsel's Opinion—Common Solicitor—Mistaken Interpretation—Duty of Solicitor.

Generally the Court will support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may be not quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the exact relative rights determined by litigation; but the family solicitor is not entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of a compromise. Where one party entered into a compromise relating to her interests under a will under a false impression as to her legal rights, arising from a wrong interpretation placed upon counsel's opinion by a common solicitor acting for all parties,—Held, that the compromise was not binding upon her.

Decision of KEKEWICH, J., reversed.

Appeal against a decision of Kekewich, J.

Edmund Roberts, by his will dated May 26, 1902, appointed his brother William Roberts, and his sister Margaret Anne, the wife of Robert Roberts, his executors; and after directing payment of his debts and funeral and testamentary expenses, gave his farming stock and household effects to Margaret Anne Roberts absolutely. The testator gave two pecuniary legacies and bequeathed the residue of his personal estate to William Roberts and Margaret Anne Roberts in equal shares. The testator devised his freehold farm on which he was residing, subject to the mortgage affecting the same, to William Roberts; and devised another freehold farm to another devisee.

The testator died in 1902, when it ap-

peared that his personal estate was insufficient for payment of debts. It was erroneously supposed that the testator was also possessed of other real estate which descended to his heir-at-law, and under these circumstances William Roberts and Margaret Anne Roberts and her husband consulted a solicitor in Anglesey, Mr. Pritchard, who, by their joint instructions, took counsel's opinion as to the order in which the different parts of the estate should be applied in payment of debts and legacies. Counsel's opinion dated June 18, 1902, advised that the pecuniary legatees had a right to marshal against the descended and perhaps against the specifically devised real estate, but that the authorities were not at one upon the latter point; and that if any debts remained unpaid after exhausting the personal estate and the descended real estate, the specifically bequeathed farming stock and the specifically devised real estate would have to contribute rateably, unless it should be held that the charge of debts made a difference, and the question arose as to the right of pecuniary legatees to marshal as against the specifically devised real estate.

William Roberts and Margaret Anne Roberts met at Mr. Pritchard's office on June 20, and a three hours' interview took place, in the course of which Mr. Pritchard, according to his evidence, read the opinion to them word for word, and ultimately suggested a compromise, and then and there wrote out an agreement, which he read over to them, and which the parties duly signed and witnessed, by which, bearing date June 20, 1902, William Roberts and Margaret Anne Roberts agreed to pay estate duties, and all legacies, debts, and funeral expenses, rateably, William Roberts three-fifths and Margaret Anne Roberts two-fifths, and the costs of administration equally.

In 1902 an originating summons—*Roberts v. Roberts*¹—was taken out by the executors for the determination of certain questions in the administration of the estate, on which an order dated October 31, 1902, was made, by which it was declared that according

(1) Unreported.

ROBERTS, IN RE, App.

to the true construction of the said will and the general charge of debts therein contained, and by reason of the general personal estate not specifically bequeathed and the real estate undisposed of by the said will (though, in fact, there was no such real estate) being insufficient for the payment of the testator's debts, the real estate specifically devised by the said will ought to contribute rateably, according to the net value thereof, after deducting the respective mortgage debts, to the payment of the said testator's debts other than mortgage debts, so far as the same should not be discharged out of the general personal estate not specifically bequeathed and the descended real estate, and that the specifically bequeathed personal estate ought to be exonerated by the specifically devised real estate, and that the pecuniary legatees under the said will were entitled to marshal as against the specifically devised real estate, but not as against the specifically bequeathed personal estate.

The present action was brought in 1903 by William Roberts against Margaret Anne Roberts and others, and claimed that an account might be taken of all estate duties payable in respect of the testator's estate, and of his debts and funeral expenses, and of the pecuniary legacies bequeathed by his will, and of the costs of administration, and that, notwithstanding the order of October 31, 1902, the defendant Margaret Anne Roberts might be ordered to pay two-fifths of such estate duties, debts, funeral expenses, and legacies, and one-half of such costs.

The plaintiff alleged that the originating summons in *Roberts v. Roberts*¹ had been taken out with the object of ascertaining whether the pecuniary legacies were payable at all in the event, which had happened, of the personal estate not specifically bequeathed being insufficient for payment of debts. He also alleged that on the hearing of the summons on which the order of October 31, 1902, was made, the agreement of June 20, 1902, was not stated to the Court, and that all proceedings in the said action were taken on the footing that the said agreement was a valid and subsisting agreement and would in no way be prejudiced by the said action, and that the said agreement was

not, in fact, in any way affected by the said action, save so far as the right of the pecuniary legatees to payment was thereby ascertained.

The defendant Margaret Anne Roberts alleged that the agreement of June 20, 1902, was entered into under the mistaken impression that counsel by his opinion had advised, amongst other things, that the specific bequests by the testator of all his live and dead farming stock to the defendant Margaret Anne Roberts might be held, as between the specifically bequeathed stock and the real estate specifically devised to the plaintiff William Roberts, primarily liable for the payment of the pecuniary legacies, debts, and testamentary expenses. She also alleged that the false impression above mentioned arose from a wrong interpretation put upon the opinion of counsel by Mr. Pritchard, the solicitor, who on behalf of the plaintiff and the executors had obtained the said opinion, and that she would not have entered into the agreement had she correctly known the facts.

She further denied that the action of *Roberts v. Roberts*¹ was brought without prejudice to the agreement of June 20, 1902, and alleged that the object was that the question of the liability of the specifically bequeathed personal estate in respect of the payment of pecuniary legacies might be determined, and not, as alleged by the statement of claim, that the only object was to ascertain whether the pecuniary legacies were payable at all in the event which had happened of the personal estate not specifically bequeathed being insufficient for the payment of debts; and she counterclaimed that the agreement of June 20, 1902, might be set aside. Kekewich, J., decided that the agreement of June 20, 1902, was binding on the parties thereto, and that the estate ought to be administered on the footing of such agreement, and dismissed the counterclaim, being of opinion that the defendant understood the opinion of counsel at the time when she entered into the agreement.

Margaret Anne Roberts appealed.

Neville, K.C., and *Bryn Roberts*, for the appellant.—The mistake here was

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really a mistake of fact. The opinion as to the law was not wrong, but the parties were wrongly informed as to what had been advised. That entitles either party to be relieved from the agreement—*Cooper v. Phibbs* [1867].²

P. O. Lawrence, K.C., Micklem, K.C., and R. A. Griffith, for the respondent.—The mistake was really a mistake of law. The point was put to the parties as being doubtful, and they cannot now be relieved from the agreement—*Stewart v. Stewart* [1839].³

[*VAUGHAN WILLIAMS, L.J.*, referred to *Cooking v. Pratt* [1750].⁴]

The validity of a compromise must be determined according to the circumstances at the time, and will not be affected by subsequent judicial decisions as to the rights of the parties—*Lawton v. Campion* [1854].⁵ and *Leonard v. Leonard* [1812].⁶ Upon the facts as proved at the trial and found by Kekewich, J., the respondent is entitled to judgment. If parties meet together to settle their rights, and are advised that there is a doubt as to them, they cannot afterwards go back upon the settlement, although the advice was wrong—*Cann v. Cann* [1721].⁷ and *Gordon v. Gordon* [1819].⁸ *Gibbons v. Caunt* [1799],⁹ *Cooper v. Phibbs*,² and cases of that class do not apply, as they turn upon common mistake of fact. Moreover, the agreement was acted on for a considerable period, and it is too late to re-open it.

Neville, K.C., in reply.—It is clear that the solicitor misunderstood counsel's opinion in thinking that he advised that a pecuniary legatee might be able to marshal as against a specific legatee. That is not the law, nor did counsel suggest it. Nothing has happened since to prevent the appellant from now insisting on her right to set aside the compromise so entered into.

[*Irvin v. Ironmonger* [1831],¹⁰ *Stokes, In re; Parsons v. Miller* [1892],¹¹ and

Aldrich v. Cooper [1803]¹² were also cited on the question of the payment of debts and marshalling.]

Cur. adv. vult.

April 19.—*VAUGHAN WILLIAMS, L.J.*, read the written judgment of the Court, in which, after stating the facts and pleadings, his Lordship continued: Now it seems to me that in the first instance one must ascertain what the facts are as to the interview at which Mr. Pritchard advised the plaintiff and the defendant at his office, and with that view I ask myself the following questions: First, what was in fact the opinion of counsel, and did Mr. Pritchard misrepresent it? Secondly, Was the agreement induced by this misrepresentation? Thirdly, was the representation given by Mr. Pritchard in accordance with the rights of William Roberts and Margaret Roberts respectively? Fourthly, assuming that the agreement was inconsistent with the rights of the parties, is it the fact that the originating summons was taken out without prejudice to the agreement? If not, what is the effect of the order made on the originating summons? To which I give the following answers. I think that the effect of the opinion of counsel is rightly set out in the defence of Mrs. Roberts, and I think that Mr. Pritchard, at the interview of June 20, inaccurately stated the effect of that opinion. I do not think that Mr. Pritchard made any positive statement that counsel had advised that as between the specifically bequeathed stock and the specifically devised real estate the pecuniary legacies and testamentary expenses were primarily payable out of the stock, nor indeed does the statement of defence impute to Mr. Pritchard that interpretation of the opinion; but I think that Mr. Pritchard did interpret counsel's opinion as raising a doubt whether the stock might not by marshalling be made liable to the payment of the pecuniary legacies, and conveyed to Mr. and Mrs. Roberts this view of counsel's opinion. According to my view, counsel's opinion did not express this view. I have arrived at the conclusion that Mr. Pritchard did express this view

(2) L. R. 2 H.L. 149.

(3) 6 Cl. & F. 911, 957, 962, 970.

(4) 1 Ves. sen. 400.

(5) 23 L. J. Ch. 505; 18 Beav. 87.

(6) 2 Ball & B. 171, 179.

(7) 1 P. Wms. 723.

(8) 3 Swanst. 400, 463.

(9) 4 Ves. 840, 849.

(10) 2 Russ. & M. 531.

(11) 67 L. T. 223.

(12) 8 Ves. 382.

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of counsel's opinion from the consideration of the notes of evidence of the learned Judge, and from the notes of the counsel for the plaintiff, and also from Mr. Pritchard's marginal notes on counsel's opinion and on the draft summons. There being, then, this misrepresentation of the effect of the opinion, was the agreement induced by it? I have no doubt that Mr. and Mrs. Roberts, by reason of what Mr. Pritchard said to them, were under a misapprehension as to the effect of the opinion. They understood that counsel had said in his opinion that he was in doubt whether the specifically bequeathed personalty could be resorted to by the pecuniary legatees; but it does not follow because Mr. and Mrs. Roberts were under this misapprehension that Mrs. Roberts was thereby induced to sign the agreement; she may have been induced to sign it, being perfectly conscious that there was a doubt about the incidence of legacies on the devised realty and the specific bequests, because she was anxious, taking a different view from William Roberts, that the legacies should be paid in accordance with the testator's wishes, and was willing with this object to assume two-fifths of the payments necessary to satisfy the estate duties and legacies and debts and funeral expenses, notwithstanding the doubts as to the true effect of the will.

Generally speaking, I should be disposed to support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may not be quite in accordance with the rights of the parties, because I think that generally the very object of the compromise is to avoid having to have the exact relative legal rights determined by litigation; but I cannot agree with Mr. Justice Kekewich if he means by his judgment that the family solicitor is entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of a compromise. I find it, however, very difficult to draw the inference in this case that Mrs. Roberts intended to make the agree-

ment of compromise irrespective of her legal rights. That Mrs. Roberts wished to avoid litigation I believe; but that she was willing to compromise, irrespective of her legal rights, if her solicitor advised her that such a compromise would be a good thing, I do not believe. The very object of taking counsel's opinion was to ascertain what the respective rights of herself and William Roberts and the pecuniary legatees were. Some difficulty arises as to the inferences one ought to draw from the conduct of the parties subsequent to the signing of the agreement; it was certainly an odd thing to do to sign the agreement first, and then afterwards take out an originating summons to ascertain the rights of those interested. Mr. Pritchard says that the originating summons was only to ascertain whether or not the pecuniary legacies failed, but his own evidence is that Mrs. Roberts was induced to enter into the agreement with the very object of securing the payment of the pecuniary legacies, and, moreover, the draft originating summons was amended by counsel on the suggestion of Mr. Pritchard himself for the very purpose of raising the question of the right of the pecuniary legatees to marshal against the specific bequests. This conduct does not look as if any one thought that Mrs. Roberts had bound herself by an agreement of compromise, which was to take effect whatever the result of the originating summons might be. It is said against this that Mrs. Roberts, through her husband, insisted on the performance of the agreement after she knew of the answer to the questions raised by the originating summons, given by the order of October 31, 1902; and certainly the letter of November 17 does do this, and does recognise to the full the obligation on Mrs. Roberts to pay two-fifths of the estate duties, all legacies, debts, and funeral expenses; but by the letter of November 20 Mrs. Roberts is asking for a copy of the Court's decision, and is suggesting that the real estate is the primary fund for the payment of the debts. On May 19, 1903, she writes to Mr. Pritchard asserting that the decision on the originating summons is binding on

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all the parties, and that the estate must be distributed in accordance with it, and, strange to say, having regard to the case now set up by the plaintiff, Mr. Pritchard on May 25 writes in answer to this: "Of course the decision of the Court is binding upon all." There is one more fact in the conduct of Mrs. Roberts which has to be considered—that is, that she has undoubtedly had the benefit of the agreement of June 20, 1902, to the extent that she became thereunder tenant of the farm devised to William Roberts, and had the advantage of keeping the hay and straw on the farm; but, giving full effect to the consideration of these matters, I am still of opinion that Mrs. Roberts was induced to sign the agreement by the misrepresentation and mistake as to her rights, and that the originating summons was taken out for the purpose (*inter alia*) of solving doubts as to the incidence of legacies on the specific bequests, and that it was not taken out without prejudice to the agreement of June 20. This being so, I am of opinion that the plaintiff fails in so far as he asks for the declaration against the defendant on the basis of the agreement of June 20, 1902, and that the defendant is entitled to have the order for which she counterclaims, setting aside that agreement.

I have only to add that I think the question as to the right of pecuniary legatees to marshal against specific legatees an open question, as to which there is no positive decision. I am inclined to think that the plaintiff ought to have the opportunity, under the circumstances, even at this late date, of appealing against the order of October 31 upon the originating summons.

Appeal allowed.

Solicitors—Jacques & Co., agents for J. Glynne Jones, Bangor; Peacock & Goddard, agents for S. R. Dew & Co., Bangor.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }
1905.
May 23, 25.

FRANCIS, *In re*;
FRANCIS v. FRANCIS.

Will—Executory Limitation—Devise to A "when she shall attain the age of 25 years"—Controlling Context—Contingency—Vesting.

A devise to A "when she shall attain the age of 25 years," in the absence of some controlling circumstance, or context, confers upon A an estate in fee-simple contingent upon her attaining that age, and not a vested estate in fee-simple liable to be divested if she die under the age of twenty-five years.

Adjourned summons.

By his will dated December 2, 1893, the late William Curling Francis, of Bexhill, in the county of Sussex, devised (*inter alia*) his two houses, situate in Princes Road, Brighton, "unto my niece Hilda May Francis when she shall attain the age of 25 years." And the testator thereby devised all the residue of his real and personal estate unto his brother, Charles Randall Francis, "absolutely and for his own use and benefit."

The testator died on May 21, 1895. The present originating summons was issued by the residuary devisee and legatee, Charles Randall Francis (who was also sole executor of the will), to determine (*inter alia*) whether, on the true construction of the will, he was now entitled in fee-simple to the two houses above mentioned, subject to an executory limitation over in fee-simple to the defendant Hilda May Francis, if and when she should attain the age of twenty-five years.

T. Pakenham Law, for the plaintiff.—"When" in this case is uncontrolled by the context, and is equivalent to "if," and the gift to Hilda May Francis is accordingly contingent—*Hanson v. Graham* [1801].¹ The plaintiff therefore is entitled to the property for an estate in fee-simple, liable to be divested if and when the defendant Hilda May Francis shall attain twenty-five.

[He was stopped by the Court.]

(1) 6 Ves. 239

FRANCIS, IN RE.

F. E. Farrer, for the respondent Hilda May Francis.—The respondent Hilda May Francis is now entitled to a vested estate in fee-simple, liable to its being divested in favour of the plaintiff in the event of her dying before attaining twenty-five.

[SWINFEN EADY, J., referred to *Jobson, In re*; *Jobson v. Richardson* [1889].²]

That is distinguishable, as a case of chattels real; in the case of pure realty, on the contrary, there is no authority directly against my proposition, though I admit that there is no authority in my favour. "If" is contingent in a deeper sense than "when"—it necessarily involves the presence in the testator's mind of the possibility of death before the attainment of the prescribed age; but this is not true of "when," which contemplates rather its certain attainment. *Johnson v. Gabriel and Bellamy* [1887]³ is, no doubt, apparently against me; but in that case the point now at issue was assumed on all sides, and not argued. It must also be admitted that the weight of the text-book writers is slightly against my contention. *Hawkins on Wills* (p. 240), however, admits the word "probably"; and *Theobald on Wills* (6th ed. p. 550) is contented with saying, "A devise to A and his heirs 'if' or 'when' he attains twenty-one is contingent according to the opinion of Fearne." In the face of these hesitating statements it can hardly be claimed that the question is not open to doubt. The hostile opinion of Mr. Fearne is found in his *Posthumous Works*, at p. 191, and even it is ushered in by the words, "I incline to the opinion. . ."

The Court has always leaned in favour of vesting: "all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will"—*per* Best, C.J., delivering the unanimous opinion of the Judges in *Duffield v. Duffield* [1829].⁴ It cannot

be said in the present case that this "condition precedent" is "so clearly expressed." To the same effect are *Boraston's Case* [1574]⁵ and *Phipps v. Ackers* [1842].⁶ In *Snow v. Poulden* [1836],⁷ the argument turned wholly on the distinction between real and personal estate. In *Simmonds v. Cock* [1861]⁸ it was held that a gift of real estate (subject to a life estate) to an infant "provided she lives to attain the age of twenty-one years" was an immediate gift (subject to the life interest), but liable to be divested by a condition subsequent. *Andrew v. Andrew* [1875]⁹ is also in my favour, though in that case it might fairly be argued that the language used was overwhelmingly contingent.

T. Pakenham Law cited in reply *Love v. Love* [1881].¹⁰

Cur. adv. vult.

May 25.—SWINFEN EADY, J., delivered a written judgment.—If the devise to the testator's niece Hilda is contingent upon her attaining twenty-five, it is not disputed that the plaintiff will acquire, under the residuary devise, all interest in the property not given to Hilda. The language of the residuary devise does not, however, in my opinion, assist the construction of the will, or afford a context for construing the devise to Hilda as vested, when otherwise it would be contingent.

In my opinion, the devise to Hilda, standing alone, as it does, and not preceded by any intermediate interest, is contingent, and the attainment of twenty-five is a condition precedent to the estate vesting in her. It is the case of a devise which is in form contingent, and which stands alone and without any context to enable the Court to hold it to be vested. There is not in terms any gift or disposition of the rents until Hilda attains twenty-five which might have enabled the Court to say that attaining the prescribed age no more imported a condition prece-

(2) 59 L. J. Ch. 245; 44 Ch. D. 154.
(3) Cro. Eliz. 122; sometimes cited as *Grant's Case*—*e.g.* in *Lampet's Case* [1612]
(10 Co. Rep. 46b, 50a).
(4) 3 Bligh (N.S.) 260, 331.

(5) 3 Co. Rep. 16a, 19a.
(6) 9 Cl. & F. 583, 590.
(7) 1 Keen, 186.
(8) 29 Beav. 455.
(9) 45 L. J. Ch. 232, 234; 1 Ch. D. 410, 417.
(10) 7 L. R. I. 306, 309.

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dent than any other words indicating that the remainderman was not to take until after the determination of the particular estate. Nor is there in terms any gift over on Hilda dying under twenty-five which might have enabled the Court to hold that Hilda took whatever was not given over to the party claiming under the devise over, and to construe the condition as a condition subsequent, divesting a previously vested estate. It is a simple case of a devise to Hilda when she shall attain twenty-five. All the authorities agree that such a devise, unaided by any context, is contingent upon the devisee attaining twenty-five. In such a case I can draw no distinction between "when she shall attain 25" and "if she shall attain 25." In *Johnson v. Gabriel and Bellamy*³ the case was that William Grant devised certain land to John Grant when he came to the age of twenty-five years, to have and to hold to him and the heirs of his body. After John attained twenty-one, and before twenty-five, he levied a fine with proclamations, and afterwards he attained to twenty-five, and had issue, and died; it was resolved that the estate tail was barred, although the consor had but a mere possibility to have an estate tail at the time of the fine levied, and not a vested estate tail. The devise was clearly treated as contingent—not as vested, though liable to be divested on death before twenty-five. Mr. Fearn's opinion was that, in such a case, the devisee, until he attains the prescribed age, takes no interest whatever in the devised lands. See *Fearn's Posthumous Works*, p. 191, where the reasons for that opinion are fully set forth. In *Phipps v. Achers*,⁶ Lord Chief Justice Tindal, in delivering the opinion of the Judges upon the question submitted to them, stated that Mr. Fearn might be right in that opinion, found among his posthumous works. In *Andrew v. Andrew*⁹ there was a devise of certain lands to the eldest son of Thomas Andrew, if he should have attained twenty-one, or so soon as he should arrive at that age. These words of gift were preceded by a life estate to Thomas Andrew, and followed by a gift over in default of Thomas Andrew having a son.

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Lord Justice James, in delivering the judgment of the Court, said, "It must be conceded that the words of gift to the son's eldest son, standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest." In *Love v. Love*¹⁰ a testator gave lands, partly freehold and partly chattel, to his nephew William Love, the plaintiff, on his attaining the age of twenty-three. He was still under twenty-one, but he claimed in the action that he was entitled to have the rents and profits accumulated for him until he attained twenty-three. It was, however, held that the gift to him was contingent upon his attaining twenty-three; and that he was not entitled to the rents and profits accruing before he reached that age. The Vice-Chancellor said: "The plaintiff in this case contends that the gift to him by the will of the testator of all the land the testator possessed in Rathcraven, Corvina and Crossrea, and part of the townlands of Ross, on his attaining the age of twenty-three, gave him a vested interest, subject to be determined by his death under twenty-three, and that he is therefore entitled to the intermediate rents and profits. The assignees in bankruptcy of the residuary legatee and devisee oppose this contention, insisting that the gift is contingent, and contend that the intermediate rents and profits belong to them. It appears that some of these lands were held by the testator for freehold interests, and others for terms of years. I am of opinion that the gift of all is contingent. There is no difference, in my opinion, between the words 'on his attaining' and 'when,' or 'if' he shall attain twenty-three, or 'at twenty-three.' All equally import contingency, when they are contained in the gift itself, and are uncontrolled by the other portions of the will. In this case there is nothing to control the effect of the words of contingency; there is no separate direction as to enjoyment to which they can be referred, as they form portion of the gift itself; there is no gift of intermediate rents and profits, either for the benefit of the devisee or any other person; no prior interest given; nor any gift over in case the devisee should not

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FRANCIS, IN RE.

attain the prescribed age. In such a gift as the present there is no distinction between real and personal estate. A pecuniary legacy, in such terms, will be conditional, just as a devise of real estate. The postponement is not on account of the position of the property, but only for a reason personal to the legatee; there is no gift of interim income, nor any gift save that of which the condition forms part of the substance. I must, therefore, hold that the Plaintiff is not entitled to a vested estate or interest, and consequently that he is not entitled to the intermediate rents and profits."

The opinions of the text-book writers are also to the same effect. In *Jarman on Wills* (5th ed. vol. i. p. 762) it is said: ". . . it is quite clear that a devise to A., if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only." So in *Hawkins on Wills*, at p. 240: "A devise to A. when he shall attain a given age, standing alone, and unpreceded by any intermediate interest, would probably be contingent"; and *Theobald on Wills* (6th ed. p. 550) refers to the opinion of Mr. Fearn to the same effect.

I therefore declare that, as regards the two houses in Princes Road, Brighton, the plaintiff is entitled in fee-simple under the residuary devise, subject to an executory limitation over in fee-simple to the defendant Hilda May Francis, if and when she attains the age of twenty-five.

Solicitors—Radford & Frankland, agents for Holmes & Johnson, Brighton, for all parties.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

FARWELL, J. } CARDIFF RAILWAY v. TAFF
1905. } VALE RAILWAY.
June 5.

Railway—Deposited Plan—Proposed Junction with Existing Line—Limits of Deviation—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 15.

Section 15 of the Railways Clauses Consolidation Act, 1845, which permits deviation by a railway company to a limited extent from the line delineated on the Parliamentary plans, and the decisions under that section to the effect that the medium filum vice of the line of railway actually laid down may be shifted as far as the limits of deviation shewn on the deposited plan, do not apply to the junction of a proposed with an existing line.

Finck v. London and South-Western Railway (59 L. J. Ch. 458; 44 Ch. D. 330) applied.

Trial of action.

By section 4 of a private Act of Parliament entitled shortly the Cardiff Railway Act, 1897 (60 & 61 Vict. c. ccvii.), the plaintiffs, the Cardiff Railway Co., were empowered to "make and maintain in the lines and according to the levels shown on the deposited plans and sections the railways and works hereinafter described.

(D) A Railway No. 4 . . . commencing in the parish of Pontypridd . . . and terminating in the parish of Pontypridd . . . by a junction with the main line of the Taff Vale Railway."

This private Act incorporated the provisions of the Railways Clauses Consolidation Act, 1845.

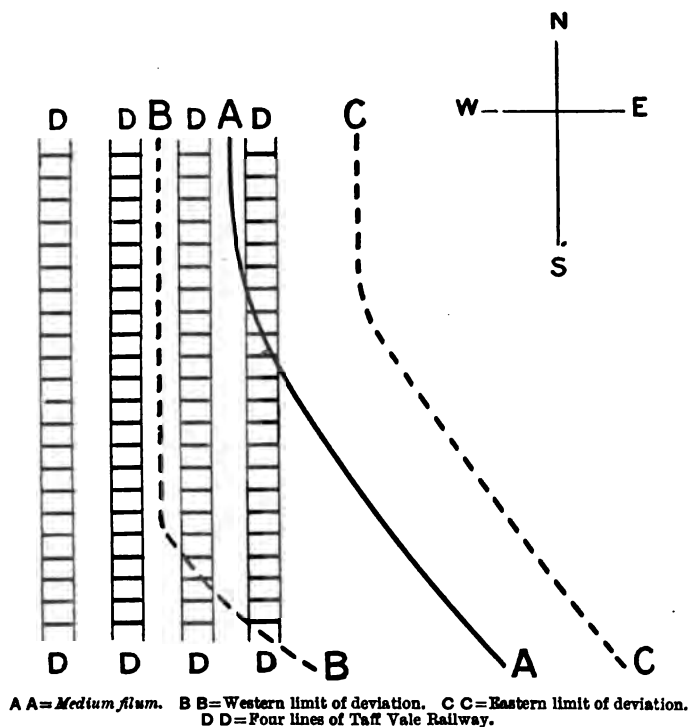
From one of the deposited plans referred to above it appeared that the Taff Vale Railway, at the point of proposed junction, consisted of four separate parallel lines running in a direction roughly north and south. The proposed new railway was indicated on this plan, in the usual manner, by a *medium filum vice* and by two dotted lines—one on each side of it—indicating the two limits of deviation. This proposed new railway approached the existing Taff Vale Railway from the south-east, and thus proceeded in a direction

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roughly north-westerly until its proposed junction with the existing line. Its *medium filum* was shewn on the plan as running, and terminating, between the two more easterly of the four existing lines of the Taff Vale Railway; its western limit of deviation was shewn as running between the two more easterly, on the one hand, and the two more westerly, on the other hand, of the same four existing lines. Its eastern limit of deviation need not now be considered. These details will appear more clearly from the subjoined plan.

Railway Act, 1897, and the four lines of the defendant company.

Upjohn, K.C., Moon, K.C., and Trevor Lewis, for the plaintiff company.—We are entitled to form a connection, if we please, with all four lines of the defendant company by four separate lines of our own. It is true that our powers must be construed, and limited, in the light of our deposited plan; and it is also true that the two more westerly lines of the defendant company are outside our own western limit of deviation.



A question having arisen between the Cardiff Railway Co. and the Taff Vale Railway Co. as to the nature of the powers conferred by their Act on the former company with respect to the proposed junction described above, the present action was commenced by the Cardiff Railway Co. for a declaration (*inter alia*) that the plaintiffs were entitled to effect a junction between the Railway No. 4 authorised by the Cardiff

If, therefore, we are not entitled to execute any part of our works outside this limit of deviation, it is clear that we are not entitled to form any connection with these two more westerly lines. It has, however, been already decided that it is possible, by virtue of section 15 of the Railways Clauses Consolidation Act, 1845,¹ to exceed these limits of deviation,

(1) Railways Clauses Consolidation Act, 1845, s. 15: "It shall be lawful for the company to

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provided always that the *medium filum* of the new railway does not exceed those limits. In other words, the *medium filum* may be shifted, in the actual execution of the works, from its position on the plan up to, and on to, the limit of deviation; but it must not be shifted further. This was decided, on the construction of a particular Act, in *Doe d. Payne v. Bristol and Exeter Railway* [1840]²; it was decided again, on the construction of section 15 of the Railways Clauses Consolidation Act, 1845,¹ in *Doe d. Armistead v. North Staffordshire Railway* [1851].³ If, therefore, we form respective connections, by four separate lines of our own, with the four existing lines of the defendant company, the result will be to shift our *medium filum* exactly on to the western limit of deviation, but not to exceed it. This, then, we are entitled to do.

Cripps, K.C., and *W. J. Noble*, for the defendant company.—The rule that the *medium filum* may be shifted as far as the limit of deviation applies only to the independent construction of a new railway; it has been decided already that it does not apply to the widening of an already existing line—*Finck v. London and South-Western Railway* [1890]⁴—and the Court is now asked to say that it does not apply, on grounds of obvious convenience, to the making of a junction with an existing railway. To effect such a junction is a matter of delicate precision, and

deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to a greater extent in passing through a town, village, or lands continuously built upon than ten yards, or elsewhere to a greater extent than one hundred yards from the said line, and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special Act provided for in cases of unintentional errors in the said books of reference."

(2) 9 L. J. Ex. 232; 6 M. & W. 320.

(3) 20 L. J. Q.B. 249.

(4) 59 L. J. Ch. 458; 44 Ch. D. 330.

the deposited plan must be strictly adhered to. Were it otherwise, there is nothing in their Act to prevent the plaintiffs, if they liked, from forming a connection with the two inner only of our four lines, and thus creating an insoluble deadlock by connecting their "up road" with our "down road," and *vice versa*. To allow the plaintiffs to depart in this fashion from their deposited plan would result in an impossible absurdity; and the plan, when construed strictly, permits them to form a junction only with the two more easterly of our four lines.

Upjohn, K.C., replied.

FARWELL, J.—The question is, Does the power of deviation given by section 15 of the Railways Clauses Consolidation Act, 1845,¹ apply to the junction that is authorised to be made by section 4 of the Cardiff Railway Act, 1897? In my opinion it does not. I cannot read this general section of the Railways Clauses Consolidation Act, 1845, as having any bearing at all upon the actual junction to be made with a rival line—or a friendly line, if the case so be—or, at any rate, a line that is deeply interested in the matter. In the present case counsel for the plaintiff company, as I followed him, was driven to admit that he would have, in practice, to make four separate lines, each of them connecting with one of the four existing lines of the Taff Vale Railway. If he did not do this, and yet were allowed to shift his *medium filum*, the impracticable result would be this—that he would be at liberty, if he wished, to form a connection with the two middle lines of the group of four; that he would be at liberty, that is, to connect his own "up road" with the "down road" of the defendants—his own "down road" with their "up road"! There is nothing in the Act, that I am aware of, to prevent the plaintiff company from doing this, if they so wish; and if their present contention be correct, and if they have that power, they might obviously make themselves extremely troublesome to the defendant company. But, in my opinion, when you have a deposited plan such as this, shewing the exact nature of the terminal junction, the general provisions

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of section 15 of the Railways Clauses Consolidation Act, 1845, have no more application than, in Mr. Justice Kay's opinion, they had to the widening of a railway in *Finck v. London and South-Western Railway*.⁴

The result is that, in my opinion, the plaintiffs' claim fails altogether, and I dismiss the action with costs.

Solicitors—Gribble, Oddie, Sinclair & Johnson, agents for John Stuart Corbett, Cardiff, for plaintiff company; Williamson, Hill & Co., agents for Ingledew & Sons, Cardiff, for defendant company.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

1905.

May 4, 5, 6, 8.

June 6.

NASH v.
CALTHORPE.

Company—Prospectus—Material Contract—Omission to Disclose—Inducement to Take Shares—Onus of Proof—Liability of Directors—Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38.

In an action against directors of a company for breach of the statutory obligation imposed by section 38 of the Companies Act, 1867, to disclose in the prospectus particulars of contracts, the plaintiff must satisfy the Court that he has been damaged by the omission to disclose. The mere fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract had been disclosed. In order that the plaintiff may succeed the Court must be satisfied that if the omitted contract had been disclosed the plaintiff would not have applied for the shares.

Per ROMER, L.J.—The plaintiff in such a case must shew that if the contract had been disclosed he might not have applied

for the shares. It is not necessary for him to prove that he certainly would not have applied.

Judgment of COLLINS, M.R., in Broome v. Speak (72 L. J. Ch. 251, 256; [1903] 1 Ch. 586, 620), considered.

Appeal from decision of Joyce, J., in an action brought by the plaintiff against General Gough Calthorpe, Lord Edward Pelham Clinton, and Mr. Sinclair Macleay, directors of the Standard Exploration Co., with which the late Mr. Whitaker Wright was connected, seeking to render them liable for loss sustained through his having subscribed for shares in the company.

The company was incorporated in 1898 with a capital of 1,500,000 shares of 12. each. A prospectus was issued on May 12, 1899, when the defendants were directors. It stated that certain properties were to be acquired by the company for a consideration of 775,000 fully paid shares, and that copies of the contracts, dated May 12, 1898, for the acquisition of these properties, which included the undertaking and assets of the Austin Friars Syndicate, could be inspected at the offices of the solicitors of the company.

The plaintiff complained, amongst other things, that an agreement of October 27, 1898, made between the London and Globe Finance Corporation, Lim. (who were promoters), and the company, whereby the corporation agreed to transfer to the company 5,000 deferred shares held by the corporation in the Austin Friars Finance Syndicate, Lim., and the company agreed to allot and issue to the corporation 40,000 shares in the company in exchange therefor, was not specified in the prospectus, with dates and names of parties, according to the provisions of section 38 of the Companies Act, 1867.¹ The plaintiff, in paragraph 7

(1) Companies Act, 1867, s. 38 (now repealed by the Companies Act, 1900, s. 33): "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not

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of the statement of claim, said that he received a copy of the prospectus, and on the faith thereof, and induced by the statements therein contained, and misled and induced by the omission to specify therein the dates and names of the parties to the contracts mentioned in paragraph 6 of the statement of claim, he subscribed for 1,000 shares in the company, and paid to the company 1,000*l.* in respect of the shares. He claimed a declaration that the prospectus was fraudulent on the part of the defendants within the meaning of section 38,¹ and that the defendants were liable to pay him damages for the loss sustained by him by reason of his having been induced to subscribe for the shares on the faith of the prospectus, and he claimed judgment for those damages.

There was no imputation against the defendants of any want of good faith or honour in the issue of the prospectus. The claim was based exclusively on the provision that the prospectus, not specifying the contracts required to be specified, should be deemed fraudulent. The statement of claim included a great many other claims based on this section besides the claim mentioned in respect of the omission of the Austin Friars contract, but as the action turned out the claim in respect of the omission of this contract was the only claim necessary to be considered.

The company was ordered to be wound up on January 6, 1901, upon a creditor's petition.

It was agreed by the parties to the action that the matters in dispute to be tried and determined should be limited to the following questions: (1) Whether the plaintiff subscribed for his shares on the faith of the prospectus; (2) whether the contract of October 27, 1898, was material; (3) whether the defendants knowingly issued the prospectus; and (4) whether the plaintiff had suffered substantial damage.

Joyce, J., held that the date and the names of the parties to the contract of specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

October 27, 1898, ought to have been specified in the prospectus, and that there had been no waiver by the plaintiff. He further held that the defendants had "knowingly" issued the prospectus, and directed an enquiry as to the damages sustained by the plaintiff.

The defendants appealed.

Gore-Browne, K.C., and *Cozens-Hardy*, for the appellants Calthorpe and Pelham Clinton.—The question is whether the statement of this contract in the prospectus would have had a deterrent effect on the subscriber's mind. That is a question of fact—see questions 6 and 8 in *Twyecross v. Grant* [1877],² and *per* Lord Selborne and Lord Blackburn in *Smith v. Chadwick* [1884].³ Unless the plaintiff proves that the fraudulent part of the prospectus induced him to take the shares, there is no damage—*Baty v. Kenwick* [1901]⁴ and *Cackett v. Kenwick* [1902].⁵ The Judge of fact, in considering whether the subscriber takes the shares on the faith of such an omission, must take into account not only what the man says, but the general probability of a reasonable man being influenced thereby—*Sullivan v. Mitcalfe* [1880]⁶ and *Shephard v. Brooms* [1904].⁷ In the present case it is apparent from the plaintiff's evidence and pleadings that the omission of this contract did not affect him, or at any rate it is a fair matter of inference that an ordinary man he would not have looked on the contract as deterrent. The word "material" in the Companies Act, 1900, s. 10, sub-s. 1 (k), which is now substituted for section 38 of the Companies Act, 1867,¹ means not only material in a general sense, but material to the particular subscriber.

There is evidence that at the time when the shares were taken they were of the value at which they were taken.

The sort of misrepresentation which the plaintiff must prove in order to succeed is shewn by *Jennings v. Broughton* [1854].⁸ The learned Judge seems to

(2) 46 L. J. C.P. 636; 2 C.P. D. 469.

(3) 53 L. J. Ch. 873; 9 App. Cas. 187.

(4) 85 L. T. 18.

(5) 71 L. J. Ch. 641; [1902] 2 Ch. 456.

(6) 49 L. J. C.P. 815; 5 C.P. D. 455.

(7) 73 L. J. Ch. 608; [1904] A.C. 342.

(8) 23 L. J. Ch. 999; 5 De G. M. & G. 126.

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have thought himself bound by the judgments in the former cases, but the facts there were quite different from the facts here. On the facts of this case the appellants are entitled to judgment.

Younger, K.C., and *Ashton Cross*, for the appellant *Macleay*.—A person who comes for relief under this section must shew that the particular representation on which he relies, although it need not have been the only thing which induced him to take shares, yet so operated on his mind that if it had not been made he would not have subscribed for the shares—that is, that it was the addition of this particular representation to the other inducements which led to his subscribing—that it was a *causa sine qua non*—and the onus is on him to shew that. In the case of relief under section 38¹ by reason of the omission from the prospectus of a material contract, the measure of damages is the amount subscribed, the plaintiff's case being that but for the omission he would not have subscribed; and the omission must be of such a character that in consequence of it the plaintiff has been brought into a speculation which he would not otherwise have entered into. The clue to the meaning of the section is to be found in the last clause—*Twycross v. Grant*² and *Sullivan v. Mitcalfe*.³ In considering this question it is important to consider other statements in the prospectus which might have outweighed any disadvantage which might have accrued by reason of the omission—*Smith v. Chadwick*.³ The case of the particular plaintiff must be taken, and it must be considered whether the prospectus was greatly, or only moderately, attractive to him. The plaintiff here admits that he was in the habit of speculating, and that he was attracted by the prospectus as a whole—that is, by the persons who were bringing out the company. He cannot say that the omission of this particular contract was a *causa sine qua non* of his subscribing.

The rules applicable in an action for deceit are applicable in an action for fraudulent concealment. The section says that the prospectus is to be deemed fraudulent by reason of the omission, but fraud without damage is not actionable.

The plaintiff must shew that there was fraud by which he has suffered loss—*Broome v. Speak* [1903].⁹

[STIRLING, L.J., referred to *Baty v. Kenwick*⁴ and *Cockett v. Kenwick*.⁵]

Hughes, K.C., and *L. Ryland*, for the respondent.—One of the first questions which a subscriber is likely to ask is whether there is any contract between the company and a promoter, and directors are not justified in suppressing such a contract even if it seems one of little moment. The words "taking shares on the faith of such prospectus" in section 38 mean that the subscriber is induced to take the shares by the prospectus as a whole with the omissions.

[ROMER, L.J.—If the plaintiff in reply to a direct question had said that if he had known of this contract it would not have made any difference to him, in that case would the directors be liable?]

The authorities shew that the statute imposes a general obligation. The right of action is founded on the statutory obligation, and the plaintiff has only to shew the breach—*Charlton v. Hay* [1874].¹⁰ The obligation is based no doubt on the general materiality of the contract; but, assuming that, there is no need for any further finding that, but for the omission, the particular plaintiff would not have taken the shares. It never became material to answer the sixth question in *Twycross v. Grant*.² As to the question of damages, the money was subscribed and has been entirely lost. The assets have realised practically nothing and the defendants are liable—*Tait v. MacLeay* [1904].¹¹

Gore-Browne, K.C., in reply.—To enable the plaintiff to recover it must be shewn that he had erroneously a better impression of the company's prospect than he would have had but for the omission of the contract in question.

[ROMER, L.J., referred to *Derry v. Peek* [1889].¹²]

Cur. adv. vult.

(9) 72 L. J. Ch. 251, 256; [1903] 1 Ch. 586, 620.

(10) 23 W. R. 129; 31 L. T. 437.

(11) *Anto*, p. 43; [1904] 2 Ch. 631.

(12) 58 L. J. Ch. 864; 14 App. Cas. 337.

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June 6.—The following written judgments were delivered:

VAUGHAN WILLIAMS, L.J.—Section 38 of the Companies Act, 1867, requires that every prospectus of a company shall specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus, whether subject to adoption by the directors or the company or otherwise, and enacts that any prospectus not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. [His Lordship stated the facts, and continued:] I shall assume for the purpose of the judgment which I am going to deliver that it has been proved that the prospectus received by the plaintiff was issued with the knowledge and by the authority of the defendants, although it has been argued strenuously that technically there is no evidence of this. It is not necessary, however, in the view which I take of this case to decide this question of fact. I hold also that the contract with the Austin Friars Syndicate which was omitted from the prospectus was material for anyone to see who was minded to become a shareholder in the Standard Exploration Co. before making his election so to do.

But these assumptions do not conclude the case against the defendants, for, in my judgment, the authorities shew, and shew plainly, that although a contract is omitted which ought to have been set out in the prospectus, yet the plaintiff cannot recover unless he shews that he personally was injured; and in my judgment the plaintiff cannot do this unless he shews that he was induced by the omission to specify the contract in question to take the shares which he took. It is not sufficient for the plaintiff to shew in the abstract that the prospectus must be deemed fraudulent on account of the omission; he must shew that he personally has been injured. As I understand Lord Justice Thesiger's judgment in *Sullivan v. Mitcalfe*,⁶ he lays

it down that the plaintiff, in order to prove he has been injured, must give evidence to satisfy the Court that he would not have taken the shares had he known of the omitted contract. The statute for the protection of those who are invited by a prospectus to become shareholders requires that the prospectus shall disclose contracts material to the election of those thus invited; but no cause of action arises except for those who suffer damage by the failure to comply with the statute. The words of Lord Justice Thesiger are "that no consequence follows the omission to disclose in a prospectus any contract except in favour of a person taking shares on the faith of such prospectus, and that giving a reasonable meaning to this not very happily worded expression no person can be said to have taken shares on the faith of a prospectus except a person who can prove to the satisfaction of a jury that he took his shares on the faith of there being no such contract as that omitted to be disclosed, and that if such contract had been disclosed to him he would not have taken his shares." It seems to me that Lord Justice Baggallay, who heard the judgment of Lord Justice Thesiger before he delivered his own, would have used very different language if he meant to differ from the view of Lord Justice Thesiger. What Lord Justice Baggallay says is that the Legislature has provided "that any omission to obey such directions [of section 38] shall be availed of, for their own benefit, by one class of persons only, namely, by persons who have taken shares in the company; and of such class by those only who have taken them upon the faith of the prospectus or notice from which the contract has been omitted, and who have had no notice of the contract from any other source." The words of Lord Justice Baggallay are hardly consistent with the idea that he thought that the Legislature intended by the section that, if the prospectus omitted a material contract, a shareholder who had taken his shares on the faith of the prospectus could recover damages, although he admitted that he would have taken his shares all the same, even though the prospectus had fully disclosed the omitted contract. This view is

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confirmed by the questions put by Chief Justice Coleridge to the jury in *Twycross v. Grant*,² one of which was, Would the plaintiff have taken the shares had the omitted contracts been disclosed in the prospectus? I may observe that Chief Justice Cockburn, in speaking of the grievance of the plaintiff in *Twycross v. Grant*,³ says: "His grievance is that he has been induced by the suppression, to which the statute attaches the character of fraud, to take shares in an undertaking, which, but for this suppression, he would not have joined, and which has turned out to be worthless—a fact which the jury have found in his favour."¹³

In my judgment, the result is that the Legislature by section 38 of the Companies Act, 1867, gives those who are invited by a prospectus of the company to take shares statutory protection by imposing on those who issue the prospectus a statutory obligation, and by enacting that the failure to comply with that obligation shall cause the prospectus to be deemed fraudulent. But I think that no one has a cause of action for a breach of this statutory obligation unless he satisfies the Court that he has been damaged by the breach of the obligation—that is, by the omission or suppression of that which the statute requires to be disclosed. One has, therefore, in the present case to look at the evidence to ascertain if the plaintiff has satisfied the onus which has been thrown upon him. I think that, so far as the evidence of the plaintiff personally is concerned, he has not satisfied this onus. He, at all events, nowhere says that knowledge of the contract of October 27, 1898, whereby the corporation agreed to transfer to the Standard Exploration Co. 5,000 deferred shares in the Austin Friars Syndicate, would in any way have deterred him from taking his shares in the Standard Co. On the contrary, his evidence goes far to shew that neither the terms upon which the Standard Co. had acquired the shares which they had purchased, nor the fact that the purchase of the Austin Friars shares was effected by a contract with the London

and Globe Co., who were promoters, would in any way have affected the plaintiff's election as to whether he should take shares. It was suggested that the mere fact that the non-disclosed contract is material to such election is sufficient to satisfy the onus thrown on the plaintiff, and to make the tribunal dealing with the question of fact presume that the plaintiff was induced to take his shares by that omission which the Legislature has declared shall be deemed fraudulent. But I think the observations of Lord Blackburn in *Smith v. Chadwick*³ negative this contention. The fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract in question had been disclosed, and any *prima facie* presumption of fact arising on the non-disclosure in the prospectus which drew the plaintiff's attention to the shares which he ultimately took, having operated to induce plaintiff so to do, may be, and in my opinion in the present case is, displaced by the plaintiff's own evidence.

I have only to add a few words about the case of *Broome v. Speak*,⁹ in which Sir R. Henn Collins, M.R., says: "It has been suggested that, unless it can be shewn clearly that the plaintiff would have been deterred from buying the shares in this company had he known of the existence of this contract, he cannot succeed. That, it seems to me, is putting the case considerably higher against the plaintiff than the authorities warrant. To begin with, to come back simply to the words of the section, what does the section itself provide? 'Every prospectus . . . shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus . . . whether subject to adoption by the directors of the company, or otherwise; and any prospectus . . . not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking any shares in the company on the faith

(13) See *Twycross v. Grant*, 46 L. J. C.P., at p. 673.

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of such prospectus, unless he shall have had notice of such contract.' Therefore the standard is: 'Did he knowingly issue the same?'—that means, intentionally put out a prospectus not including a contract of the existence of which he was aware." The Master of the Rolls then goes on to say: "I will refer to the judgment of Lord Justice Baggallay in *Sullivan v. Mitcalfe*⁶ as stating, as it seems to me quite accurately, and also in accordance with subsequent decisions, what the real meaning of that enactment is, so far as materiality to the plaintiff is concerned. He says this: 'Why should provision be made for its being specified in every prospectus or notice issued for this purpose'—that is, the purpose of inviting persons to subscribe for shares—'whilst no provision is made for its being specified in any prospectus or notice issued for any other purpose, unless it was the intention of the Legislature to afford some protection to or to confer some benefit upon persons who might be likely to respond to the invitations so given to them? And if such was the intention of the Legislature it is difficult to suggest any other class of contracts as being within its contemplation than such as, if made known to a person reading the prospectus or notice, would be likely to influence him in determining whether he would or would not become a shareholder in the projected company.' Mr. Astbury has pointed out, and the learned Judge" (Mr. Justice Buckley) "also in a passage which I will presently read from his judgment, that it is really demanding impossibilities of the Court to ask it to find, as a fact, that a person would have been influenced in a particular way if a contract which he had never seen, and of which he knew nothing, had been disclosed at the time. That is a problem too complicated for solution by any one. What the attitude of the intending investor would have been had the contract been known to him becomes a question of mere speculation; but it seems to me that he is clearly entitled to this—to have every element material for enabling him to form a judgment, as to whether he will or will not subscribe for shares, fairly put before him; and as regards the par-

ticular case of contract, the statute has made a specific enactment treating the prospectus which does not disclose material contracts as fraudulent, and giving remedies in such a case upon the basis of the prospectus being fraudulent." It does not seem to me that Lord Justice Baggallay meant to say that if the omission of a material contract likely to induce a person to take shares is proved, it is to be presumed as a matter of law that the plaintiff was induced by the omission to take his shares, or that upon proof of such omission the plaintiff is entitled to relief. Lord Blackburn, in *Smith v. Chadwick*,³ said, speaking of a material misstatement in an action of deceit, quoting the *dictum* of Mr. Justice Croke,¹⁴ cited by Mr. Justice Buller in *Pasley v. Freeman* [1789]¹⁵ "Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies." And Lord Blackburn goes on to say: "I think that if he [the plaintiff] did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. . . . I think that, if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave v. Hurd* [1881]¹⁶ the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as

(14) 3 Bulst. 95.

(15) 3 Term Rep. 51; 2 Sm. L.C. (11th ed.), 66.

(16) 51 L. J. Ch. 113; 20 Ch. D. 1.

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evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act." These observations of Lord Blackburn are quite inconsistent with any presumption as a matter of law that the plaintiff would have been deterred from taking the shares if the omitted contract had been disclosed, or with any proposition such as that the proof that there has been such an omission from a prospectus as that section 38 enacts shall cause the prospectus to be deemed fraudulent will entitle the plaintiff to relief, and give him a cause of action without the proof of personal damage. I am aware that it is suggested that the plaintiff may prove this damage, even though he should admit that the disclosure of the omitted contract would have had no effect whatever upon his election, by proving that it was the receipt of the prospectus which induced him to consider the question whether or not he should take shares. Such a suggestion seems to me altogether inconsistent with *Twycross v. Grant*² and *Sullivan v. Micalfe*,⁶ and difficult to reconcile with the provision in the section excluding from the benefit of it any person taking shares in the company on the faith of the prospectus, unless he shall have had notice of such contract. At all events, I do not think that the Court of Appeal, or any member of it, meant by the judgment in *Broome v. Speak*⁹ to impeach the authority of *Sullivan v. Micalfe*,⁶ or of the judgment of Lord Justice Thesiger. I think that the Master of the Rolls, when he dissented from the proposition that the plaintiff could not succeed unless it could be shewn clearly that he would have been deterred from buying the shares in the company, meant no more than that the plaintiff would make a *prima facie* case by proof of the omission of a material contract, and that he took his shares after the receipt of the prospectus. To this I entirely assent, but, in my judgment, no *prima facie* case requiring an answer from the defendants would be made if the plaintiff went on to give evidence himself from which the just inference would be that he would still have taken the shares if the sup-

pressed contract had been disclosed, or that he was induced to take the shares by matters altogether outside the receipt and the reading of the prospectus.

I think, therefore, that this appeal ought to be allowed.

ROMER, L.J.—It does not of necessity follow that if a person applies and pays for shares on the faith and footing of a prospectus which is fraudulent as against him under section 38 of the Companies Act, 1867, by reason of the omission of a material contract, and he thereby suffers damage, he can recover the damage against the directors who knowingly issued the fraudulent prospectus. Suppose, for example, he, as plaintiff in an action for the damage, admitted in the witness-box that, though he read the prospectus through, he attached no importance to the statement in it as to the contract entered into, and that if the omitted contract had been stated as provided by the Act that fact would have made no difference to him, and he would still have applied for the shares. In that case it is clear that the plaintiff could not recover. And of course the plaintiff could not recover, even though he did not make an admission of the facts above mentioned, if the result of the evidence before the Court as a whole was to establish those facts. What, then, must a plaintiff prove in such an action to entitle him to succeed? I think the answer to that question is to be found by considering what a plaintiff has to prove, in order to succeed, in an action of an analogous kind, based, not on section 38, but on fraudulent misrepresentations of a material character contained in a prospectus. In that case the plaintiff must prove that he relied on the fraudulent misrepresentations in applying for the shares, so that the Court can reasonably conclude that but for the misrepresentations he might not have applied for the shares. I do not think the plaintiff would be bound to prove more than that. He would not, in my opinion, be bound to embark further upon a consideration of the hypothetical question as to what would have happened if the fraudulent misrepresentations had not been made so as to have the onus cast upon him of

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proving (if, indeed, he could possibly do so satisfactorily) that, as a matter of fact, he certainly would not have applied for the shares if the misrepresentations had not been made. So, in an action based on section 38, it appears to me that by analogy the Court must be able from the evidence before it reasonably to conclude that if the omitted material contract had been stated in the prospectus the plaintiff *might* not have applied for the shares. I think this was the view taken by Mr. Justice Farwell in his decision in *Cackett v. Keswick*⁵ and *Baty v. Keswick*,⁴ with which I agree. At the same time I think that the plaintiff in such a case would not be obliged to further establish as a fact that if the contract had been stated it would certainly have prevented him from applying for the shares. I think this was what was pointed out and meant by Sir R. Henn Collins, M.R., in what he said in *Broome v. Speak*.⁹

Now that being, in my judgment, the law applicable to the case, I have to consider whether, from the evidence before the Court as a whole, it can reasonably conclude that, if the omitted material contract in the present case had been stated in the prospectus, the plaintiff might not have applied for his shares. As to this, I will only say that in my opinion the Court cannot reasonably come to such a conclusion. On the contrary, it appears to me that, so far as this particular plaintiff's application for shares was concerned, the omission of the contract from the prospectus was a matter of no substantial moment or weight.

That being so, I think the appeal should be allowed.

STIRLING, L.J.—The question in this action is whether the defendants, directors of the Standard Exploration Co., are, under section 38 of the Companies Act, 1867, liable to pay to the plaintiff damages by reason of the prospectus of the company failing to specify the dates and names of the parties to a contract dated October 27, 1898, and made between the London and Globe Finance Corporation (the promoters of the company) of the one part and the company of the other part, being a contract for the sale by the London and

Globe Finance Corporation to the company of five thousand deferred shares in a company called the Austin Friars Finance Syndicate. The contract in question was one which, regard being had to the decision in *Broome v. Speak*,⁹ affirmed by the House of Lords in *Shepherd v. Broome*,⁷ ought to have been specified in the prospectus in manner provided by section 38, and consequently the section requires that the prospectus be deemed fraudulent on the part of the directors of the company who knowingly issued the same.

But in order that the plaintiff may succeed in this action he must prove not merely fraud, but damage occasioned by the fraud. In *Smith v. Chadwick*³ Lord Blackburn says: "In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage." On the question of what is sufficient proof he points out that it is not necessary that the plaintiff should always be called as a witness to swear that he acted on the inducement; that if the defendants, with a view to induce the plaintiff to enter into a contract made a statement of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement, but that its weight as evidence must greatly depend on the degree in which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act; and that whenever the inference is a matter of fact, the tribunal which has to decide the fact should remember that in the present state of the law the plaintiff can be called as a witness on his own behalf, and, if he is not so called, or being called does not swear that he was induced, it adds much weight to the doubt whether the inference was a true one, but he does not say that it is conclusive.

In *Cackett v. Keswick*⁵ Mr. Justice

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Farwell applied the law thus laid down to a case of the omission from a prospectus of the particulars of a contract under section 38 of the Companies Act, 1867. He says: "If a material fact is omitted from a statement put forward to induce a person to enter into a contract, and he does enter into the contract on the faith of that statement, it is a fair inference that he would not have contracted if he had known of the fact, and that in this sense the omission induced the contract. . . . It would no doubt be matter of comment if a plaintiff was not called nowadays to swear that the fact omitted would have deterred him from contracting; but neither his testimony nor his absence is conclusive." The decision in *Cockett v. Keswick*⁵ was in favour of the plaintiff, and was affirmed by the Court of Appeal, but in *Baty v. Keswick*,⁴ which was heard immediately after and decided at the same time with *Cockett v. Keswick*,⁵ the same learned Judge, acting on the principles laid down in *Cockett v. Keswick*,⁵ and finding as a fact that the plaintiff acted on the faith of the directors' names and never read the clause in the prospectus and attached no importance to it, dismissed the action. In my judgment the principles laid down by Mr. Justice Farwell in *Cockett v. Keswick*⁵ were correct, and were correctly applied by him in *Baty v. Keswick*.⁴ The subject was subsequently discussed in *Broome v. Speak*⁹ before Mr. Justice Buckley and in the Court of Appeal, and affirmed under the name of *Shepherd v. Broome*⁷ in the House of Lords; but nothing is there laid down which appears to be inconsistent with what was decided in *Cockett v. Keswick*⁵ and *Baty v. Keswick*.⁴

Now the plaintiff in cross-examination said that in 1899 Mr. Whitaker Wright was a gentleman who had a great reputation, whose lead a good many people (including the plaintiff himself) were prepared to follow; that the companies floated by the London and Globe stood in a good position and were all well thought of; that he held shares in the British American Corporation, a sister company to the London and Globe, and in seven other companies floated either by the London and Globe or the British American Corporation, and that he was very

ready to go in for "anything that seemed reasonable" which was floated by either of these companies. He said that he read the prospectus of the Standard Exploration Co., and was attracted by its being issued by the London and Globe and by the statement that the London and Globe was making no profit, and by Mr. Whitaker Wright being the chairman; that he noticed that among the properties to be acquired was the Austin Friars Syndicate, and that the purchase-money for getting those assets was included in the 775,000 fully paid shares mentioned in the prospectus, and that it would not matter whether the shares came to the shareholders of the selling company directly or through an intermediary, provided no intermediate profit was taken and the price was fair. He also admitted that when the statement of claim was prepared he believed that there were actual misrepresentations, and not merely an omission in the prospectus, and relied on them, but they were afterwards given up. He was cross-examined at considerable length as to the contract, the omission of which from the prospectus was complained of. I do not attempt to summarise the cross-examination, but read the concluding part: "Q. You did not think it worth while to inspect the contracts among which you would have found the Austin Friars contract?—A. No that would have been very unusual. Q. It would have been very unusual, I quite agree, so that I do not think I am doing you an injustice in saying that so long as the aggregate was correct of 775,000 shares paid for the properties you did not mind how it was divided between those companies?—A. Not if it was true. Q. And if not more than 775,000 shares were paid you have no grievance?—A. Not on that point—the price that was paid. Q. If the 100,000 shares which were allotted to Austin Friars—I will use that word, although it is begging the question—if the 100,000 shares allocated to Austin Friars reached the hands of the shareholders in the Austin Friars companies in exchange for their assets, I think you have told me that you would have no grievance?—A. But is that so? Q. I am putting it as a question. If it had reached their hands you would have no

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grievance.—A. If the 100,000 shares . . .
 Q. Which were allocated to Austin Friars reached the hands of the shareholders of the Austin Friars Co. you have no grievance?—A. I think not. Q. You think not?—A. No. Q. And the steps by which it reached their hands do not really matter so long as there is no intermediate profit?—A. I do not admit that quite. Q. I will take it from you in your own words. 'Always providing that there was no intermediate profit,' would it matter to you what steps were gone through to make the 100,000 shares reach the hands of the shareholders?—A. May I have that again? Q. Yes; I want you to understand it. How does it matter to you that there were certain intermediate stages to be gone through, always provided that there was no intermediate profit taken?—A. Oh, I think it might affect it. Q. It might; but let us hear how it did, or could, or would?—A. It might cover something up that it was undesirable to disclose. Q. Do you suggest that in fact it covered up anything which it was undesirable to disclose?—A. No, I do not." In re-examination he was asked: "Q. Do you think it would be likely to affect your mind if you saw in the prospectus that there was a contract with the London and Globe Co.?—A. I think it might have; I cannot say." Now this last answer is certainly wanting in decision; but it is not conclusive, and was rightly held by Mr. Justice Joyce not to be so. The Court has to look at the whole of the evidence and say whether the fair inference to be drawn is that the plaintiff would not have contracted if he had known of the contract with the London and Globe Co., and that in this sense the omission induced the contract. I have endeavoured to perform this duty to the best of my ability, and my conclusion is that this inference ought not to be drawn, and in my opinion the appeal ought to be allowed.

Appeal allowed.

Solicitors—Burn & Berridge; Gilbert Robins, for appellants; Carter & Bell, for respondent.

[Reported by A. J. Spencer, Esq.,
 Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.
 ROMER, L.J.
 STIRLING, L.J.
 1905.

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 COLLIS.

May 2, 3, 4.

Trustee—Breach of Trust—Consent of Tenant for Life—Payment into Court at Suit of Remaindermen—Surplus after Replacing Capital—Bankruptcy of Tenant for Life—Right to Surplus Moneys—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45.

As a general rule a cestui que trust who consents to a breach of trust by a trustee cannot complain, as between himself and the trustee, of loss occasioned by that breach of trust. This rule is quite independent of, and is not affected by, section 45 of the Trustee Act, 1893, which empowers the Court to impound, by way of indemnity to the trustee, any interest in the trust estate of a cestui que trust at whose instigation or request, or with whose consent in writing, the trustee has committed a breach of trust; and the rule does not require the consent to the breach of trust to be in writing.

A trustee, with the consent of the tenant for life, sold the trust funds, and gave the proceeds in his presence to his wife. The trust funds were lost through this breach of trust, and in an action by infant remaindermen an order was made in the nature of a compromise, by which the trustee was to pay into Court out of a pension and the proceeds of certain life policies the whole of the sum paid away to the wife of the tenant for life, with interest. The order directed that these moneys should be applied in the first instance in satisfaction of the capital of the trust funds, and then of interest thereon on application for the purpose. The tenant for life at the date of this order was bankrupt, and his trustee in bankruptcy declined to consent to the order, which was made without prejudice to his rights. The trustee of the settlement was now dead, and the moneys in Court exceeded the capital of the trust funds. The surplus of such moneys, after replacing the capital, was claimed by the personal representative of the deceased trustee on the one hand, and by the trustee in bankruptcy of the tenant for life on the

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other hand :—Held (*varying the order of* BYRNE, J.), *that the trustee in bankruptcy stood in no better position than the tenant for life; that the tenant for life could not have called on the deceased trustee to make good his life interest, and that his trustee in bankruptcy had therefore no right to any of the surplus moneys as against the personal representative of the deceased trustee.*

There were three appeals against an order of Byrne, J.

On the marriage of William Fletcher and Ellen Blanche, his wife, in November, 1881, a settlement was made of certain trust funds which were vested in trustees, of whom William Collis was one, upon trusts for William Fletcher for life, with remainder upon trust for the wife for her life, with remainder in trust for the children of the marriage.

In 1885 the whole of the trust funds were sold by the trustees with the written consent of the husband, and the entire proceeds of sale were, with the consent and in the presence of William Fletcher, paid over to his wife, who misapplied the whole of them. Byrne, J., was of opinion that it had not been shewn that William Fletcher gave his consent to the misapplication of more than the sum of 1,000*l.*, but the Court of Appeal held on the evidence that his consent was given as to the entire fund.

In 1891 William Fletcher was adjudicated bankrupt, and immediately afterwards, in August, 1891, an action was commenced by the infant children of the marriage, by their next friend, to make the trustees liable for the breach of trust which they had committed, to which the trustees of the settlement, the trustee in bankruptcy of William Fletcher and Ellen Blanche Fletcher, were defendants. On February 22, 1893, an order in the nature of a compromise was made in the action, which recited that the plaintiffs and defendants other than the trustee in bankruptcy of William Fletcher consented to the order, and contained a declaration that William Collis was liable to make good to the trust estate the capital sum of 3,100*l.* with interest from the date of the issue of the writ, and William Collis

thereby undertook, out of a pension to which he was entitled and by means of certain policies of insurance on his life, which he mortgaged for the purpose, to pay into Court the said sum of 3,100*l.* and interest; and it was ordered that "all monies paid into Court pursuant to the undertaking aforesaid be applied first in satisfaction of the said principal sum of 3,100*l.* and then of the interest therefor upon an application for that purpose," and it was expressly declared that the order was made without prejudice to any claim which the trustee in bankruptcy might have against the trustees of the settlement, or either of them, or against Ellen Blanche Fletcher, and generally without prejudice to any right whatever of the trustee in bankruptcy under the settlement. It also provided that in case any such claim was sought to be enforced by the trustee in bankruptcy the order was also to be without prejudice to any claim which the trustees of the settlement might, or, but for that order would, have had against William Fletcher to have his interest in the trust estate impounded by way of indemnity. William Collis was now dead, and Margaret Agnes Collis was his legal personal representative. By means of the payments made during his life and out of the proceeds of the policies after his death there was a surplus of moneys in Court after replacing the sum of 3,100*l.* representing the capital of the trust funds; and on July 31, 1902, a summons was taken out by the present trustees of the settlement asking—first, for payment to them of the funds in Court; secondly, that it might be declared what part thereof ought to be treated as capital and what part as income; and thirdly, that it might be determined whether the portion representing income, or any part thereof, or any and what further income was payable to Margaret Agnes Collis as personal representative of William Collis deceased. The summons was served on Margaret Agnes Collis and on the trustee in bankruptcy of William Fletcher.

On the hearing of this summons, Byrne, J., said that, having regard to the terms of the order and surrounding circumstances, Margaret Agnes Collis, as the personal representative of William

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Collis, was not precluded from now raising the question; that the onus of proof lay upon her, and that in his opinion she had made out that to the extent of 1,000*l.* William Fletcher was privy to the breach of trust, but not to any greater extent; and that his life interest ought to be impounded to make good that amount and no more; and directed the costs of all parties to be paid out of capital.

The order made on the summons was subsequently settled on an application to Warrington, J., on May 4, 1904, and recited that all parties agreed to treat the summons as raising the claim of Margaret Agnes Collis to have the income accrued or to accrue during the life of William Fletcher of the funds subject to the settlement impounded by way of indemnity to make good to the estate of William Collis the moneys paid into Court pursuant to the order of February 22, 1893, and the interest thereon; and contained a declaration that Margaret Agnes Collis, as such legal personal representative, was entitled to have the life interest of William Fletcher in the sum of 3,100*l.* (being the settlement trust funds) impounded by way of indemnity in respect of the sum of 1,000*l.*, part of the said sum of 3,100*l.*, and ordered the costs of all parties to be paid out of the trust funds.

Margaret Agnes Collis appealed from this order, and asked by her notice of appeal that the declaration might be varied by declaring that she was entitled to have the life interest of William Fletcher in the said sum of 3,100*l.* impounded by way of indemnity in respect of the whole of the said sum of 3,100*l.*

The trustee in bankruptcy of William Fletcher gave notice of cross-appeal asking that the order might be reversed so far as it impounded the life interest by way of indemnity in respect of 1,000*l.*, part of the sum of 3,100*l.*

The present trustees of the settlement, also by special leave, gave notice of cross-appeal asking that the order might be reversed so far as it ordered the costs of all parties to be paid out of capital.

The Court having decided as a preliminary point that the question as between Margaret Agnes Collis and the trustee in bankruptcy was not concluded

in favour of the latter by the language of the order of February 22, 1893, the question was then argued on the merits.

Levett, K.C., and *A. d'B. Terrell*, for Margaret Agnes Collis.—On the evidence there is a sufficient case of instigation or request on the part of William Fletcher as to the whole fund to bring the case within section 45 of the Trustee Act, 1893¹; but apart from that, there is a clear case of consent on his part, and it is a well-settled rule that a party consenting to or concurring in a breach of trust cannot afterwards complain of it as against the trustee—*Trafford v. Boshm* [1746],² *Bolton v. Currie* [1894],³ *Lincoln v. Wright* [1841],⁴ *Sawyer v. Sawyer* [1885],⁵ *Somerset, In re; Somerset v. Poulet* [1893],⁶ and *Walker v. Symonds* [1818].⁷

Section 45 of the Trustee Act, 1893,¹ which requires the consent to be in writing, considerably extends the relief by enabling the Court to impound any interest of the *cestui que trust*, but it leaves the old rule untouched where the consent is not in writing.

Byrne, J., was wrong on the facts in drawing a distinction between the 1,000*l.* and the residue of the money.

Alexander, K.C., and *A. H. Jessel*, for the trustee in bankruptcy of William Fletcher.—There is no evidence that William Fletcher derived any personal advantage from the breach of trust. The case is not within section 45 of the Trustee Act, 1893,¹ and independently of the statute there is no authority against us except cases in which the consenting *cestui que trust* derived a benefit or personal ad-

(1) Trustee Act, 1893, s. 45, sub-s. 1: "Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

(2) 3 Atk. 440, 444.

(3) 64 L. J. Ch. 164; [1895] 1 Ch. 544.

(4) 4 Beav. 427, 431, 432.

(5) 54 L. J. Ch. 444; 28 Ch. D. 595.

(6) 63 L. J. Ch. 41; [1894] 1 Ch. 231.

(7) 3 Swanst. 1, 64.

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vantage from the breach of trust—*Somerset, In re; Somerset v. Poulet*,⁶ was a case of instigation. *Chillingworth v. Chambers* [1896]⁸ shews that the *cestui que trust* must have profited by, as well as consented to, the breach of trust.

We are not now claiming to make the trustee personally responsible, but claim against the fund which has been made good.

E. P. Hewitt, for the trustees of the settlement on their appeal.—The only costs which ought to be paid out of capital are such as were necessary for obtaining payment out of the fund, and apportioning it between capital and income.

[*Gilbert v. Huddlestons* [1885]⁹ was cited.]

Levett, K.C., and *Alexander, K.C.*, for the respective respondents to the trustees' appeal.

VAUGHAN WILLIAMS, L.J., stated the facts, and continued: The real substantial result of this case is this—it does not matter what form it is put in—that the trustee in bankruptcy representing Mr. Fletcher, the *cestui que trust* who concurred in the breach of trust, has really come into Court to say, "I am entitled to complain of this breach of trust, and I am entitled to have paid over to me the income which is now embodied in the surplus beyond what is necessary for the replacement of the trust fund." Now the question is whether, having regard to the facts which I have mentioned as constituting this concurrence by the *cestui que trust* in the breach of trust, he can come here and be heard to complain of that breach of trust by the trustee. Can he be heard as against that trustee—I am not speaking of his rights as against other parties, but as against the trustee—to say that the act of the trustee, in which he concurred, was wrong? He concurred in it, and in my judgment he ought not to be allowed to say anything of the sort.

Now the way in which counsel for the trustee in bankruptcy in his very clear argument put the case was this: He quite accepted for the purpose of his

argument that there was a concurrence by the *cestui que trust* of the character which I have described, but he said, "If you go through all the cases, beginning with *Trafford v. Boehm*,² before Lord Hardwicke, you will not find any case in which a *cestui que trust* has been held liable to have his interest either impounded, or retained, or withheld from him, unless the *cestui que trust* has derived a benefit from the breach of trust, and then only to the extent of the benefit which he derived"; and counsel said further that it was admitted that this was not a case in which the *cestui que trust* received a benefit in the sense in which the word had been used with reference to these cases of breach of trust, and the impounding of the *cestui que trust's* interest to indemnify the trustee. With regard to that, I do not agree with counsel's view of the cases. I will call attention in a moment to the cases in which it seems to me that, although the *cestui que trust* received no benefit personally, yet he was held to be debarred from complaining of the breach of trust. I propose before I call attention to those cases to go a step further, and say that, quite independently of any authority, and if there had been no authority to that effect, I should have been prepared to say that on general principle it is impossible to hold that a *cestui que trust* who has so concurred should be allowed to take proceedings against the trustee based upon a complaint of the improper or wrongful dealing with the trust property, in which dealing he has himself concurred.

One of the cases in which this principle has been recognised is *Chillingworth v. Chambers*,⁸ and I propose to read a passage from the judgment of Lord Justice Lindley, who says this: "Suppose a *cestui que trust* in remainder to induce his trustees to commit a breach of trust for the benefit of the tenant for life—perhaps his own father or mother—can such a remainderman compel the trustees to make good the loss or resist their claim to have it made good out of his interest when it falls in, if some other *cestui que trust* compels them to make the loss good? I apprehend not; and yet, in

(8) 65 L. J. Ch. 343; [1896] 1 Ch. 685.

(9) 54 L. J. Ch. 751; 28 Ch. D. 549.

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the case supposed, the *cestui que trust* in remainder might not himself have derived any benefit at all from the breach of trust." I do not say that that passage is exactly upon all-fours with the present case, because the word Lord Justice Lindley uses is "induce," which is consistent with instigation as distinguished from mere concurrence; but what he does plainly negative is that a receipt of a benefit is essential if the *cestui que trust* is to be debarred from recovering against the trustee that which he is entitled to under the settlement. I am not going to call attention at any length to the case of *Somerset, In re; Somerset v. Poulet*,⁶ but I think that, if the words at the conclusion of the judgments of Lord Justice Lindley and Lord Justice Davey in that case are read, the same negation of the notion that a benefit is essential will be found involved in those judgments. Under these circumstances, in my judgment the trustee in bankruptcy in the present case, being in the same position for this purpose that Mr. Fletcher, the concurring *cestui que trust*, would have been in, is not entitled to complain against those who represent the deceased trustee of the loss which was brought about by what the trustee did with his concurrence, nor is he entitled to make any claim against this fund, which has been placed in Court really at the expense and out of the pocket of the deceased trustee. If we were to hold that Mr. Fletcher, the husband, can enforce a claim against the trustee in this respect, we should really be saying that the husband is entitled to complain of that which he, the husband, concurred in doing as being a wrong against himself. Under these circumstances, I think that the substantial claim made by the trustee in bankruptcy of Mr. Fletcher fails altogether.

In order to prevent any mistake as to the length to which I mean to go in respect of the negation of the right of a party consenting to a breach of trust to complain of that breach of trust, and to found a claim upon it as against his trustee, I wish to say that I can quite conceive circumstances in which it might be right to allow such a claim to be made even by a concurring party. In the first

place, there may be the case where the trustee owes a particular duty to the *cestui que trust*, such as the cases in which it was held that such a duty existed on the part of the trustee towards a married woman who under the trust deed had property settled upon her for her separate use without power of anticipation. Nor is that the only case. I can quite conceive that there may be other cases. But in the present case I see no circumstances whatsoever to induce this Court to assist the *cestui que trust* who has concurred in the breach of trust in recovering, as against the trustee, any loss which he sustains by that breach of trust.

This exhausts the whole case. There is the money in Court—money which undoubtedly has been provided by the deceased trustee, and which, having regard to the order which was made, is his money unless and until the trustee in bankruptcy can establish a claim to it.

There are still matters of costs which have to be decided. Now Mr. Justice Byrne made an order, the result of which is that the costs are thrown upon the *corpus*—that is, thrown upon the infants. In my judgment that order was not right. Mr. Justice Byrne said that there was a fair question of construction here, and that under those circumstances the capital ought to bear these costs. We have already expressed our opinion that, inasmuch as the bulk of these costs have been incurred in respect of the dispute between the trustee in bankruptcy and the representatives of the deceased trustee, it is not right to throw those costs upon the *corpus*. Then, under these circumstances, how ought these costs to be dealt with? In so far as the costs are costs that were necessary to the questions raised on the summons, I think those costs may properly come out of the *corpus*; but those are a very small portion of the costs. The other costs—the costs of all the affidavits and evidence and documents relating to this question which has been raised between the trustee in bankruptcy and the representatives of the deceased trustee—ought to be dealt with differently. I entirely agree with counsel for the trustee in bankruptcy that where there is a fair question of construction and ambiguity

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the Court throws the costs upon the fund; and in the present case counsel contends that, though it is perfectly right that these costs should not be thrown on the *corpus*, they ought to be thrown upon the income—in other words, that they ought to be thrown upon the representative of the deceased trustee. I cannot agree. The Court no doubt has a discretion, in the exercise of which it might make that order, but I do not think that this is a case in which it ought to do so. I do not forget, myself, that the trustee in bankruptcy chose in the first instance to stand out and take his chance of what he would get ultimately. Very possibly if he had come in and taken the course that the other parties did the minutes might have been settled in such a form that these questions would never have arisen. He did not choose to do so. In my judgment, under these circumstances, we ought to treat this at the best, in favour of the trustee in bankruptcy, as a case in which each party ought to bear his own costs, and the result of that will be that the trustee in bankruptcy will have to pay the costs of the appeal by the deceased trustee's representatives and also of the appeal by the present trustees of the settlement; but as regards the costs below, as I have already said, a certain portion of the costs—namely, those costs which were necessary to the questions as to capital in which the infants were interested—will be borne by the *corpus*, and otherwise each party will pay his own costs below.

ROMER, L.J.—There was one proposition of law urged by counsel on behalf of the respondents before us to which I accede. It is this: If a beneficiary claiming under a trust does not instigate or request a breach of trust—is not the active moving party towards it, but merely consents to it—and he obtains no personal benefit from it, then his interest in the trust estate would not be impoundable in order to indemnify the trustee liable to make good the loss occasioned by the breach, even though the trustee derived no benefit himself from the breach. I think this is what was meant and referred

to by Mr. Justice Chitty in his judgment in *Sawyer v. Sawyer*,⁵ where he says: "It strikes me as a novelty in law, and a proposition not founded on principle, to say that the person who merely consents, is bound to do more than what he says he consents to do. It does not mean that he makes himself personally liable, nor does he render any property liable to make it good." But that proposition of law must be taken to be subject to the following right of the trustee as between him and the beneficiaries. In the case which I have before referred to in respect to the general proposition, the beneficiary who knowingly consented to the breach could not, if of full contracting age and capacity, in the absence of special circumstances, afterwards be heard to say that the conduct of the trustee in committing the breach of trust was against him—the particular beneficiary—improper, so as to make the trustee liable to the beneficiary for any damage suffered in respect of that beneficiary's interest in the trust estate by reason of the loss occasioned by the breach, and, of course, if satisfactorily proved, the consent of the beneficiary to the breach need not be in writing. I will illustrate what I have said by a concrete case, not only to make my meaning perfectly plain, but also because the illustration will have a bearing upon the present case before us. Take a simple case of a trust under a settlement, say of 3,000*l.*, for a tenant for life, and after the death of the tenant for life for certain remaindermen. Suppose the trustee commits a breach of trust and sells out 1,000*l.* and pays it over to some third person, so that the trustee does not benefit by it himself, and suppose that the tenant for life, being, as I have said, of full age and so forth, knows of that act of the trustee and consents to it: what would be the position of the trustee in reference to that breach of trust if the trustee were at the instance of the remaindermen attacked and made liable for the loss accruing by the breach of trust, assuming the 1,000*l.* to have been lost? The remaindermen would have the right of saying, so far as their interest in remainder is concerned, that the capital must be made good by the trustee; but the tenant for life who consented could

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not himself have brought an action against the trustee to make him liable for the loss of income suffered by the tenant for life by reason of the breach of trust as to the 1,000*l*. On the other hand, the trustee would not have had a right, to my mind, as against the beneficiary, the tenant for life, to have impounded his life interest in the 2,000*l*., the remaining part of the trust funds, in order to indemnify the trustee. Now suppose that the remaindermen having brought an action to make good the breach of trust against the trustee, the tenant for life is a co-plaintiff, and that the trustee puts in a defence raising his right as against the tenant for life, seeking relief in respect of the loss of income, but admitting the right of the remaindermen. What would the Court in such a case do if the question between the tenant for life and the trustee had been tried out, as it might have been, and the tenant for life was found to have consented knowingly to the breach of trust? To my mind, the right of the Court would have been clear. It might have ordered the 1,000*l*. to be paid into Court by the trustee, but pending the life of the tenant for life have ordered the income to be paid to the trustee, because the income of the 1,000*l*. would have been coming out of the pocket of the trustee just as much as the *corpus* from which it proceeded; and not to have given that relief to the trustee would have been to ignore his right and to have acceded to the claim of the tenant for life in the action by him which I have indicated. Now suppose that the tenant for life is not a co-plaintiff, but co-defendant with the trustee, so that the question cannot be tried out at the trial as between the tenant for life and the trustee: what might the Court do if so advised in that case? It might order the 1,000*l*. to be paid into Court by the trustee, and it might reserve the question of the right as between the tenant for life and the trustee to the income to be determined at some later period. It will be found that that illustration is pertinent to the case that is now before us. In such a case, when the question as to income arose the trustee would be able to say, "The remaindermen

are clearly not entitled to the income on the trust fund which I have found if the tenant for life is not entitled to it as against me. I find it; it is my money and I am entitled to it"; and therefore when the question came to be tried out ultimately as between the tenant for life and the trustee, if that income was still under its control the Court would again have the right to say to the trustee who found the *corpus*, "The income is yours in the absence of the right of the beneficiary, the tenant for life, to claim as against you to make you liable for his loss of income."

Now that right of a trustee which I have been dealing with—the right to resist the claim by the beneficiary as against him to make good the income—has, to my mind, clearly not been affected either by section 6 of the Trustee Act of 1888 or by section 45 of the Trustee Act of 1893. I have elsewhere pointed out that those sections were intended to and did extend the powers of the Court for the benefit of the trustee. They clearly extended the powers of the Court so far as concerns the case of a beneficiary being a married woman entitled to income restrained from anticipation; but they also extended them in another respect by giving the power to the Court to impound any part of the interest in the trust property of any beneficiary who consented to a breach of trust, provided that consent was in writing. But clearly there was nothing in those sections which was intended to, and nothing in my opinion which operated so as to, deprive the trustee of such a right as I have already indicated—namely, the right of saying, as against a beneficiary who has consented to a breach of trust, that that beneficiary cannot make him, the trustee, personally liable to recoup to the beneficiary who consented the loss accruing to that beneficiary by the breach of trust committed with his consent. The beneficiary, if he consented to the breach of trust, could not be heard to make that breach a ground of complaint and a ground of action as against the trustee. Of course, the right which I have indicated of a trustee as against the consenting beneficiary might possibly be lost if not raised by the trustee before it

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was too late. Probably—I say probably, for I have not to decide the question—if a trustee in such a case were to hand over the funds out of his own pocket to new trustees without reserving his right in any way as against the tenant for life, it might be—I will say no more—that he might be held to have lost his right to claim the income after he had parted with the fund. It might be so, and other cases might be given; but so long as his right can be claimed by him, it is a right which must be recognised by the Court and given full effect to when it is insisted upon at the proper time.

Now that being, to my mind, the law, so far as it is necessary to deal with it for the purpose of the present case, I will say a few words about the facts of this case; and I ask myself, looking at those facts, this question: Is not this matter that we have to deal with on this appeal in substance one where a beneficiary who has consented to a breach of trust is now, for his own benefit, calling upon the trustee to make good the loss accruing to the beneficiary by reason of the breach? I think it is. In this case the tenant for life, the husband, knew of and consented to the breach. He authorised the selling out of the trust funds; and it appeared from his evidence—he was not, to my mind, a truthful witness in many respects, as far as I can see, but he was driven to admit it at last—that he was actually present when the trustee handed over to the wife the whole of the proceeds of sale of the funds which had been authorised. The Judge in the Court below has made a difference with regard to those proceeds—a difference I am bound to say that I cannot follow. Mr. Fletcher, the tenant for life, tried to make a difference with regard to the funds in this way. He said, “I knew the funds were going to her”—at least he could not help saying that, seeing that he saw them absolutely handed over to her—but he said, “I thought she was going to use only about 1,000*l.*, about one-third part, for her own benefit, and I thought she was going to hand back the balance, the two-thirds, or that in some form it was to come back to the trustee or in some shape or form was to be re-invested.” To use a homely phrase, that

story as to the re-investment of about 2,000*l.* so deposed to, appears to me, speaking for myself, to be what is commonly called a cock-and-bull story. But even if I were to attribute any substance at all to such a statement, how does it avail this husband who allowed the whole funds to go to his wife? He knew they were to go to her; he knew she was to have control of them; and in fact it was by reason of that control that the funds were lost and never came back, nor did the husband ever take any proceedings to see that they came back, or anything of the sort. I can draw no distinction for the purpose of such a case as this, as between the husband and the trustee, between the 1,000*l.* or the third part and the remaining two-thirds. It appears to me that he consented to the whole of the funds being handed over in breach of trust to the wife, and he cannot afterwards say as against the trustee that the trustee is bound to make good to him any loss accruing to him, the husband, by reason of the trust funds having been dealt with by the wife and lost. I need scarcely say that the fact that the husband has become bankrupt makes no difference. The trustee in bankruptcy can only take such rights as the husband would have had if he had not been bankrupt. Now that was the breach of trust, and that was the consent of the husband. What happened when this action was brought in this case? The sole plaintiffs were the remaindermen. As against them, in respect of their interest in remainder, there was no defence. The trustee in bankruptcy of the tenant for life was a defendant. A compromise was made by which the trustee out of his own funds made up by instalments the trust funds. He was ordered to pay in these instalments even though they exceeded the capital, the reason being that at that time the question, as between the trustee in bankruptcy and the trustee of the settlement with regard to the life income, and with regard to the consent given by the tenant for life, had not been determined. That order was one made entirely without prejudice to the right of the trustee in bankruptcy. So far as the order directed these instalments to come in beyond what was necessary to recoup

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the capital to make good the interests of the remaindermen, all rights were reserved. I notice that the order by which those instalments were directed to be paid contains a direction that all moneys paid into Court pursuant to the undertaking "be applied first in satisfaction of the said principal sum of 3,100*l.* and then of the interest therefor upon an application for that purpose." To my mind the order is reasonably clear. The trustee of the settlement had not so dealt with these instalments that he could be said to have lost the right he had as against the consenting tenant for life. He still had a right to say, "No income shall come out of my pocket to benefit you the tenant for life at your instance." A hold was kept upon the funds, and the trustee of the settlement is now entitled, in my opinion, to say: "Subject to the interests of the remaindermen, unless the tenant for life by his trustee in bankruptcy can claim the income, that income is mine—it certainly is not the remaindermen's. That income is mine unless the tenant for life is entitled to it as against me"; and the Court, having the hold it has upon this fund, is bound to decide that question, to my mind, as if the trustee in bankruptcy were now actively claiming as against that income, as if it was still in the pockets of the trustee, and he were seeking to make the trustee hand over that income to him. The right which I have indicated of the trustee, to my mind, is existing, can still be enforced, and ought to be enforced; and I think it ought to be enforced, as I have pointed out, in respect of the whole income. It does not belong to the tenant for life as against the trustee. That being so, I think the appeal of the personal representative of the deceased trustee should be allowed, and the cross-appeal of the trustee in bankruptcy should be dismissed, and I have nothing to add to what has been said by my Lord with regard to the question of the costs of the three appeals which have been made or as to the necessity of complying with the appeal that was made as to costs by leave of the Court on behalf of the infants who are interested.

This ought to be made clear. I think,

with regard to the costs, that what is intended to be given out of the *corpus* in respect of the costs in the Court below are—First, the costs as between solicitor and client of the trustees and of the infants. Those costs are not distinguishable, for the same counsel appeared for the trustees and for the infants. Then such costs of the trustee in bankruptcy and of the representative of the trustee of the settlement as would have been incurred if the summons had been merely for the segregation out of the funds in Court of what was necessary to represent the *corpus* of the trust fund, and to pay over the balance and the income of the *corpus* to the trustee of the settlement. All costs incurred beyond that on this summons by the trustee in bankruptcy or by the representative of the trustee of the settlement, which will include, of course, all costs occasioned by the dispute between them, will have to be borne by the parties to that litigation. I do not think I need add anything more to what has been said by my Lord with regard to the costs of the appeals. That disposes of the three appeals.

STIRLING, L.J., after stating the facts, and that as a conclusion of fact it was perfectly clear that the husband concurred in the breach of trust which was committed by the trustees, continued: Now, what is the effect in point of law of concurrence in a breach of trust? It seems to me that the law is clear. In *Walker v. Symonds*⁷ Lord Eldon said: "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go further, and agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees: but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence." I will pause there to remark that in the present case there are no special circumstances beyond those which I have stated, which, as it appears to me, do not in any way modify the application of the general rule stated by Lord Eldon. In

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the case of *Chillingworth v. Chambers*,⁸ which has already been referred to, Lord Justice Lindley says, "if I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw that loss on him"; and Lord Justice Kay, in the same case, after referring to the passage which I have read from *Walker v. Symonds*,⁷ says this: "This refers only to an attempt by the *cestui que trust* to make the trustee liable for any loss which the *cestui que trust* may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust." And in the case of *Somerest, In re; Somerest v. Poulet*,⁶ a remarkable illustration, as it seems to me, was given of the application of the rule. In that case there was, as there is here, a settlement. The tenant for life under the settlement was very anxious that the trust fund should be invested on a particular mortgage, and he requested the trustees to make that investment. The trustees did so, and it turned out that the property, the subject of the mortgage, was an insufficient security, and the trustees had to make good the loss at the instance of the remaindermen. They then made an application to the Court seeking to put in force the provisions of section 6 of the Trustee Act, 1888, which are substantially the same as those of section 45 of the Trustee Act, 1893. Now that provides that any person who instigates or requests and consents in writing to a breach of trust is liable to have his interest impounded for the purpose of indemnifying the trustee. It was held by the Court of Appeal that the tenant for life did not know that the trustees were committing a breach of trust. He simply asked them to invest in a particular security, but he left it to them to make the proper enquiries as to the nature of the property which was offered as security. Consequently the trustees were held liable for neglect in the discharge of their duties, to which the tenant for life was no party; and it was pointed out by the Court of Appeal further that he was not seeking in any way to get an advantage or benefit to himself at the expense of the remainder-

men, but was simply, as it is put by Lord Davey, seeking to get a good security for the funds. What happened there? It was held that the application to impound any interest in the remaining property failed, but, the trustees having replaced the fund, it was held that they were entitled to interest upon the fund which they had themselves found and replaced, and that the tenant for life had no claim to that, but must, in accordance with the rule, be bound by the result of his own concurrence in the act which the trustees had done.

That being so, we have to apply the law to the present case. In the first place, if the tenant for life had not become bankrupt and the application had been made by him, it is quite clear upon these authorities to which I have referred that he could not in any way attempt to make the trustees liable for a loss which had been occasioned by his concurrence in the payment of the trust funds to his wife; and the trustee in bankruptcy cannot stand in any better position, unless, indeed, he has in some way acquired some new and better right than he would have had simply as trustee in bankruptcy succeeding to the position of a *cestui que trust* who had concurred in a breach of trust. It is suggested, or rather contended, that the trustee in bankruptcy is in a better position by reason of the order to which I have referred of February 22, 1893. In my judgment he is not. It seems to me that the effect of that order was simply to preserve to the trustee in bankruptcy, who declined to assent to that order in any way, such rights as he then had, but not to give him any new or better rights. I think, therefore, that he simply stands in the same position as the bankrupt husband would have been in if no bankruptcy had occurred. Then what is the present position? A fund is in Court of capital and interest, and no decision has been given by the Court, nothing has been decided by the form of the order, as to who is entitled to the interest for the period which I have mentioned. The order directs that in the first instance the payments into Court shall be applied in satisfaction of the capital, and secondly

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of the interest upon an application for that purpose. There has been no application made to the Court as yet. But there the fund is; and it seems to me in that state of things that the right of the legal personal representative of the deceased trustee who had paid the fund in ought to be given effect to. It seems to me that in reality the trustee in bankruptcy is setting up a claim to this interest. It is true that in form the application must be taken to have been made by the legal personal representative of the deceased trustee, and the trustee in bankruptcy is served. But what course does the trustee in bankruptcy take? He appears and resists, and insists on an order being made in his favour, and he has succeeded before the learned Judge in the Court below as to part. In my judgment the legal personal representative is entitled to the fund. The income has not arisen from the original trust fund at all. That trust fund has disappeared by reason of its having been paid over to the wife, who lost it, and that payment was made with the concurrence of the husband. He therefore is precluded from claiming anything from the trustee, and the trustee in bankruptcy is in no better position.

For these reasons I think that the decision of the learned Judge was right as regards that portion of the fund which was known to be applied for the benefit of the wife, but that he ought to have gone on and applied the same rule as regards the balance which the husband stated that he believed was to be reserved for re-investment. I therefore agree that the appeal of the legal personal representative of the deceased trustee should be allowed, and that the cross-appeal of the trustee in bankruptcy should be dismissed. I have nothing to add as to costs.

Order varied.

Solicitors—Allingham & Heys-Jones; Emanuel & Simmonds; Brooks, Jenkins & Co.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.]

FARWELL, J. }
1905.
April 14, 15. }

GOOD, *In re*;
HARRINGTON v. WATTS.

Will—Charitable Bequest—Regiment—Officers' Mess—Gift for Maintenance of Library—Efficiency of Army—Public Benefit—Relief of Taxation—Gift of Houses for Use of Former Officers during their Life—Perpetuity.

A bequest to the officers' mess of a particular regiment for the maintenance of a library for the use of the officers of the mess for ever, is a good charitable gift within the Statute of Elizabeth, on the ground that, the mess being an integral part of the regiment, the gift was directly a public benefit by increasing the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country.

Quære, whether the gift might not also be supported as charitable within the statute on the ground that it would be in relief of taxation in so far as applied to the maintenance of the officers' mess.

A gift of houses for the use of old officers (that is, ex-officers) of a regiment at a small rent during their life is void for perpetuity.

Adjourned summons.

By his will dated May 21, 1900, the testator, Thomas Good, an old non-commissioned officer of the second battalion of the 14th Regiment, gave certain legacies and annuities and then made the following provisions: "I give to the Officers Mess 2nd Battn. 14 Regiment now called the 2nd W.Y.P. of Wales O. Regiment now at Natal all my books and bookcases whatsoever and wheresoever for the use of the officers of the aforesaid Mess only And subject to the aforesaid trust I ask my Trustee to hold the whole of my residuary estate and the investments and income thereof in trust for the aforesaid Officers Mess absolutely and I give them the same accordingly to be invested and left as at present invested and the dividend and annual income only arising therefrom be paid to the aforesaid Officers Mess to maintain the aforesaid library and renewal of books for ever Should there be an overbalance at any time the Colonel and any two officers of the afore-

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said Regiment serving at the time may spend the same in the purchase of plate for the use of the aforesaid Officers Mess only Should the officers consider the library a burden it may be left at the Depot for use But the giver hopes it will always be in the Mess or ante-room of the 2nd Batt. 14th Regt. of Foot his old happy home." The testator then proceeded to appoint the plaintiff Colonel Harington, a former commanding officer of the same regiment, executor of his will and trustee for carrying into effect the trust, and the will proceeded: "my two houses at Ryde for use of old officers of the regiment at a small rent during their life"; and the testator finally appointed the plaintiff and the officer commanding at the date of his death executors of his will.

The testator died in September, 1904, and his will was duly proved by the plaintiff and the defendant Colonel Watts, who was the commanding officer of the regiment at the time of the testator's death. The gross value of the estate was over 7,000*l.*, the houses at Ryde, which were leasehold, being worth between 300*l.* and 400*l.*

The plaintiff took out this summons for the determination of the questions whether the above-mentioned bequest of the testator's residuary estate was a good charitable trust or was otherwise a valid and effectual gift, or whether the said residuary bequest was void for remoteness, and whether the direction relating to the houses at Ryde constituted a valid and effectual gift or was void for remoteness.

The official solicitor was appointed to represent the testator's next-of-kin.

In his affidavit in support of the summons, the plaintiff stated his view of the character of the officers' mess as follows: "The Officers Mess consists of from 12 to 30 members and is of the nature of a club and owns property consisting of plate, furniture, books, crockery, and other articles, and I believe that the officers for the time being comprising the said Mess can by an unanimous resolution dispose of all or any part of the property of the said Mess." On the other hand, Colonel Browne, the Assistant Adjutant-General in the War Office, stated in his affidavit that it was not the fact that the officers'

mess was of the nature of a club, and in his opinion the officers for the time being could not properly dispose of the property of the mess, which, like all other regimental officers' messes, was constituted under the King's Regulations, a copy of which he exhibited. Colonel Browne further stated as follows: "Every Officer of the Regiment has to be a member thereof and as such has certain specified privileges and certain specified obligations. The Mess is, in fact, a Regimental Institution as indissoluble as the Regiment itself, and its plate and other property are in no sense the property of its members, but belong to the Institution in trust for its members for the time being." "Part of the Mess equipments in divers Regiments already consist of a Library and it has been more than once considered by the Military Authorities whether a Library should not be made a part of the necessary equipment of every Officers Mess on the ground that access to books and particularly books dealing with military matters is conducive to military efficiency."

The following numbers of the King's Regulations and Orders for the Army were referred to at the hearing:

"931. Every officer of the corps is to be a member of the regimental mess. The commanding officer is responsible that all the regulations relating thereto are observed. He will also ensure that the mess is conducted without unnecessary expense or extravagance, and must by his personal example and advice encourage economical habits and careful management."

"932. Every officer is personally to pay to the mess president his mess bill and all authorized subscriptions on or before the 7th of each month, and the president of the mess committee will report in writing to the commanding officer any omission to do so. The officer concerned will then be called upon for an explanation. If the result be unsatisfactory, and the account is not settled by the 14th of the month, the circumstances will be reported to the general commanding."

"934. All officers present at regimental headquarters, except married officers, are to be dining members of the mess. When their wives or families are absent,

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married officers are also to become dining members."

"935. Upon the arrival of a unit at a new station, the commanding officer will, if a civilian mess-man is employed, take steps to caution tradesmen that the officers are not responsible for debts incurred by, or on behalf of, the mess-man. When a non-commissioned officer is employed as caterer, the mess committee will be responsible for pecuniary transactions with tradesmen."

"936. A sergeant is allowed to act as mess-man or caterer or superintendent of the mess-establishment, but no non-commissioned officer is to be employed in any menial capacity about the mess."

"939. The whole of the mess property, other than that supplied by the War Department, will be insured against loss by fire or shipwreck, the premiums being made a charge against the mess fund."

"940. Presents of plate from officers on first appointment, on promotion, or on other occasions, are prohibited."

"943. When a unit furnishes a detachment of not less than three companies, a proportion of the mess fund, plate, and equipment is to be assigned for its use."

"958. When an officer is removed from one unit or corps to another by transfer, exchange, posting, or promotion, his subscription will be due to his former unit or corps until the date of his actually quitting it. Subscriptions during the period which may intervene between an officer quitting one unit or corps and joining another will be due to the unit or corps to which he actually belongs, according to the date given in the *London Gazette*. The subscriptions will be paid in the rank with the pay of which the officer is actually credited."

"1166. Reference libraries, for the use of officers, are established at certain military stations, and supplied with standard military works. These libraries will be in charge of the staff officer referred to in para. 1163, who will inspect all the books about the 15th May of each year, and will send a report, accompanied by a list of the books in his charge, and any remarks that he may have to make concerning their condition, &c., to the general officer commanding, who will then report

the state of the library, and the names of any books he may wish added, to the War Office."

The following numbers of the Regulations for the Allowances of the Army were also referred to:

"527. Mess allowance is granted in aid of the maintenance of regimental messes, so as to enable every officer to become a member of the mess. Except the expense of a reasonable supply of mess hardware, and utensils, the whole sum received from the public should be applied to the reduction of the daily expenses of the mess and for the comfort and accommodation exclusively of the officers, and more particularly of the junior officers, who attend it."

"671. Library allowance is granted for the provision, repair, &c., of books, the supply of newspapers, periodicals, and games, and the pay of the librarians in garrison and regimental libraries and reading rooms; the fees and subscriptions being appropriated in aid of the expenses, instead of being credited to the public."

Upjohn, K.C., and *J. W. Manning*, for the plaintiff, stated the case.

Stafford Crossman, for the defendant Watts.—In the first place, this is an absolute gift of the library and residuary estate to the officers for the time being representing the mess of the regiment. The words "and I give them the same accordingly" shew that it was a gift to the individuals constituting the mess, not to the mess itself. The subsequent words are an attempt to graft an invalid trust on an absolute gift and are not effectual—*Hancock v. Watson* [1901].¹ If, however, the subsequent words are valid, then the gift is a valid charity. The gift of the houses is a good gift during, at any rate, the lives of the old officers of the regiment now alive, and the life of the survivor of them.

R. J. Parker, for the Attorney-General.—This gift of residue is within the preamble to the Statute of Elizabeth, being covered by the phrase "aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes." A gift for the raising of

(1) 71 L. J. Ch. 149; [1902] A.C. 14.

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soldiers was always held to be charitable, because it relieved the districts responsible for furnishing the local militia. That idea has been carried to the extent that a gift to the Chancellor of the Exchequer for the relief of the national revenue has been held to be a charity, inasmuch as the gift is really in relief of the general tax—*Newland v. Att.-Gen.* [1809]² and *Nightingale v. Goulburn* [1848].³ Moreover, the gift in the present case also falls within the fourth class which Lord Macnaghten gives in *Income Tax Commissioners v. Pemsel* [1891],⁴ being for a general public purpose beneficial to the community. In *Stratheden and Campbell, In re; Ali v. Stratheden and Campbell* [1894],⁵ a gift for the benefit of a volunteers corps was regarded as a charitable bequest, although in that particular case the gift was to arise upon a condition which transgressed the rule against perpetuities, and was held void. In *Stephens, In re; Giles v. Stephens* [1892],⁶ the gift of a prize for national rifle-shooting was held to be charitable. In *Nottage, In re; Jones v. Palmer* [1895],⁷ however, the gift of a prize for the promotion of yachting was held not to be a good charity; for although it might indirectly increase the efficiency of the nation in the matter of shipping, yet that was not the object of the gift, but only an indirect consequence of it. The officers' mess is not, as stated in the plaintiff's affidavit, a club, but is an integral part of the regiment, and is a compulsory, and not a voluntary, affair. The King's Regulations bear that out, and also shew that the mess is a continuing thing quite independent of the volition of the existing officers. A gift to the mess, therefore, would be equally effective as a charitable gift as a gift to the regiment; and there seems to be no reason why a gift for the purpose of increasing the efficiency of the army should not be a good charitable gift.

Jenkins, K.C., and *T. T. Methold*, representing the heir-at-law and next-of-kin of the testator.—This is a gift of residue for the benefit of the mess as a continuing body, not of the individual members of it for the time being. This gift for the purpose of maintaining the library and renewal of books for ever is not charitable. Lord Macnaghten's definition is wide enough to include all charities, but certain objects might come within it which would not be a charity. Gifts for all public purposes are not necessarily charitable. The case of *Carme v. Long* [1860],⁸ which was the Penzance Library case, is an illustration of that. That was not for the benefit of the public at large so as to come within the meaning of Lord Macnaghten's definition, and is thus distinguishable from the case of a gift to the Chancellor of the Exchequer for the reduction of the National Debt. It cannot in the circumstances be said that the gift in this case will benefit the nation at large; it is only a gift for the benefit of the officers for the time being of a particular regiment. The Government subsidy to the mess cannot properly be applied in buying books. Whether the authorities may hereafter make a library a necessary part of the equipment of an officers' mess or not, they have not yet done so; and therefore, although they may consider it would contribute to the efficiency of the army and so be a public benefit, still, as it is not at present a duty that the nation undertakes, no expense would be saved to the nation by this present gift, which therefore does not fall within the principle making it a charity. No doubt it is for the benefit of the nation that officers should be well educated, and books may be useful in educating officers, but it is too far-fetched to say that therefore a gift of books to the officers of a particular mess is a good charitable gift.

In commenting on Lord Macnaghten's fourth class, Lindley, L.J., in *Macduff, In re; Macduff v. Macduff* [1896],⁹ explained that there might be some purposes of public general utility which might be charitable, and some which might not.

(2) 3 Mer. 684.

(3) 16 L. J. Ch. 270; 17 L. J. Ch. 296; 5 Hare, 484; 2 Ph. 594.

(4) 61 L. J. Q.B. 265; [1891] A.C. 531.

(5) 63 L. J. Ch. 872; [1894] 3 Ch. 265.

(6) 27 L. J. N.C. 130; W. N. (1892), 140.

(7) 64 L. J. Ch. 695; [1895] 2 Ch. 649.

(8) 29 L. J. Ch. 503; 2 De G. F. & J. 75.

(9) 65 L. J. Ch. 700; [1896] 2 Ch. 451.

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In this present case, the benefit to the community is not sufficiently direct and clear to make it possible to bring it within the fourth head. The War Office makes no provision for mess libraries, and so this would not be charitable on the ground of saving national expense.

The gift of the houses at Ryde is void for perpetuity, and with regard to them there is an intestacy.

R. J. Parker replied.

FARWELL, J.—I think that it is plain from the affidavit of the Assistant Adjutant-General that the mess is an integral portion of the regiment, and not a mere club as has been suggested, and in my opinion this gift is not a gift to officers individually, but is a gift to the mess for the time being.

Now the real question is whether a gift to the mess of a fund the income of which is to be applied in perpetuity to keep up a library for the officers' mess of the regiment is a charitable gift within the Statute of Elizabeth. I think that probably every one will agree with Lord Justice Lindley's criticism in *Macduff, In re*,⁹ of Lord Macnaghten's judgment in *Income Tax Commissioners v. Pomsel*,⁴ that he did not intend to say that every object of public utility is necessarily a good charity; but there is no doubt that many objects are charitable because they are of public utility. Some objects of public utility are charitable, though not all, and the question is whether within the purview of the Statute of Elizabeth a particular object is or is not charity.

On behalf of the Attorney-General the argument was put on two grounds—namely, that anything that assists the efficiency of the army is charitable within the meaning of the Act, because it is for a public purpose—a purpose in which the public is interested. The other ground was that it would also come within the last clause of the preamble to the Statute of Elizabeth—"Aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes"—because it would relieve taxation in so far as it is applied to the maintenance of the officers' mess. The difficulty of applying the second portion is that at

present, at any rate, looking at the Regulations I have before me, there is no provision made for payment by the Government in aid of the library of the mess, although the Government does make allowances in aid of the supply of other things to the mess, such as hardware, furniture, and other appliances.

I have come to the conclusion that this is a good charitable gift on the former ground—namely, that it is a direct public benefit by increasing the efficiency of the army in which the public is interested, not only financially, but also for the safety and protection of the country. I am disposed to think it might be supported on the other ground also, having regard to the fourth paragraph of the Assistant Adjutant-General's affidavit, which states, "Part of the mess equipment in divers regiments already consists of a library, and it has been more than once considered by the Military authorities whether a library should not be made a part of the necessary equipment of every Officers Mess on the ground that access to books, and particularly books dealing with military matters, is conducive to military efficiency." I do not think I am bound to consider whether at the moment it is so, if there is any reasonable probability that it will be provided in the future; but I prefer to decide the point on the former ground, because that appears to me to come within the principle on which the Court has acted in applying this very difficult question of the Statute of Elizabeth. Of course I desire to avoid any misunderstanding. I am not suggesting for a moment that the officers are objects of charity. It is the public, not the officers, who get the benefit by the better means put at the disposal of the officers to make themselves efficient servants of the King for the defence of their country. On that ground I think it may be upheld.

Mr. Justice Kekewich has held that a prize for shooting is a good charitable gift, and Mr. Justice Romer has also considered that a gift to a volunteer corps was a good charity. I think it would be difficult to say that money to be expended in terms in some specific way in order to increase the efficiency

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of the regiment in a particular mode would not be a good charity. This, to my mind, does increase the efficiency of the army by giving the officers greater opportunities of providing themselves with literature. It is suggested that the literature that they buy may not necessarily be confined to military literature, but I cannot regard that as a consideration in this case any more than the Courts have considered that in the case of a provision for a public library the library may contain rubbish as well as useful books. I must assume that the books bought will be books of merit; and so long as they are books of merit, they need not necessarily be confined to military literature. After all, an officer is all the better equipped if, in addition to being well instructed in the military art, he can speak several languages, and if he knows the history of his own nation and many other nations. I should be sorry to have to hold that any gift which tends to educational equipment in that way is not a charitable gift. I will declare that the gift of the residuary estate is a good charitable gift, and I must direct a scheme. With regard to the two houses at Ryde, I think that by "old" the testator meant "former" officers, not "aged" officers, as a young man may be called an old Etonian, and that, therefore, the gift fails altogether. The testator has in fact given the whole of his residuary estate to his trustees in trust for the officers' mess, and he directs it "to be invested and left as at present invested," to provide money for the library. Then the testator gives directions as to these houses — "my two houses at Ryde for use of old officers of the regiment at a small rent during their life." It seems to me that the houses form part of the residue, but are to be devoted to this particular purpose. Unless the houses pass as part of the residue, they are not given by the will at all. I think that the testator intended to dispose of these houses as part of his residuary estate, and that he meant them to be a perpetual endowment for the use of former officers of the regiment at a small rent during their lives. On that ground, I think that the gift fails, and that there is an intestacy. There will

have to be an enquiry as to who are the testator's next-of-kin.

Solicitors—C. E. Beal, agent for J. Robinson, Ryde; Treasury Solicitor; Official Solicitor.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} COHEN & COHEN, <i>In re</i> (No. 2).
ROMER, L.J.	
STIRLING, L.J.	
1905. May 17.	

Solicitor — Costs — Taxation — Third-party Order—Compromise of Litigation—Agreement to Pay Costs—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38.

On a taxation at the instance of a third party under section 38 of the Solicitors Act, 1843, according to the rule established by Longbotham & Sons, In re (73 L. J. Ch. 681; [1904] 2 Ch. 152), the Taxing Master is right in disallowing, as against the third party, any unusual and unnecessary costs, though incurred by the special instructions of the person chargeable, which, apart from such special instructions, would not have been allowed against the person chargeable on an ordinary taxation between solicitor and client; and it makes no difference whether the liability of the third party arises out of an implied contract, as in the case of mortgagor and mortgages, or under an express agreement by the third party to pay the costs, not amounting to a complete indemnity to the person chargeable.

Holliday and Godlee, *In re* (58 L. T. 301), overruled.

Appeal against a decision of Swinfen Eady, J.

Mrs. Cotton brought an action in the King's Bench Division against Mr. Edwardes, and Mr. Edwardes brought an action in the Chancery Division against Mrs. Cotton. In the course of these actions Mrs. Cotton had authorised her solicitors, Messrs. Cohen & Cohen, to incur

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unusual and unnecessary expenses which she was aware that she would have to pay herself, and which, it was stated, had been allowed against Mrs. Cotton in a previous partial taxation of an earlier bill of costs between solicitor and client, in which taxation, however, no certificate had been made, and which had not been proceeded with.

On January 12, 1904, an agreement was made between Mrs. Cotton and Mr. Edwardes that the actions should be stayed and that Mr. Edwardes should pay Mrs. Cotton's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed."

The solicitors delivered a bill to Mr. Edwardes which included these unusual and unnecessary charges. Mr. Edwardes then obtained the usual third-party order for taxation under the Solicitors Act, 1843, s. 38. The Taxing Master in taxing the bill under this order disallowed these extra costs, and on a summons by the solicitors to review the taxation Swinfen Eady, J., made an order on December 14, 1904, sending it back to the Taxing Master to make a further certificate, not being satisfied that the Taxing Master had taxed the bill on a right principle, which his Lordship stated, when once the items for which the third party was liable were ascertained, to be as between the solicitor and his client and not as between the solicitor and the third party.¹ The Taxing Master, when the matter came before him under this order, adhered to his former certificate, which was re-filed on February 16, 1905. He gave the following reasons:

"In pursuance of the order herein dated December 14 1904 I have been attended by the solicitors for the Applicant and by counsel for the Respondents and have reviewed and reconsidered my former taxation in respect of the items mentioned in the objections referred to in the said order.

"I have carefully read and considered the judgment of Mr. Justice Swinfen Eady given herein on December 14 1904, and I say that I have taxed the said bill of costs

in relation to the matters in dispute as between the solicitors and their client, in so far as in my judgment and discretion such costs came within the scope of the liability of the third party. The agreement between the parties to pay solicitor and client costs is not an indemnity but means fair reasonable and proper costs as between solicitor and client shall be paid by the third party, leaving all costs that are luxurious, incurred through over caution, unnecessary or unreasonable, to be paid by the client.

"I have therefore taxed and allowed the bill of costs with the exceptions lastly mentioned as between solicitor and client, and in the exercise of my discretion (where I have such discretion) and I have allowed in the said bill the items that I consider the third party is liable to pay."

The solicitors then took out a summons asking (a) that the Taxing Master's certificate filed on July 13, 1904, and re-filed on February 16, 1905, might be varied or discharged on the ground that the taxation had proceeded on a wrong principle and had disallowed items properly charged; and (b) that the taxation might be reviewed in respect of the objections carried in before the Master.

The objections, which are stated in the previous report, related to 111*l.* 9*s.* 3*d.* taxed off the whole bill (amounting with disbursements to 486*l.* 12*s.* 2*d.*). As instances, the Taxing Master had disallowed items relating to (a) consultation with leading counsel to settle statement of claim; (b) consultation with leading counsel to advise on evidence; (c) a copy of a particular edition of a certain play which gave rise to the questions in dispute in the first action. He had also reduced a charge of 5*l.* 5*s.* for "instructions for brief" on a motion in the Chancery action to a nominal amount, although it was stated that, after hearing the parties, he had allowed the 5*l.* 5*s.* to stand in the earlier bill, the taxation of which had not been proceeded with.

Swinfen Eady, J., dismissed the application. He said: "This is a renewed attempt to obtain the allowance of certain very heavy charges. The Master has taxed the bill, and, as appears from his certificate, he has proceeded on the right

(1) See *Cohen & Cohen, In re, ante*, p. 192; [1905] 1 Ch. 345.

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principle—that is to say, he has taxed the bill as between the solicitor and client relating to the matters in dispute in the two actions. He has disallowed certain items as being outside the agreement for which the third party is not liable, and moreover as being excessive and luxurious. It has been contended that the Master ought to have allowed these items, and that practically every item should be allowed, this being an indemnity taxation. In my opinion that is not so, and I have only to read again what I said on the former occasion—namely, ‘In my opinion this is not an indemnity taxation, and it does not follow that because on this taxation items for which the third party is not liable are disallowed, those items have not been authorised by the client. It may well be that the solicitors will be entitled to recover them against their client, but the liability of the third party is not enlarged or increased by his obtaining the third-party order.’ I have nothing to add to that.”

The solicitors appealed, having obtained leave from the Court of Appeal.

Macnaghten, K.C., and *H. Greenwood*, for the appellants.—Whether the agreement does or does not amount to a complete indemnity is immaterial. The third party, by electing to take advantage of section 38, puts himself into the shoes of the party chargeable, and as to any items of work within the scope of the agreement he cannot take any objection which is not open to the party chargeable. Therefore he cannot object to charges which the party chargeable has expressly authorised, even though the party chargeable could not recover them from him if the party chargeable had paid the bill and brought an action to enforce the agreement. A contrary view would place the solicitor in a very difficult position, involving two taxations on different principles against different persons in respect of the same work under precisely similar orders to tax.

The language of section 38 shows that the taxation is to proceed on the same footing in all respects as if it had been obtained by the party chargeable under section 37, and the petition for such an

order contains a submission to pay what the client owes. The decision of North, J., in *Holliday and Godlee, In re* [1888],² where, as here, there was an express agreement, is a direct authority to that effect.

[ROMER, L.J.—The Court of Appeal decided the opposite in *Longbotham & Sons, In re* [1904].³]

Longbotham & Sons, In re,³ and the cases which were there approved of—*Negus, In re* [1894],⁴ and *Gray, In re* [1900]⁵—were all cases where the work charged for was not within the scope of the third party's legal liability. They were all cases of implied agreement, and the items were not such as the implied agreement imposed on the third party. In the present case the costs undoubtedly relate to the subject-matter of the express agreement, the matters in dispute in the two actions; and that being so, there is no authority for saying that the third party can object to their reasonableness if he proceeds under section 38, which he is under no obligation to do. *Brown, In re* [1867],⁶ as appears from the facts stated in the report, was really a case under section 39, the language of which is quite different from that of section 38, and does not put the *cestui que trust* or residuary legatee in the same position as the person chargeable.

[VAUGHAN WILLIAMS, L.J., referred to *Cordery on Solicitors* (3rd ed.), p. 328.]

Even if that case be a decision under section 38 it is distinguishable.

We also contend that, having regard to the surrounding circumstances and the nature of the litigation between the parties, the items objected to are reasonable, and would have been allowed if the client had paid the bill and brought an action against Mr. Edwardes on his agreement, although we admit that in such an action only fair and reasonable charges would be recoverable. On this view it becomes an agreement to indemnify, quite apart from the effect of the order under section 38.

(2) 58 L. T. 301.

(3) 73 L. J. Ch. 681; [1904] 2 Ch. 152.

(4) 64 L. J. Ch. 79; [1895] 1 Ch. 73.

(5) 70 L. J. Ch. 133; [1901] 1 Ch. 239.

(6) 36 L. J. Ch. 842; L. R. 4 Eq. 464.

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Cave, K.C., and *A. F. Peterson*, for the respondent, in the course of the argument for the appellants, referred to *Chapman, In re* [1882],⁸ *Blythe & Fanshawe, In re* [1882],⁹ and *Broad & Broad, In re* [1885],¹⁰ but were not themselves called on to argue.

VAUGHAN WILLIAMS, L.J.—In my judgment the decision of Mr. Justice Swinfen Eady was quite right, and ought to be affirmed. In substance, counsel for the appellants divided their arguments into two parts. Their first argument is really upon the construction of this agreement. They have invited us, as they invited Mr. Justice Swinfen Eady, to construe this agreement as, according to its words, an indemnity agreement. They pressed that to a certain extent upon us. I do not think that the leading counsel urged upon us—certainly he did not do so very strenuously—that the items disallowed by the Taxing Master could come within the agreement, unless we acquiesce in his contention that this is an indemnity agreement. The junior counsel did say something to suggest that, even if we construed this agreement otherwise than as an indemnity agreement, the decision of the Taxing Master would not be justified. But it does not seem to me that really that point was discussed at all before Mr. Justice Swinfen Eady, and it is a matter on which the decision of the Master cannot be seriously impeached as a decision on a question of fact. I look for one moment at the agreement to see whether it is an indemnity agreement. Paragraph 4 contains a passage by which Mr. Edwardes agreed to pay Mrs. Cotton's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." In my judgment that is not an indemnity agreement. I think in construing these words naturally, according to their plain meaning, they were not intended to include any costs which Mrs. Cotton might have chosen to incur relating to the matters in dispute, but only such costs as were

reasonable and proper and necessary in the actions. I do not propose to say anything more upon the question of the construction of the agreement. That is my view. It is manifestly not an indemnity.

Taking that to be so, counsel's second point was that, by electing to tax under section 38 of the Solicitors Act, 1843, a third party is precluded from objecting to any item which he could not be called upon to pay apart from the section or apart from the scope of the agreement. We have got rid of the question of the scope of the agreement; so the argument comes to this—that the effect of section 38 is that a third party who obtains an order for taxation under that section alters the nature and scope of his liability under the agreement. In substance that is what was contended before us to-day and, so far as I can make out, before Mr. Justice Swinfen Eady. The learned Judge says in his judgment in *Cohen & Cohen, In re*,¹ "It is quite clear from the decision in *Gray, In re*,⁵ the principle of which was affirmed by the Court of Appeal in *Longbotham & Sons, In re*,³ that where a third party obtains an order to tax it does not alter the nature or enlarge the scope of his liability." I entirely assent that that was the decision in *Longbotham & Sons, In re*,³ and I say again, as I said in that case, that we were merely following that which had been laid down by Mr. Justice Cozens-Hardy in *Gray, In re*,⁵ and by Mr. Justice Chitty in *Negus, In re*.⁴ What was laid down by Mr. Justice Cozens-Hardy in *Gray, In re*,⁵ was as follows: "With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third party order to tax." He had referred to the judgment of Mr. Justice Chitty in *Negus, In re*,⁴ and read a long passage from that judgment beginning: "The other point remains, viz., that this is a third party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not

(8) 52 L. J. Q.B. 75; 10 Q.B. D. 54.

(9) 52 L. J. Q.B. 186; 10 Q.B. D. 207.

(10) 54 L. J. Q.B. 573; 15 Q.B. D. 252.

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prevent the taxing master from considering the question of the liability of the third party." Speaking for myself, I do not think it is necessary to say any more. I agree with the judgment of Mr. Justice Swinfen Eady. I think his judgment followed—as indeed he said it followed—our own decision in *Longbotham & Sons, In re*,³ and I really regard the argument which has been addressed to us to-day as an attempt to persuade us that we were wrong in that case.

I will add a word upon *Gray, In re*.⁵ It is said that in that case Mr. Justice Cozens-Hardy recognised the decision in *Holliday and Godlee, In re*.² I cannot agree with that suggestion. In *Gray, In re*,⁵ Mr. Justice Cozens-Hardy, in dealing with the case before him, said: "In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The master has also struck out from the bill the costs relating to the counterpart lease, although such costs were clearly proper as between the solicitors and their client. How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think the true view is that the third party order does not alter the nature or enlarge the scope of the liability upon the existence of which the order is based." The learned Judge said that just after he had been dealing with the judgment of Mr. Justice North in *Holliday and Godlee, In re*²; and it seems to me therefore quite plain that what he was doing was simply to distinguish *Gray, In re*,⁵ from *Holliday and Godlee, In re*,² upon a ground which brings *Gray, In re*,⁵ and also the present case within our decision in *Longbotham & Sons, In re*.³ In my judgment it does not make any difference whether, as in *Longbotham & Sons, In re*,³ the liability is that of a mortgagor and mortgagee, which is not the result of an agreement *inter partes*, but an agreement implied by law, or whether the obligation is that which arises from an agreement *inter partes*. In

either case, if there is an obligation limited by an agreement implied by law or *inter partes*, the fact that the third party obtains an order under section 38 does not alter his liability. The appeal must be dismissed with costs.

ROMER, L.J.—I also am of opinion that this appeal fails. On the question of the construction of the agreement I have come to the conclusion that Mr. Edwardes did not contract with the lady to indemnify her against all sums which she might have to pay, nor against all the liabilities which she might have incurred to her solicitors. The agreement speaks of costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." In my opinion the proper construction of the agreement is that Mr. Edwardes made himself liable for all costs which would ordinarily be allowed between solicitor and client on taxation. In my view he did not make himself liable for items which could not be properly charged by the solicitor against his own client except by virtue of some special agreement. Test it in this way. Suppose she had agreed to pay 50*l.* to the solicitors as a retaining fee, and it was paid under circumstances which precluded her from getting it back again, could it be said that this agreement made Mr. Edwardes liable to pay such an item as that? To my mind, no. He has contracted to pay solicitor-and-client costs to be taxed in the ordinary way without regard to any special arrangement which may have extended the ordinary client's liability.

That being so, on the construction of the agreement Mr. Edwardes was a third party, and entitled to an order under section 38. Since the full discussion of these orders in *Longbotham & Sons, In re*,³ and of the cases there cited, it is clear at the present day that a third party obtaining such an order does not make himself liable to pay such items as I have referred to, which could not be charged for by the solicitors except by virtue of a special arrangement. To hold otherwise would be to prevent a third party from obtaining the benefit of

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section 38. Either he would have to forego taxation, or, if he obtained it, would find himself liable to pay sums which could not be contemplated by him, and for which as third party he was not liable. Applying the general principle of *Longbotham & Sons, In re*,³ to this case, it is clear that the items disallowed by the Taxing Master were items for which Mr. Edwardes was not liable. They were items for which the lady would not have been liable but for some special agreement. Unless the solicitors had explained these items to Mrs. Cotton and shewn her that they could not be properly charged against her and would not be allowed on a party-and-party taxation and obtained her special authority, these items could not have been charged against her by her solicitors, and therefore the third party was not liable under the agreement, and his liability was not increased because he had taken advantage of the order under section 38.

That ends the case; but I should like to say a word on the so-called hardship to solicitors which may be caused by this decision. The hardship would be the other way, to my mind, if we decided differently. It would be a great hardship if a person who had made himself liable to pay solicitor-and-client costs of the ordinary kind could, by taking an order under section 38, find himself liable to pay sums which he knew nothing about—sums only chargeable against the client by virtue of some special agreement. There, to my mind, would lie the hardship. On the other hand, I see no hardship on the solicitors. They have always the liability of their own client to fall back upon. Every solicitor knows his liability to have his bill of costs taxed. His bill is always to be taxed under the third-party section, and if he puts into his bill items which cannot be charged against the third party, it is no hardship on him if they are not allowed; nor is it any hardship that he cannot be allowed extra items—items which can only be allowed by special agreement where his bill is taxed between solicitor and client.

STIRLING, L.J.—There are two points to be considered—first, the construction

of the agreement entered into with the third party; and secondly, whether the fact that he has obtained an order under section 38 makes any difference. The agreement is that the third party is to pay the client's costs "as between solicitor and client relating to the matters in dispute in the said two actions, such costs to be agreed or taxed." To my mind that means proper and reasonable costs relating to the matters in dispute, and does not extend to costs which the solicitors could only recover from their client if they shewed that they had obtained proper authority from her after giving her an explanation.

Then does the fact that the order was made under section 38 makes any difference? Prior to the decision in *Longbotham & Sons, In re*,³ there was a great deal to be said on that question, but I understand that that decision was intended to follow the law laid down in *Gray, In re*,⁵ where it was said, "even on a third-party taxation the Court is bound to look at the nature of the items and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third-party order to tax." That being the view which I take, I think that the judgment of Mr. Justice Swinfen Eady was right, and that the appeal fails.

Appeal dismissed.

Solicitors—Cohen & Cohen; Slark, Edwards & Co.

[Reported by A. Cordery, Esq.,
Barriater-at-Law.

KEKEWICH, J. } TAPP AND LONDON AND
1905. } INDIA DOCKS CO.'S
May 12. } CONTRACT, *In re*.

Vendor and Purchaser—Title—Settlement—Investment Clause—"Securities"—Power to Vary or Transfer—Purchase of Ground-rents—Implied Power to Sell—Trustees for Purposes of Settled Land Acts.

Under a marriage settlement the trustees were directed to stand possessed of certain scheduled shares, stock, and securities upon trust at any time, with the usual consents, to sell the same and invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature." The trustees purchased freehold ground-rents, and in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of the Settled Land Acts:—Held, that the word "securities" in this settlement meant anything to be purchased under the power, and that, having regard to the power to vary and transfer the "securities" the trustees had power to sell the ground-rents, and were consequently trustees for the purposes of the Settled Land Acts.

By a marriage settlement dated April 13, 1887, and made on the marriage of William Munro Tapp with Kate Garrett Grimwood, it was declared that the trustees therein named should stand possessed of the shares, stock, and securities specified in the schedule thereto, and the income thereof, upon trust to permit the same to remain in their then present state of investment, or at any time or times, with the consent in writing of the husband and wife, to sell or realise the same or any part or parts thereof, and invest the moneys produced thereby in any of the public stocks or funds or Government securities of the United Kingdom, or India, or any colony or dependency of the United Kingdom, or upon mortgage of freehold, copyhold,

leasehold, or chattel real securities in England or Wales, or in the purchase of freehold ground-rents, or in guaranteed or preference stocks or debentures or debenture stock of any railway company or municipal body in the United Kingdom, or in the shares or stocks or securities of any railway in India, or upon the first mortgage bonds or debentures of any railways in the United States of America paying a dividend on their original stock, with power from time to time, with such consent as aforesaid, "to vary or transfer such stocks funds shares or securities into or for others of the same or a like nature." W. M. Tapp was tenant for life of the trust funds under the settlement.

On May 27, 1898, the trustees of the settlement, with the consent of the husband and wife, purchased the freehold ground-rents issuing from the premises known as 167-185 (odd numbers only, both inclusive) Drew Road, Silvertown, North Woolwich; and on May 24, 1899, the trustees, with the like consents, made a further purchase of the ground-rents issuing from Nos. 187-193 in the same road, and all the said premises were duly conveyed to the trustees.

On December 16, 1901, the London and India Docks Co., as authorised by the London and India Docks Co. (New Works) Act, 1901, gave notice to the trustees to treat for the purchase of the premises Nos. 167-193 Drew Road. On February 15, 1905, an agreement was made between W. M. Tapp, in exercise of his statutory power as tenant for life under the settlement, for the sale of the premises in question to the London and India Docks Co. An abstract of title was delivered, and the purchasers objected that the trustees of the settlement of April 13, 1887, were not trustees for the purposes of the Settled Land Acts, and that their power of sale was limited to stocks, funds, shares, and securities, and did not extend to ground-rents purchased by them outright. To this objection it was replied that the trustees' power of sale extended to the investments representing the trust funds. A summons was taken out by the vendor to have this question determined.

TAPP AND LONDON AND INDIA DOCKS Co.'s CONTRACT, IN RE.

Paynter (J. W. Greig with him), for the summons.—The word “securities” includes these “freehold ground-rents,” which there was express power under the settlement for the trustees to purchase. The word has been construed in a wide sense as synonymous with “investments” in the case of *Gent and Eason's Contract, In re* [1905].¹

The power to sell arises by virtue of the power in the settlement to “vary or transfer securities.” Having this power to sell, they are trustees for the purposes of the Settled Land Acts.

C. A. Turner, for the purchasers.—The meaning of “securities” has been in effect defined in this settlement, and cannot be enlarged. There is no power to sell real estate at all. The case of *Gent and Eason's Contract, In re*,¹ was the case of a will, and the words in a settlement will be construed more strictly. The power to vary “securities” will not give a power to sell ground-rents, which are not “securities” strictly so called. The case referred to is distinguishable. Here all the words point to funds of a personal character. *Rayner, In re; Rayner v. Rayner* [1903],² which was followed in *Gent and Eason's Contract, In re*,¹ by Farwell, J., is distinguishable also on similar grounds.

KEKEWICH, J.—The purchasers have been well advised in taking the opinion of the Court upon this point, as it affects the title of the property which they are purchasing; but I have no doubt myself that they will get a good title to it, so far as this point is concerned. What the word “securities” means in any particular instrument must depend mainly upon the construction of that instrument. The word is often used loosely. I do not think the question here depends upon the exact meaning of the word “securities” by itself. The whole settlement must be looked at in order to see what it was intended that the trustees should do. The settlement provides that the trustees are to hold the shares, stock, and securities mentioned in the schedule, and they are to vary such securities. Then the trustees

are directed to sell or realise the same, or any part or parts thereof, and invest the proceeds. In the investment clause the word “securities” occurs; and after stating various Government funds, the clause goes on: “or upon mortgage of freehold copyhold leasehold or chattel real securities in England or Wales.” It is quite clear that a mortgage of freeholds or leaseholds as a security was intended to be covered. If the trustees were not authorised to invest upon the security of freehold ground-rents, of course they would not have been justified in such a purchase; but they were expressly authorised to invest in the purchase of freehold ground-rents and divers other things. There is a long and elaborate list of investments, and then the settlement goes on to give the trustees power from time to time with such consent as aforesaid, “to vary or transfer such stocks funds shares or securities into or for others of the same or a like nature.” That must include the shares, stock, and securities mentioned in the schedule, and it must also include the specified things in which they are at liberty to invest, and, amongst other things, the freehold or leasehold mortgages. If that is so, why not also the freehold ground-rents which they have purchased under the power in the settlement?

Then it is said that a freehold ground-rent is not a “security.” In one sense, no doubt, it is not, accurately speaking. A man who invests upon ground-rents is not investing upon a security; yet, apart from a lawyer's point of view, a man who invests on ground-rents is securing so much a year in return for his money. I think it is not an uncommon thing for a man to say, “I have invested my money in freehold ground-rents which bring me in 6 per cent.” He is not speaking in language of grammatical accuracy, but in common parlance he speaks of a security. It is not particularly good drafting in this settlement, but I cannot doubt that the “securities” to be varied mean anything to be purchased under the power, including freehold ground-rents. Here, therefore, I have an instrument which seems to me to give a power to the trustees to sell anything that they have purchased under the power. They have

(1) *Ante*, p. 333; [1905] 1 Ch. 386.

(2) 73 L. J. Ch. 111; [1904] 1 Ch. 176.

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purchased under the power, and they can sell. Having the power of sale under the settlement, as regards these freehold ground-rents they are trustees for the purposes of the Settled Land Acts, and there will be a declaration accordingly.

Solicitors—Tapp, Blackmore & Weston, for vendor; E. F. Turner & Sons, for purchasers.

[Reported by G. Macon, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

1905.

April 17, 18.

May 19.

BRITISH
WIDOWS
ASSURANCE
Co., *In re*

Insurance (Life)—Company—Other Business besides Life Assurance—Insufficiency of Insurance Fund—Winding-up Petition—Scheme of Future Working—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 4.

A company which carried on the business of selling tea combined with that of life assurance was ordered to be wound up by BUCKLEY, J. On appeal, a scheme having been prepared and approved by all parties enabling the company to carry on its businesses separately so as to comply with section 4 of the Companies Assurance Act, 1870, and affording reasonable security to the assured, the COURT sanctioned the scheme and discharged the order of BUCKLEY, J., the company undertaking to carry on its business in accordance with the scheme.

Form of scheme.

Appeal by the company against a winding-up order made by Buckley, J.

The company, which was incorporated under the Companies Acts in 1902, carried on the business of selling tea combined with life assurance for providing pensions for widows. According to its original scheme the company undertook to pay 10s. a week to every woman who had purchased not less than half a pound of

the company's tea for not less than thirteen consecutive weeks previously to her becoming a widow, and to continue such payments so long as she should continue a widow and purchase half a pound of tea from the company in each week. Pensions of 5s. a week were to be obtained by purchasers of half the quantity on the same conditions. The rights under the assurance were limited to receiving payment of the pensions rateably out of 75 per cent. of the net profits on the tea sold, and the pensioners were to have no rights against the company beyond the 75 per cent. and accumulations thereof. To provide this fund the tea was sold at a price of from 8d. to 1s. in excess of its fair retail value, and those who wished to avail themselves of the pension scheme purchased the tea at this extra or loaded value. In November, 1904, the company were advertising a proposal to sell coffee and cocoa on the same terms.

On February 5, 1905, Buckley, J., made an order for winding up Nelson & Co., which was a company of a similar kind—see *Nelson & Co., In re* [1905]¹—after which the British Widows Assurance Co., considering that their own original scheme was a failure, ceased to accept fresh business under the old conditions, and issued a prospectus offering their old customers substituted contracts or policies under six "Tables of Benefits" (A, B, C, D, E, and F), classifying the several events on which the benefits would accrue, which tables were believed to be calculated on a sound financial basis. The new scheme involved setting aside 90 per cent. of the net profits on the tea sold, and placing a minimum of 7d. or 8d. per pound of tea sold to the insurance fund; whereas under the original scheme it appeared that only a very small proportion of the extra or loaded price ever reached the insurance fund.

The great majority of the existing customers accepted policies under the new scheme; but on March 2, 1905, two dissentient policy-holders presented this petition, intituled under the Companies Acts, 1862 to 1890, and the Life Assurance Companies Acts, 1870 and 1872, alleging that the company was insolvent,

(1) *Ante*, p. 290; [1905] 1 Ch. 551.

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that a winding-up was just and equitable, and that the business of the company required investigation, and asking for the compulsory winding-up of the company.

Buckley, J., made the usual compulsory order. He considered that, on the evidence, having regard to the insufficiency of the insurance fund, the company had become insolvent under the original scheme, and that the insolvency continued under the new scheme; and, further, that the scheme provided no "separate assurance fund" within the meaning of section 4 of the Life Assurance Companies Act, 1870.²

The company appealed.

The appeal was heard on April 17 and 18, when, after hearing the argument, their Lordships directed that the appeal should stand over in order that a scheme for further carrying out the objects of the company might be prepared by the company and submitted to the respondents' actuaries. Upon its being approved of by all parties, it was to be brought before the Court for its sanction, with evidence sufficient to satisfy the Court that the requirements of section 4 of the Life Assurance Companies Act had been complied with. In the meantime the business of the company was to be carried on by the official receiver in the same way as it had been since the winding-up order had been made by Buckley, J. Thereupon a scheme for the future working of the company was prepared by the company, and submitted to and approved of by the actuaries for the respondents, the scheme being in the following form :

(2) Life Assurance Act, 1870, s. 4: "In the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance. . . ."

"Proposed Conditions of Future Working.—1. The company will institute a separate life assurance branch assuring benefits in accordance with the six Tables A, B, C, D, E, and F already advertised—but assurances in accordance with the terms of Tables A, B, C, and D will be issued only to persons at present holders of policies upon those terms, and to the extent to which they now are entitled to assurance. 2. Every assurance contract under the new scheme will be secured by a separate policy, which will be issuable both to customers for tea and cocoa, &c. (hereinafter called tea customers), and to those who are not tea customers of the company. 3. The policy will be an ordinary industrial life assurance policy containing no reference whatever, neither in the body of the policy nor by endorsement, to the purchase of tea. The weekly premium to be charged for full assurance shall be 1s. ; for half assurance, 6d. ; and for quarter assurance, 3d. 4. Full assurance means such assurance as under Tables A to F would have been obtained by the purchase of 1 lb. of tea per week; half assurance such as would have been obtained by the purchase of $\frac{1}{2}$ lb. of tea per week; and quarter assurance such as would have been obtained by the purchase of $\frac{1}{4}$ lb. of tea per week. 5. In the case of those assured who are tea customers the collection card shall show in the heading thereof that the sum payable weekly includes 1s. in respect of insurance premium. 6. If the tea customer ceases to purchase tea, the insurance premium of 1s. remains payable should she decide to continue the insurance. 7. The whole of the premiums received will be carried to an assurance account and an assurance fund, as provided by the Life Assurance Companies Act, 1870, out of which will be payable only the sums allowed by the Life Assurance Companies Acts, subject to a provision that the contribution of the life assurance fund towards the expenses of conducting the business shall not exceed 5d. per week in respect of each full assurance, and 2½d. per week in respect of each half assurance, and 1¼d. per week in respect of each quarter assurance, so that if the *maximum* rate of expense is charged against the

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life assurance fund there will be left 7*d.* to meet claims and bonuses in respect of each full assurance, 3½*d.* in the case of each half assurance, and 1½*d.* in the case of each quarter assurance. 8. The company shall agree to pay to the assurance fund 1*d.* upon every premium for a full assurance, ½*d.* upon every premium for a half assurance, and ¼*d.* upon every premium for a quarter assurance paid by persons assured previously to February 5, 1905, who are holders of policies under Tables A, B, C, or D, or have policies assuring larger amounts than those specified in Tables E or F, and the sums payable under this clause into the assurance fund shall be applicable only to the payment of claims and bonuses (if any) as aforesaid. 9. Any expenses of the business of the company in connexion with assurance not provided for out of the amounts applicable thereto, as hereinbefore mentioned, shall be borne and paid by the company out of its funds, other than those carried to the assurance account and assurance fund. 10. The accounts of the company shall be made up annually, and if a sum equal to 90 per cent. of the profits of the company for each year other than profits in the life assurance fund shall exceed the aggregate of 7*d.* out of every full assurance premium, 3½*d.* out of every half assurance premium, and 1½*d.* out of every quarter assurance premium paid to the company during the year, for which the accounts are so made up, or 8*d.*, 4*d.*, and 2*d.* respectively in the case of those insurances referred to in Clause 8 hereof, the said excess shall be added to the assurance fund and be applicable only to the payment of claims and bonuses (if any) as aforesaid. 11. A first valuation of the assets and liabilities of the assurance fund shall be made by a qualified actuary as at December 31, 1908, and annually thereafter, and any surplus available after making all necessary reserves shall be divided into ten equal parts, nine of which shall be apportionable either in cash or equivalent benefits among the persons assured who at the date of the valuation are in full benefit, and such apportionment shall be made in such manner as the directors shall determine; and the remaining one-tenth part shall

be treated as part of the profits of the company. 12. The other conditions of the assurance shall be the same as those now in force under the policies issued in pursuance of Tables A, B, C, D, E, and F respectively, save that in the place of purchases of tea, cocoa, &c., the payment of premiums shall be the consideration for the policy and definition of full benefit, partial benefit, and the other conditions shall be varied accordingly. 13. As regards existing business:—Every person entitled to insurance benefits under the Tables A, B, C, D, E, and F shall be offered and be entitled to claim a new policy conferring similar benefits under the new scheme. 14. As regards lapsed business, any person whose right to benefits has lapsed during the period since February 5, 1905, by reason of the company's agents not having called upon her, or since March 2, 1905, by reason of the uncertainty created by the presentation of the petition to wind up, or otherwise owing to the presentation of the said petition, and not by her own desire or default, shall be entitled, upon applying for a policy under the new scheme under Tables E or F, and on making a purchase of tea, &c., to the amount which if purchased during the said interval would have kept her assurance on foot (or in the alternative, on paying a sum equal to the aggregate weekly premiums falling due during the said interval at the rate of 1*s.*, 6*d.*, or 3*d.* per week, as the case may be), to have a new policy issued to her for full assurance, half assurance, or quarter assurance, as the case may be, under such of the said Tables E or F as she may select. 15. Any person holding a subsisting assurance under the original pension scheme effected before February 5, 1905, who has not in the meantime accepted or agreed to accept an assurance under one of the Tables A, B, C, D, E, or F, and whose claims have not emerged, and who has regularly taken tea up to this date, shall be offered (a) the return of all premiums paid by her at the rate of 7*d.* for every lb. of tea or cocoa she shall have purchased, together with interest at 4 per cent. per annum, or (b) the right to have a new policy issued to her for full assurance, half assurance, or

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quarter assurance, as the case may be, under such of the said Tables E or F as she may select. 16. Any person who was assured before February 5, 1905, under the pension scheme, and whose claim has emerged and is still outstanding, shall have her claim satisfied in ordinary course."

The case having been restored to the paper, the scheme was on May 19 submitted to the Court for approval.

Gore-Browne, K.C., and *Martelli*, for the appellants.

Younger, K.C., for contributories supporting the appeal.

Eve, K.C., and *Ward Coldridge*, for the petitioners.

A. H. Jessel, for parties supporting the petition.

R. J. Parker, for the Board of Trade.—The scheme has not been sufficiently examined by the Board of Trade, and I ask that the sanction be postponed to enable it to be further examined.

VAUGHAN WILLIAMS, L.J.—In this matter we have the advantage of having had this scheme critically considered by actuaries representing both the petitioners in the winding-up petition and the company; and these actuaries, who are people whose position as skilled actuaries can be in no way questioned, are agreed that if this scheme is carried out there will be reasonable security for the assured receiving the benefits which it is intended they should receive under the policies. In addition to that, the evidence before us shews that there is nothing in this scheme which in any way leads one to suppose that the carrying out of the scheme which the company by their counsel undertake to carry out will so cripple the business of the company as to prevent them not only from carrying on their business as a solvent company, but also from arriving at a period of prosperity.

Every one must be glad that this result has been arrived at, because it is plain that, if the anticipations of these experts are verified in fact, the assured will gain thereby that sort of assurance which, as thrifty people, they have been trying to obtain, and they will be saved from the

very serious loss which would inevitably have come upon them if this company had had to be wound up under a compulsory order.

With regard to what counsel for the Board of Trade has said about the Board of Trade, that Board very often affords great assistance to the Court in company cases, and the Court is always glad to accept its assistance; but in the present case it appears that the Board has not in fact examined into this scheme, and to postpone the sanction of this scheme to allow the Board to do so would be, in effect, to run a great risk that the scheme never could be carried out at all, because it is obvious that every week's delay makes it more difficult to carry out a scheme of this sort.

Counsel mentioned that the Board of Trade thought that they might possibly have thrown some light upon the previous events in the history of this company which might lead us to the conclusion that this opportunity of framing and working out this scheme might possibly be an opportunity which the company were not entitled to have. With regard to that, we decided when this appeal was before us on the last occasion that the company should have this opportunity, and they have had it; and I myself have no reason at all to doubt that in acting upon the opinions of these experts we are acting upon opinions which the Court is not only entitled to act upon, but is bound to accept. Under these circumstances we sanction the proposed order.

ROMER, L.J., and STIRLING, L.J., concurred.

Appeal allowed, the company undertaking to carry on their business in accordance with the scheme approved by the Court.

Solicitors—Walter B. Styer; L. Weatherley; H. Garland Wells, agents for Dunn & Baker, Exeter; Solicitor to the Board of Trade.

[Reported by A. Cordery, Esq., Barrister-at-Law.]

SWINFEN EADY, J. }
 1905. } VILLAR v. GILBEY.
 May 26, 30. }

Will — Strict Settlement — Devise of Estate Tail—Provision for Reduction to Life Estate if Devisees "Born" within Testator's Lifetime—Devisees en Ventre sa Mère at Time of Testator's Death.

There is no rule of law that the word "born" includes a child en ventre sa mère under all circumstances.

Where, accordingly, a will devised an estate tail to a child unborn at the date of the will, with a proviso that this estate tail was to be cut down to a life estate in case the devisees should be "born" within the testator's lifetime,—Held, that the devisees was not "born" within the testator's lifetime, although he was en ventre sa mère at the date of the testator's death.

Trial of action.

By his will dated June 22, 1854, the late George William Rush devised certain real estate to his brother, Alfred Rush, for life, with remainder to his brother's eldest son, Alfred George Anderson Rush, for life, with divers remainders in tail; with remainder to his brother's second son, George Acland Gordon Rush, for life, with divers remainders in tail; with remainders to the third, fourth, and every other son and sons of his brother, Alfred Rush, severally, successively, and in remainder one after another, according to priority of birth, and to the heirs of the body, and bodies, of such son, and sons, lawfully issuing. And the testator thereby declared that any third, or other, son, or sons, of his brother, Alfred Rush, born in the testator's lifetime, should not take a larger interest in the said estates than for life only, with remainder to his issue in tail.

The testator died on September 15, 1854, and a third son, William Beaumarice Rush, was born to his brother, Alfred Rush, on October 9, 1854, about three weeks after the testator's death.

Alfred Rush was now dead, and his two eldest sons, Alfred George Anderson Rush and George Acland Gordon Rush, had also died without leaving issue.

A question having arisen as to whether the third son, William Beaumarice Rush, was "born," within the meaning of the will, within the testator's lifetime (and so took only an estate for life, with remainder to his issue in tail) or was "born" after the testator's death (and so took an estate in tail), the present action was commenced for its determination, asking for a declaration that he was entitled to an estate in tail.

Eve, K.C., and *R. J. Parker*, for the plaintiff.—"Born," as used in this will, must be taken in its strict and literal sense. It is true that the Courts have decided, with reference to the rule against perpetuities, that a child *en ventre sa mère* at the time of a testator's death is living at that period. It is also true that, with reference to remoteness, this is now a fixed and established rule, and applies even in a case where it results in hardship—*Wilmer's Trusts, In re; Moore v. Wingfield* [1903].¹ There is, however, nothing in that case—or in any other case—to suggest, as a rule of universal construction, and apart from all reference to the rule against remoteness, that "born" is under all circumstances, and for all purposes whatever, to be construed as including a child *en ventre sa mère*.

Micklem, K.C., and *Wace*, for the defendants.—"Born," in this case, must be construed so as to include a child *en ventre sa mère* at the critical date. It was the intention of the testator to tie up the estate as long as was legally possible, and this intention will best be met by the construction for which we contend. Such a construction does not offend against the rule against perpetuity. It is significant that in the 2nd edition (1864) of *Davidson's Precedents* (vol. iv. p. 334) the following provision is added to the end of the proviso for reducing to life tenancies tenants in tail male born in the testator's lifetime: "But no person who shall be en ventre sa mère at my decease shall, with reference to the operation of the proviso lastly hereinbefore contained, be considered as born in my lifetime." It is noticeable, in the present case, that no

(1) 72 L. J. Ch. 670; [1903] 2 Ch. 411.

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such provision is inserted. In the 3rd edition (1880, vol. iv. p. 391) the same provision is still inserted, but a doubt (note f) is expressed as to whether its retention is not superfluous, having regard to the decision in *Blasson v. Blasson* [1864].² In *Trower v. Butts* [1823]³ it was held that a bequest in trust for all the children of the testatrix's nephew, born in her lifetime, included a child *en ventre sa mère* at the time the testatrix died.

Eve, K.C., in reply.—There is no case in which a child *en ventre sa mère* has been held to be born, as a matter of pure construction, with the result of cutting down his interest. In *Trower v. Butts*,³ in which the Court seems to have been influenced by *Doe d. Lancashire v. Lancashire* [1792],⁴ there was no question of curtailing the child's interest.

Cur. adv. vult.

May 30.—SWINFEN EADY, J., delivered a written judgment.—The question is, Did William Beaumarice Rush take under the will, in the events which happened, an estate tail, or only a life estate? Although not actually born until three weeks after the testator's death, is he to be deemed to have been "born in the testator's lifetime" within the meaning of the will? Construing the will according to the primary (or natural) meaning of the words used, it is clear that William B. Rush was not born in the testator's lifetime, but twenty-one days after the testator's death. No doubt it has been held that, for the purpose of taking under or fulfilling the condition of a gift, a child *en ventre sa mère* will come within such words as child or issue "living" or "born" at a certain time—*Trower v. Butts*³ and *Burrows, In re; Cleg-horn v. Burrows* [1895]⁵; but considerations of this kind do not arise in the present case, where the only result of holding that the child was born at the testator's death would be to reduce his interest from an estate tail to a life estate. Again, in considering the rule of

law as to remoteness, and deciding a question of perpetuity, a child *en ventre sa mère* at the testator's death, and subsequently born, is considered as a "life in being" at the testator's death—*Long v. Blackall* [1797]⁶ and *Wilmer, In re; Moore v. Wingfield*.¹ But no such question arises here.

If the language of the will had referred to any third or subsequent son "born in the testator's lifetime, or in due time after his decease," William B. Rush would clearly have taken only an estate for life, with remainders in tail; and such remainders would have been perfectly valid, and would not have infringed the rule of law as to remoteness. I have only to consider what the testator meant. Did he mean actually born in his lifetime; or did he mean, born in his lifetime, or in due time after his death? In my opinion he meant exactly what he said, and there is no rule of law compelling me to hold that by the phrase "born in his lifetime" he included a child not born in his lifetime, but three weeks after his death. The practice of conveyancers has not been uniform with regard to the provisions of the clause in wills reducing to life tenancies the estates tail of persons born in the testator's lifetime, made tenants in tail by the will. In *Davidson's Precedents* (3rd ed. vol. iv. ("Wills"), p. 391) there is a proviso that no person *en ventre sa mère* at the testator's decease shall be considered as born in the testator's lifetime, with reference to the operation of the clause reducing an estate tail to a tenancy for life; but a note appears on p. 392 that the proviso is probably superfluous. In other books of precedents the proviso does not find any place.⁷ In any case, it is not, in my opinion, necessary. The true construction of the clause in question is to confer an estate tail on all persons born after the testator's decease, by the will made tenants in tail; and this estate is not reduced to a life estate merely because, although born after the testator's death, they are nevertheless born within the

(2) 34 L. J. Ch. 18; 2 De G. J. & S. 665.

(3) 1 L. J. (O.S.) Ch. 115; 1 Sim. & S. 181.

(4) 5 Term Rep. 49.

(5) 65 L. J. Ch. 52; [1895] 2 Ch. 497.

(6) 7 Term Rep. 100.

(7) But see *Bythornood and Jarman's Conveyancing* (4th ed. [1889] vol. vii. p. 937, form 12).

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period of gestation. There will be a declaration as asked by the statement of claim.

Solicitors—Reed & Reed, agents for Reed & Co., Taunton; Baileys, Shaw & Gillett.

[Reported by Joseph E. Morris, Esq., Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} RAINFORD v. JAMES KEITH & BLACKMAN Co., LIM.
ROMEE, L.J.	
STIRLING, L.J.	
1905.	
May 9, 10. June 6.	

Company—Articles—Shares—Certificate—Transfer—Note on Certificate as to Production before Registration of Transfer—Duty of Company as regards Transfer—False Statement by Shareholder—Notice of Prior Charge through Officers of Company—Power to "lend money"—Loan to Servant of Company.

C., the registered holder of shares in the defendant company, in May, 1903, deposited the certificate for the shares with the plaintiff as security for a loan, and executed a transfer to the plaintiff with the date left in blank. There was a note at the foot of the certificate: "without the production of this certificate no transfer of the shares mentioned therein can be registered." C., who was in the employment of the company, in June, 1903, entered into an arrangement with the managing director and two of the officers of the company for an advance to be made to him by the company, part of the arrangement being that he should sell his shares in the company, and that the proceeds of sale should be paid to the company in part repayment of the loan. C. sold his shares to Y. for 90l., and the money was paid by Y. to the company. C. lodged a transfer of the shares to Y. with the company for registration without the certificate, but with a declaration that the certificate was held by a friend of his, but not "as a charge against any loan or other consideration." C. was trusted by the directors, and they, acting in

good faith, accepted his statement, and registered the transfer to Y., and issued a new certificate to him:—Held, on the facts, that the company had received the 90l. with such knowledge, and under such circumstances that they ought to be treated as having received it to the use of the plaintiff, and the plaintiff was entitled to recover it from the company.

Decision of FARWELL, J. (*ante*, p. 156; [1905] 1 Ch. 296), reversed on the facts.

The articles of the company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company:—Held, that this authorised the making of a loan to a servant trusted by the company.

Appeal from decision of Farwell, J.

The facts as to the formation of the company are stated in the report of the case in the Court below, but, having regard to the view which the Court of Appeal took of the case, the following additional statement of facts is necessary.

The memorandum of association of the company stated the specific objects for which it was formed, the chief object being the taking over and carrying on the business of mechanical engineers, and it included as an object the doing of all such things as were incidental or conducive to the attainment of the other objects.

In June, 1903, one William Casmey was in the employment of the defendant company as manager of the company's business at Leeds, and was the registered holder of 120 shares in the company. On June 23, 1903, he wrote to James Keith, the managing director of the defendant company, a letter in which he stated that he was in financial difficulties and asked for assistance, saying that he would like an advance of 180l., which he would return at 25l. quarterly and pay 6 per cent. for it. Keith replied by a letter dated June 24 to the effect that, having consulted Mr. Shillito, the secretary of the company, he had sent Mr. Hampshair, the accountant of the company, who would do his best to arrange matters, and to whom he, Casmey, was to be perfectly frank and open and disclose everything,

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and whatever Hampsheir proposed he must agree to in writing. Hampsheir made arrangements which, according to a document dated June 25, signed by Casmev, amounted to this—that an advance of 180*l.* should be made to Casmev by the company, and should be repaid, as to 90*l.*, by the proceeds of sale at that price of Casmev's 120 shares to one Alexander Younie, and as to the balance by monthly deductions from his salary of not less than 8*l.* Casmev received the 180*l.* by a cheque drawn on the company's bankers, and he accordingly executed a transfer dated June 25, 1903, of the shares to Younie, who paid the price by giving a cheque dated June 27, 1903, in favour of the defendant company for 90*l.* This cheque was paid into the company's bank and duly honoured on June 29, 1903. On the same day the transfer by Casmev to Younie came before the board of directors for registration and was passed and registered.

During all this time the certificate of the shares was in the hands of the plaintiff, having been deposited with him by Casmev in May, 1903, as security for a loan. There was a note printed at the foot of the certificate: "without the production of this certificate no transfer of the shares mentioned therein can be registered." In October, 1903, the plaintiff discovered that the shares had been transferred and registered in the name of the transferee, Younie, without any notice to him, and he threatened legal proceedings against the company. Thereupon the company's solicitors wrote a letter to the plaintiff's solicitor, dated October 26, 1903, in which they say: "We think it only fair to Mr. Rainford and yourself to forward you a copy of two documents which were signed by Mr. Casmev and given by him to our clients on June 25 last, of the existence of which documents we think it clear that both you and Mr. Rainford must have hitherto been ignorant. Under the circumstances our clients cannot of course recognize any legal claim by Mr. Rainford in the matter, and of course if he still chooses to institute legal proceedings against our clients they will defend such proceedings and the result may be somewhat serious to Mr. Casmev." The docu-

ments, of which copies were inclosed, were in the following terms:

"Leeds, June 25, 1903.

"Received of Messrs. James Keith and Blackman Co. (Limited) the sum of 180*l.*, which is to be repaid as follows:

"Witness—J. W. Hampsheir.

"W. H. CASMEV.

"By the sale of 120 fully-paid ordinary shares of 1*l.* each in James Keith and Blackman Co. (Limited), for which I have this day signed a transfer deed in favour of Mr. Alexander Younie, the proceeds of which sale—viz., 90*l.*—I hereby authorize and request the said James Keith and Blackman Co. (Limited) to retain . . . £90
By the deduction from my salary of not less than 8*l.* per month from and including the month of July, 1903, which deduction I hereby authorize and request the said James Keith and Blackman Co. (Limited) to make until the balance of 90*l.* is repaid in full . . . £90

£180

"W. H. CASMEV.

"Witness—J. W. Hampsheir."

"Leeds, June 25, 1903.

"To the Directors of James Keith and Blackman Company (Limited).

"I hereby declare that my share certificate No. 50 for 120 ordinary shares in James Keith and Blackman Company (Limited) is in the possession of a friend of mine; that I have signed no transfer deed in respect of the said shares excepting only that deed in favour of Mr. Alex. Younie, and that the said shares are not held by my friend as a charge against any loan or other consideration. In consideration of your honouring the transfer deed in favour of Mr. Younie and issuing a certificate in his favour, I hereby agree to hold you indemnified against all loss arising from the non-return of my certificate No. 50.

"W. H. CASMEV.

"Witness—J. W. Hampsheir."

The plaintiff issued his writ in this action against the company on May 13, 1904, and thereby claimed—first, a declaration that, by virtue of the deposit with him by Casmev of the certificate of the shares for the purpose of securing the repayment of the sum of 100*l.*, with interest at 5 per cent., lent to Casmev on September 18, 1901, the plaintiff became entitled to an equitable mortgage on the shares, and on any moneys to arise from the sale thereof, for the amount of the loan, with interest; secondly, to recover the sum of 90*l.* paid to the company upon the transfer of the shares to Younie; and

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thirdly, damages for the wrongful registration by the defendant company of the transfer to Younie, and the refusal by the company to register the transfer to the plaintiff.

The plaintiff alleged that the sale to Younie was at the request and by arrangement with the defendant company, who registered the transfer from Casmev to Younie without requiring the production of the certificate of the transferor Casmev in accordance with the warning at the foot of the certificate, and without making proper enquiry for the certificate or obtaining any sufficient statement of a reason for the non-production. He also alleged the receipt by the defendant company of the 90l., the consideration for the transfer, and that, before the transfer was registered or the proceeds received, the company had notice of his charge.

The defence set up, besides denying most of the material allegations in the statement of claim, relied upon articles 13-24, and 26 of the articles of association of the defendant company as justifying the registration of the transfer by Casmev to Younie without the production of Casmev's certificate, and alleged that on September 2, 1903, when the plaintiff applied for registration, Casmev was and ever since had been indebted to the defendant company for money lent and entrusted to him as their agent. The defendant company also by their statement of defence submitted as a point of law that the defendant company owed no duty to the plaintiff to abstain from registering the transfer from Casmev to Younie, or to register the alleged transfer to the plaintiff, and that the statement of claim alleged no cause of action.

At the trial the only witness called for the plaintiff was the plaintiff himself, who proved the deposit of the certificate with him as security for the loan mentioned. The plaintiff's counsel also put in the correspondence between Casmev and Keith in June, 1903; the cheque of Younie, the purchaser of the shares, dated June 27, 1903, in favour of the defendant company; the letter of the defendant company's solicitors of October 26, 1903, and the two documents there referred to; and also offered in evidence

a third document signed by Casmev on June 25, 1903, of which disclosure was made by the company's affidavit of documents. This last document disclosed the fact that Casmev's shares were held by his friend as security for a debt, but Farwell, J., refused to admit it. For the defendants the only witness called was the chairman of the board of directors of the defendant company, who stated that he was present at the board meeting of June 29, 1903, when the transfer of Casmev's shares was passed and registered; that no certificate was produced to the board, but that they were shewn Casmev's declaration of June 25; that Casmev had been a faithful and confidential servant of the company for sixteen years and had always proved trustworthy; and that they believed him. He also said that he had not the remotest idea that Casmev was in financial difficulties; that Keith was present at the meeting, but he (the witness) had no idea why the transfer to Younie was made, and knew nothing of Younie's cheque to the company. On re-examination he said that nothing was said at the board on June 29 as to how the 90l. was going to be paid or anything about it. Keith, Shillito, and Hampshair were all present at the trial, but no one of them was called.

Farwell, J., dismissed the action. He held that the directors had acted with complete *bona fides* and believed Casmev's explanation of the absence of the certificate, but if the company did in fact owe a duty to the plaintiff to take reasonable and proper care they had not in fact discharged it; they were not, however, liable to the plaintiff, as the note on the certificate was not an invitation to the whole world to deal with the certificate on the footing of a contract by the company with the holder for the time being thereof not to allow a transfer to be registered without its production.

The plaintiff appealed.

Articles 13, 24, and 26 of the company's articles of association are set out in the former report. In addition, the following articles may be referred to:

Article 98: "The board may from time to time confer on the managing director or directors, or on the general

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manager, such powers, of any of them, as are possessed by the board themselves, and may revoke and alter such powers as they shall think fit." Article 116 empowered the directors, in their management of the business of the company, to do (*inter alia*) the following things: "(e) They may, on behalf of the company, lend money . . . and generally undertake such other financial operations as may in their opinion be incidental or useful to the general business of the company (g) Generally they may adopt all such acts as they may consider advisable for the proper and efficient carrying on the business of the company, or likely in any other respect to be advantageous to the company."

Gore-Browne, K.C., and *T. Clarkson*, for the appellant.—The company through its officers had actual notice of the plaintiff's security; but apart from actual notice there was ample to put the company on enquiry—*Maxfield v. Burton* [1873]¹ and *Oliver v. Hinton* [1899].²

[*VAUGHAN WILLIAMS, L.J.*, referred to *Gordon, Ex parte; Gomersall, in re* [1875].³]

Having such notice, notwithstanding section 30 of the Companies Act, 1862, the company could not deal with the shares in such a way as to defeat the plaintiff's interest—*Bradford Banking Co. v. Briggs* [1886]⁴—and an action for damages lies against the company for having done so.

A share certificate is a document of title issued by the company for the purpose of enabling the world at large to act upon it, and the company is under a duty not to register a transfer or issue a second certificate until the first certificate is called in or its absence satisfactorily accounted for—*Bahia and San Francisco Railway, In re* [1868],⁵ *Shropshire Union Railways and Canal Co. v. Reg.* [1875],⁶ *Simm v. Anglo-American Telegraph Co.* [1879],⁷ *Société Générale de Paris v.*

(1) 43 L. J. Ch. 46; L. R. 17 Eq. 15.
(2) 68 L. J. Ch. 583; [1899] 2 Ch. 264.
(3) 46 L. J. Bk. 1; 1 Ch. D. 137. Affirmed in *H.L., sub nom. Jones v. Gordon* [1877], 47 L. J. Bk. 1; 2 App. Cas. 616.

(4) 56 L. J. Ch. 364; 12 App. Cas. 29.
(5) 37 L. J. Q.B. 176; L. R. 3 Q.B. 584.
(6) 45 L. J. Q.B. 31; L. R. 7 H.L. 496.
(7) 49 L. J. Q.B. 392; 5 Q.B. D. 188.

Walker [1885],⁸ *Colonial Bank v. Whinney* [1886],⁹ *Agra Bank, Ex parte; Worcester, in re* [1868],¹⁰ *Balkis Consolidated Co. v. Tomkinson* [1893],¹¹ and *Bradford Banking Co. v. Briggs*.⁴

[*ROMER, L.J.*, referred to *Longman v. Bath Electric Tramways* [1905].¹²]

Upjohn, K.C., and *Clauson*, for the respondents.—The arrangement made with Casmev in June, 1903, was outside the powers of the persons who purported to make it, and the company is not liable for what they did—*Barwick v. English Joint-Stock Bank* [1867],¹³ *Foss v. Harbottle* [1843],¹⁴ and *Tomkinson v. South-Eastern Railway* [1887].¹⁵

The doctrine of constructive notice rests on the presumption that notice was communicated, but if the remaining facts of the case rebut that presumption the Court does not impute notice—*Cave v. Cave* [1880]¹⁶ and *Taylor v. Blakelock* [1886].¹⁷ The facts of the present case are not sufficient to raise the imputation of notice. A company is not affected with notice through its officer unless the notice is given to the officer as an officer of the company. Further, it will not be affected where the officer is under an obligation not to communicate the information to the company, or where it is prejudicial for him to do so. In that case the imputation of notice will be negatived—*Cave v. Cave*¹⁶ and *Société Générale de Paris v. Tramways Union Co.* [1884].¹⁸ That case is very like the present. There was knowledge, but not notice. *Marseilles Extension Railway, In re; Crédit Foncier and Mobilier of England, ex parte* [1871],¹⁹ also supports this contention.

(8) 55 L. J. Q.B. 169; 11 App. Cas. 20.
(9) 56 L. J. Ch. 43; 11 App. Cas. 426.
(10) 37 L. J. Bk. 23; L. R. 3 Ch. 555.
(11) 63 L. J. Q.B. 134, 138; [1893] A.C. 396, 405.
(12) *Ante*, p. 424; [1905] 1 Ch. 646.
(13) 36 L. J. Ex. 147; L. R. 2 Ex. 259.
(14) 2 Hare, 461.
(15) 56 L. J. Ch. 932; 35 Ch. D. 675.
(16) 49 L. J. Ch. 605, 507; 15 Ch. D. 639, 644.
(17) 56 L. J. Ch. 390; 32 Ch. D. 560.
(18) 54 L. J. Q.B. 177, 180; 14 Q.B. D. 424, 438. In *H.L.*: 55 L. J. Q.B. 169; 11 App. Cas. 20.
(19) 41 L. J. Ch. 345; L. R. 7 Ch. 161.

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[VAUGHAN WILLIAMS, L.J., referred to *David Payne & Co., In re; Young v. David Payne & Co.* [1904],²⁰ and to *Hampshire Land Co., In re* [1896].²¹]

The officers of the company here had this knowledge, because they were parties to an irregular transaction—that is, they had it as principals, and not as agents for the company.

The point made on behalf of the appellant raises the same question as that which arose in *Maxfield v. Burton*¹ and *Oliver v. Hinton*,² but the facts here are not the same as in those cases.

There is no question of estoppel here. There was no representation sufficient to raise that. The directors had no legal duty to register the transfer by Casmev to the plaintiff; but if they had they would have been absolved from that duty in this case, as Casmev was in fact indebted to the company, though that has not been put in evidence; and under article 26 the directors need not register a transfer by a shareholder who is indebted to the company.

The dictum of Lord Watson in *Colonial Bank v. Whinney*²² is not consistent with that of Lord Cairns in *Shropshire Union Railways and Canal Co. v. Reg.*⁶ Lord Cairns's dictum was referred to without disapproval by Lord Selborne in *Société Générale de Paris v. Walker*,⁸ and the respondents rely upon that.

Gore-Browne, K.C., in reply.—“The transaction was not *ultra vires*. It would be within the powers of a company like this to lend money. This man was a trusted agent and in receipt of a good salary. He was in difficulties, and it was suggested that an advance should be made to him, which he should repay out of his salary. There was nothing wrong in that.

The act was the act of the company. Keith and Hampshair purported to act on behalf of the company, and persons who deal *bona fide* with a managing director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which accord-

ing to the constitution of the company he could exercise—*Biggerstaff v. Rowatt's Wharf* [1896].²³ Knowledge of an agent of a company who has a duty to disclose it is notice to the company.

The company made their advance with knowledge of the plaintiff's debt, so that their advance will be postponed to the plaintiff's—*Bradford Banking Co. v. Briggs*.⁴ *Taylor v. Blakeslock*¹⁷ is in the appellant's favour. There was express notice here, and also constructive notice by reason of want of proper enquiry.

Under section 31 of the Companies Act, 1862, a certificate is *prima facie* evidence of the title to shares; and where a certificate has upon it a statement that no transfer of the shares will be made without production of the certificate, that is an intimation to persons who take certificates as title that they may act on the assumption that the company will observe that, and the company is liable if it does not—*Balkis Consolidated Co. v. Tomkinson*.¹¹

Cur. adv. vult.

June 6.—VAUGHAN WILLIAMS, L.J., read his judgment. He referred to the claim made by the plaintiff, and to the points raised by the statement of defence, and continued: The judgment of Mr. Justice Farwell delivered at the conclusion of the trial deals principally with points of law, and the facts are only stated in so far as is necessary to raise those points; the main facts so stated being that the learned Judge finds that the board of directors acted with complete *bona fides* and believed Casmev's explanation of the absence of the certificate, but that if they did in fact owe a duty to the plaintiff to take reasonable and proper care they did not in fact discharge it. The learned Judge then proceeds to discuss whether the defendants, by reason of the note at the foot of the certificate, or otherwise, have a duty to the plaintiff not to register without taking reasonable and proper care to have the non-production of the transferor's share certificate accounted for. He points out that the plaintiff, so far as he relies on the foot-

(23) 65 L. J. Ch. 536, 540; [1896] 2 Ch. 93, 210.

(20) 73 L. J. Ch. 849; [1904] 2 Ch. 608.

(21) 65 L. J. Ch. 860; [1896] 2 Ch. 743.

(22) 56 L. J. Ch., at p. 50; 11 App. Cas., at p. 441.

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note to the certificate, must contend that it amounts to a representation which the defendants are estopped from denying, or that it is a contract with all persons to whose hands the certificate may come. He disposes of the estoppel on the ground that the estoppel is based on a representation (if representation there be), not of fact, but of intention or of law, and that, as established by *Citizens' Bank of Louisiana v. First National Bank of New Orleans* [1873],²⁴ no action will lie; and also on the ground that the plaintiff does not allege that he saw the foot-note before he made the loan. And as to the suggestion that the foot-note amounted to an offer to any one into whose hands the certificate might pass, and was accepted and acted on by the plaintiff when he received the certificate as security for the loan to the plaintiff, he holds that the foot-note is a warning only, and not an offer to contract. It is to be observed, however, that counsel, in their argument on behalf of the plaintiff, did not rely only on the foot-note, but contended that a duty arose independently of the foot-note by reason of the operation of the certificate as a document of title issued by the company for the purpose of enabling persons to whom share certificates might be offered for sale or pledge to act upon the certificate as a document of title, and thus giving to shares a negotiability highly advantageous to the company issuing the certificate, which negotiability would be defeated if companies had no duty to call in one certificate of shares before it issued a second certificate in respect of the same shares, or at least to obtain information reasonably accounting for the non-return of the certificate of the transferor.

I propose, before dealing with any of these questions of law, to state the facts as I understand them, because I think that it may be that the plaintiff has a good cause of action, independently of the question of law dealt with by Mr. Justice Farwell, by reason that the defendant company may have received the 90%, the proceeds of the sale, with such notice and under such circumstances that *ex æquo et bono* they ought to treat the 90% as received to the use of the plaintiff, or

(24) 43 L. J. Ch. 269; L. R. 6 H.L. 352.

because the plaintiff may be entitled to damages by reason that the defendants may have by their conduct put it out of their power to exercise their discretion as to whether or not they should register a transfer to the plaintiff based upon an equitable charge of which the defendant company had notice at the time when, by registering the transfer to Younie, the company did so put it out of their power to exercise such discretion. Now, the facts seem to me to be these. The defendant company, by a cheque of the company, signed by the managing director Keith, and countersigned by the secretary Shillito, dated June 24, 1903, and receipted on the cheque by Casmey on June 25, and cashed on June 27, made a loan of 180*l.* to their servant Casmey. Such a loan, it is now admitted, was, having regard to article 116 (e), not *ultra vires* of the company in the sense that it could not be ratified by the company; and it follows that the only question of *ultra vires* which remains is the question whether the managing director had delegated authority to do that which it is admitted under the articles the board of directors might have done if not *ultra vires* of the company. Now the loan was arranged by Keith, the managing director, and Shillito, and I have not any doubt but that in making the loan Keith and Shillito professed and purported to act on behalf of the company. They submitted the proposed loan to the report of Hampshair, the trusted accountant of the company, and he made a report which bears the stamp of receipt by the company dated June 26, 1903. This report discloses that the certificate for Casmey's shares had been and was deposited as security for a loan. It follows that Keith, Shillito, and Hampshair were all aware of the deposit of the share certificate as security for the loan. Mr. Justice Farwell rejected this document as not being evidence against the company; but, in my judgment, the report, bearing as it does the stamp of receipt by the company placed on it by an officer of the company whose duty it was to register the receipt, *prima facie* is evidence against the company, and I find nothing in the evidence given in this action negating this pre-

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sumption of agency which makes this report admissible in evidence against the company. On the contrary, the evidence to which I will presently call attention shews ratification by the defendant company of the loan with reference to the making of which Hampshair's report is addressed. Of course, if the conclusion is right that the report was received by the officers of the company in the execution of their duties, one must, unless and until the contrary is proved, impute to the board of directors, and through them to the company, notice of the fact that Casmey, to whom the company made the loan of 180*l.*, had pledged the share certificate with somebody as security for a loan; but even apart from the report there is written evidence that the company had notice or knowledge that the shares the transfer of which the company registered in the name of Younie, were in fact held by a friend of Casmey's, although Casmey says for no consideration. I refer to the receipt and declaration of Casmey bearing date June 25, as to which the solicitors of the defendant company write the letter of October 26 to Mr. Brown, who, as solicitor, had written on October 24, 1903, threatening to institute proceedings against the defendant company. It seems to me impossible not to treat this letter of October 26 as conclusive against the defendant company to shew that the inclosed documents, both the receipt and the declaration, were received by the company on June 25, and the company must be taken to have had notice of the contents of these two documents at the time when the company received the cheque dated June 27 for 90*l.*, the consideration for the transfer from Casmey to Younie, which cheque, it is to be noted, is drawn to the order of the company and at the time when the company registered the transfer to Younie. The result is that the company must be taken, at the date of the registration, to have had knowledge of the loan of 180*l.* to Casmey and of the arrangement whereby Casmey was to repay that loan by the sale of 120 shares and by deductions to be made in future from his salary. The cheque for 90*l.* duly passed to the credit of the defendant company at their bank on

June 29. It seems to me not only must, on this evidence, knowledge of the contents of these documents be imputed to the company, but also the knowledge of the agents through whom the transaction thus ratified by the company was carried out. This does not mean that the company are affected with notice of a trust, but it does mean that the company received the 90*l.* under such circumstances and with such knowledge that *ex æquo et bono* the money must be treated as received to the use of the plaintiff.

I will now deal with some of the objections which were urged in argument against the conclusion which I have just mentioned. It was urged that the managing director, Keith, had no authority to enter upon the loan arrangement with Casmey, or to draw the cheque for 180*l.* for the purpose of making the loan, without a special delegation under article 98 of the articles of association. The answer to this seems to me to be that, even if generally it is necessary to prove such special delegation, the receipt of June 25 is sufficient ratification of the loan arrangement which Keith purported to make on behalf of the company to render antecedent delegation unnecessary. There is no direct evidence as to when this receipt was given to the company, but the cheque for 180*l.* and the cheque for 90*l.* in part repayment were recognised by the company without objection. Next, it is said that this evidence of ratification, or, at all events, the imputation of the knowledge of the loan and its terms, is negatived by the evidence of Mr. Alsop, the chairman. I cannot agree. The evidence of Mr. Alsop goes to his personal knowledge only. The letter of October 26 is *prima facie* evidence that the loan transaction was brought to the knowledge of the company at or about the date of the inclosed documents. It was for the defendants to displace this *prima facie* proof. They do not do this. Not a word is said in explanation of the letter of October 26, or in correction of the facts therein alleged. Of course, if one is to assume that which Mr. Justice Farwell seems to find—that the company received the 90*l.* in good faith without the knowledge of facts from which the reasonable inference

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was that they were receiving moneys which Casmey had no right to deal with as against the plaintiff Rainford—the defendant company have a right to retain that money; but I think that it is impossible to assert this of Keith, the director, or Hampsheir, or Shillito, the agents who carried through the transaction and whose act in making the loan and receiving part repayment out of the proceeds of the sale of the shares was, if not a transaction within their authority, at least a transaction ratified by the company as a transaction done on behalf of the company—see *Thomson v. Clydesdale Bank* [1893].²⁵

The result is that I think this appeal must be allowed, and the defendant company ordered to pay to the plaintiff the 90%, the proceeds of the sale to Younie of the shares in question; and, as I understand the plaintiff is content with this result, it is unnecessary to deal with the questions of law raised by his counsel as to whether a company, by issuing a certificate, incurs any obligations except to the persons to whom the share certificate is issued.

ROMER, L.J.—I have had the advantage of considering the judgments of Lord Justice Vaughan Williams and Lord Justice Stirling, and the conclusions at which they have arrived in favour of the appellant on the facts of the case; and it is only necessary for me to say that I agree with their judgments, and for the reasons given by them.

STIRLING, L.J., read his judgment. He stated the facts, and continued: The learned Judge held that the plaintiff had failed to make out any case for payment to him of the 90% received from Younie; and as regards the claim for damages, he further held that the plaintiff had failed to establish 'the evidence of any duty on the part of the defendant company, when considering the propriety of registering a transfer, to take reasonable care in registering the transfer, though, if such a duty did exist, he was of opinion that they had failed to discharge it. The judgment of the learned Judge on the second part

(25) 62 L. J. P.C. 91; [1893] A.C. 282.

of the case, as to the liability of the defendants in damages for wrongfully registering the transfer of Casmey's shares, is reported, but there is no report of his judgment on the first part of the case, and we are ignorant of the grounds on which he came to the conclusion that that part of the case failed. Upon the appeal the decision of the learned Judge was challenged as to both parts of the case.

Now, the first of the two documents of June 25, 1903, shews that a transaction was purported to be entered into between the defendant company and Casmey, one of the terms of which was that the repayment of 90%, part of the loan, was to be made by a sale of Casmey's shares. This document was certainly an equitable assignment of the proceeds of the sale of the shares to Younie; but, in my opinion, it went beyond this, and, if the sale to Younie had gone off, would have conferred on the company a right in equity to have the shares sold and the proceeds applied in payment of the advance made to Casmey. The persons who negotiated and carried out this transaction were the managing director and two officers of the defendant company purporting to act on behalf of the company. The loan was made out of the funds of the defendant company, and the cheque of the purchaser of the shares was made out in favour of the defendant company and was paid to the defendant company's account with their bankers. By this transaction the defendant company, *prima facie* at all events, acquired for its own benefit an equitable interest in Casmey's shares. The declaration made by Casmey stated that the certificate of the shares was not in his possession, but in that of a friend; and although it was also stated that the shares were not held by the friend "as a charge against any loan or other consideration," it appears to me that any person dealing with Casmey in respect of those shares was thereby affected with notice that the holder of the certificate might have a charge on or other interest in the shares, and could not prudently deal with Casmey without ascertaining what the real interest of the holder of the certificate was. Where the company in which the shares are held

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sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party, and is affected with such notice if it is brought home to the agents who managed the transaction on its behalf—see *Bradford Banking Co. v. Briggs*.⁴ Now Keith, Shillito, and Hampsheir all had such notice. Further, the two documents of June 25, 1903, passed into the possession of the company and were put forward by the solicitors of the company acting on its behalf in October, 1903, as documents which justified the company in dealing as they did.

It seems to me that in these circumstances the plaintiff makes out a *prima facie* case entitling him to recover from the defendant company the proceeds of a sale carried into effect in disregard of the rights of the plaintiff, of which the defendant company had notice. Now, how is this case met? It is said, in the first place, that the transaction was *ultra vires* of the company. It was pointed out that the memorandum of association of the company does not expressly authorise the lending of money, and this is quite true. But the memorandum does, however, among the objects of the company, include the doing of all such things as are incidental or conducive to the attainment of the other objects. And by the contemporaneous articles of association the directors are empowered, amongst other things—article 116 (e)—on behalf of the company to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company. Regard being had to the decisions in *Harrison v. Mexican Railway* [1875]²⁶ and *South Durham Brewery Co., In re* [1885],²⁷ I think that the lending of 180*l.* to a faithful and confidential servant of the company cannot be held to be beyond the powers of the company. It was said, however, that there was no evidence that the transaction had been sanctioned by the board of directors; but the transaction was carried out with the sanction

of the managing director of the company, on whom the board of directors are authorised by article 98 to confer such powers, or any of them, as are possessed by the board themselves. No evidence was given by the defendants as to what limits (if any) had in fact been imposed on the managing director's powers. No evidence was given that the transaction had ever been repudiated by the board, and, on the contrary, the transaction itself is put forward by the company's solicitors on October 26, 1903 (and, it must be assumed, with the sanction of the company), as one which justified the company in resisting the plaintiff's demand. In the total absence of any explanation whatever by the chairman of the board of directors, or any one else on behalf of the company, of what had actually taken place, I think that the transaction ought to be held to bind the company, and that the plaintiff is entitled to recover from the defendants the 90*l.* received by means of Younie's cheque.

Taking this view of this portion of the case, I think it is unnecessary to express any opinion on the important question decided by Mr. Justice Farwell as to the duties of a board of directors with reference to the registration of transfers.

I cannot part with the case without referring to the third document signed by Casmey, which was dated June 25, 1903. With great deference to the learned Judge, I think that this document was admissible against the company. It shews that Casmey stated in writing to Hampsheir, contrary to the declaration which I have already read, that he had given his friend his share certificate as security for a debt; and consequently that Keith had actual notice that the certificate was so held. I do not understand how two inconsistent documents came to be executed by Casmey on the same day, and how reliance came to be placed on that one of the two which proves to be inaccurate; and I regret that no explanation as to this was given on behalf of the company. But in the absence of such explanation I have preferred to rest my judgment on the documents put forward by the company's solicitors in their letter of October 26, 1903, without taking the third document

(26) 44 L. J. Ch. 403; L. R. 19 Eq. 358.

(27) 55 L. J. Ch. 179; 31 Ch. D. 261.

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into account. I think that the appeal ought to be allowed.

Appeal allowed.

Solicitors—C. G. Cudby, agent for Samuel Brown, Manchester, for plaintiff; Gadsden & Treherne, for defendants.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J. } LEVESON-GOWER'S
1905. } SETTLED ESTATE,
May 3. } In re.

Settled Land—Capital Money—Improvements Enabling Mansion-house to be Let—“Additions to or alterations in buildings”—Detached Vinery and Peach-house—Rebuilding—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13, sub-s. (ii.), s. 15—Short Occupation Lease—House Agent's Commission—Incidence—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. (x.).

Upon the negotiation for an occupation lease of the principal mansion-house upon settled land, the intending tenant agreed to take the lease on condition that the dilapidated lean-to vinery and peach-house, situated near the kitchen garden and five hundred feet away from the mansion-house, were rebuilt. The tenant for life accordingly pulled them down and removed them and built an entirely new vinery and peach-house on the same sites. Upon the application of the tenant for life under section 13, sub-section (ii.), and section 15 of the Settled Land Act, 1890, to have this expenditure recouped out of capital moneys,—Held, that the removal of an old building and the erection of a new one in its place was not an improvement authorised by the words of section 13, sub-section (ii.)—namely, “making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.”

The commission payable to house agents for procuring a tenant for the principal mansion-house, on a short occupation lease granted by the tenant for life under his Settled Land Act powers, is not such an expense as ought to be paid out of capital moneys.

Adjourned summons.

Application by the tenant for life of certain settled estates in the counties of Kent and Surrey for the recoupment to him out of capital moneys in the hands of the trustees of (*inter alia*) certain sums expended by him upon improvements on the settled land—namely, a sum of 294*l.* in respect of rebuilding a vinery and peach-house appurtenant to the principal mansion-house on the Surrey estate, and a sum of 60*l.* paid by way of commission to a firm of house agents for procuring a tenant for the same mansion-house.

The applicant, who was thirty-nine years of age, claimed under a re-settlement made in 1889, and upon the death of the previous tenant for life on May 30, 1895, became tenant for life in possession. The rent-roll of the settled estate after payment of all outgoing was upwards of 4,000*l.* per annum. The vinery and peach-house in question were lean-to houses and were built against the wall of the kitchen garden about five hundred feet away from the mansion-house. They had been erected in 1820 and were dilapidated beyond repair in 1895, and they so remained for the next seven years. The applicant, being unable to reside in the mansion-house, employed a firm of house agents to procure a tenant. Early in 1903 the present tenant, who had previously been in occupation of the house for six months, agreed to take a fourteen years' lease of the mansion-house, grounds, and appurtenances, together with the sporting rights over a portion of the estate, at a yearly rent of 600*l.*, one of the terms of the agreement being that the vinery and peach-house in question should be rebuilt. This stipulation was verbal, and no mention of the agreement in this behalf was made in the lease which was subsequently granted.

In pursuance of the agreement the remains of the old vinery and peach-house were entirely pulled down and removed, and a new vinery and peach-house built on the old sites. The vinery was rebuilt before, and the peach-house was rebuilt after, the lease had been granted.

The lease was granted by the applicant in exercise of his Settled Land Act powers, and was made with the consent of the

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trustees of the settlement, and provided that after the expiration of the first seven years of the term either party might determine the lease by giving the other party six calendar months' notice in writing and paying a certain fine, but the lease was not to be determined by the lessor under this power unless he required the mansion-house for his own occupation. On the death of the lessee at any time during the term his legal personal representative was to be entitled to determine the lease by serving a like notice and paying a similar fine.

The sum of 60*l.* above-mentioned, which the applicant had paid and now asked to have recouped to him, represented the commission charged by the house agents for letting the house, being at the rate of 5*l.* per cent. on the first year's rent and 2*l.* 10*s.* per cent. on the second and third years' rent.

No scheme for the execution of the improvements above-mentioned had been submitted to the trustees for their approval. The capital moneys in the hands of the trustees amounted to about 9,000*l.*

The respondents were the trustees and the infant remainderman.

Austen-Cartmell, for the applicant.—With regard to all the improvements which have been executed, this application is made under section 15 of the Settled Land Act, 1890. The applicant claims to be entitled to be recouped the money expended on the vinery and peach-house by virtue of section 13, sub-section (ii.) of the same Act, on the ground that in the circumstances those improvements are covered by the words "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." They were appurtenances of the mansion-house, which would not have been let unless they had been rebuilt. In *Gaskell's Settled Estates, In re* [1894],¹ the removal of the utterly dilapidated roof of the mansion-house and the building of a new one was held to be an alteration within the meaning of this sub-section. This is a structural addition or alteration within the limits specified by Buckley, J., in

(1) 63 L. J. Ch. 243; [1894] 1 Ch. 485.

Clarke's Settlement, In re [1902].² These houses are in sufficient propinquity to the mansion-house to be taken as part of it within the meaning of the judgments in *Gerard's Settled Estates, In re* [1893].³ They are, in fact, part of the premises to be demised, and their rebuilding was an "addition to or alteration in buildings" necessary and proper to enable those premises to be let.

The commission of 60*l.* was an expense incurred by the tenant for life in the exercise of the statutory power of leasing conferred upon him by the Settled Land Acts, and capital moneys may be applied under section 21, sub-section (x.) of the Settled Land Act, 1882, in payment of such an expense—*Maryon-Wilson's Settled Estates, In re* [1901].⁴

P. F. Wheeler, for the infant remainderman.—The applicant has not brought his application within the scope of section 13, sub-section (ii.) of the Act of 1890. The improvement in question is the complete removal of an old building and the substitution of a new one in its place; it is not an alteration in a building in order to enable the same to be let. Then, was this rebuilding "reasonably" necessary? This was only a fourteen years' lease, after all, and the applicant has not shewn such a case that the Court will allow this expenditure to be repaid out of capital moneys.

With regard to the commission to the house agents, *Maryon-Wilson's Settled Estates, In re*,⁴ was a wholly different case, for there the leases were long building leases, improving the value of the inheritance, and not short occupation leases, the whole benefit of which will in all probability enure to the applicant alone.

Burleigh Muir, for the trustees.

SWINFEN EADY, J., after stating the facts as above set out, continued as follows: The question which I have to consider, in the first place, is whether the erection of the vinery and peach-house comes within section 13, sub-section (ii.) of the Settled Land Act of 1890, because

(2) 71 L. J. Ch. 593; [1902] 2 Ch. 327.

(3) 63 L. J. Ch. 23; [1893] 3 Ch. 252.

(4) 70 L. J. Ch. 500; [1901] 1 Ch. 934.

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it is under that sub-section that this application is sought to be supported. These two houses are situated five hundred feet away from the mansion-house, and are lean-to houses. I am of opinion that where an old building is entirely removed and a new building erected, such new building does not come within sub-section (ii.), the wording of which is as follows: "making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let." It is not an addition to or alteration in a building entirely to remove the remains of the old building and to put up a new one in its place. Therefore, in my judgment, this case does not fall within sub-section (ii.); but even if it did, and it was a case in which the Court was able to exercise its discretion, I should hesitate long before allowing the repayment. The cost of rebuilding the vinery and peach-house is something like half the yearly rent at which the mansion-house has been let; the tenant for life is a young man; and the life of a glass house is short—about twenty years. Having regard to the rental of the estate, including the rent derived under the lease of the mansion-house, and to the cost of these glass houses, and to the fact that no scheme was submitted to the trustees, I should have had considerable hesitation in finding that this was a proper case for allowing the expenditure in question to be recouped out of capital moneys.

The remaining question relates to the application for the repayment by the trustees of 60% for commission paid to the house agents on the short letting of the mansion-house to the present tenant. It has been let for fourteen years with power to either side to determine the lease on the expiration of any year after the first seven years and also on the death of the lessee, so that it is a short tenancy under an occupation lease. The application is made after the first two years have practically expired. I am of opinion that the commission on a short term is not an expense which ought to be thrown on capital moneys. If the applicant's contention were right, it would come to this—that on any short letting, provided the tenant for life let in exercise of his statu-

tory powers under the Settled Land Acts, he would be able to take advantage of this provision and get the house agent's commission paid out of capital moneys. That cannot be so. Now it seems to me that such a commission is not an expense which ought to be paid out of capital moneys; and with regard to this particular item, even if I had a discretion, I should decline to exercise it in this case on behalf of the tenant for life.

Solicitors—Cooper, Turner & Evans, agents for
Morrisons & Nightingale, Reigate.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

WARRINGTON, J. }
1905.
May 17, 24. }

CHANT, In re;
BIRD v. GODFREY.

Administration—Simple Contract Debt—Part Payment by Tenant for Life—Administration of Estates Act, 1833 (3 & 4 Will. 4. c. 104)—Limitation Act, 1623 (21 Jac. 1. c. 16)—Order for Administration of Real Estate.

Testator, who died on October 30, 1894, was at his death indebted to the plaintiffs as simple contract creditors. By his will the testator devised part of his real estate to a tenant for life, and subject thereto he devised his residuary real estate to other devisees in fee. In 1895, the plaintiffs made an arrangement with the executors and the tenant for life, under which they received payments on account of their debt and interest out of the rents of the real estate given to the tenant for life, and these payments continued until 1903. In 1905 the plaintiffs took out a summons asking for the administration of the real and personal estate of the testator:—Held, that the part payment by the tenant for life of the simple contract debt of his testator and of interest thereon was sufficient to keep the debt alive, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator.

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Hollingshead, *In re*; Hollingshead v. Webster (57 L. J. Ch. 400; 37 Ch. D. 651), *followed*.

Roddam v. Morley (26 L. J. Ch. 438; 1 De G. & J. 1) and Dibb v. Walker (62 L. J. Ch. 536; [1893] 2 Ch. 429) *applied*.

Originating summons.

The testator, Thomas Chant, who died on October 30, 1894, was, at the time of his death, indebted to the plaintiffs in the sum of 298*l.* for work and materials in building houses upon simple contract.

By his will, made in 1894, Thomas Chant, after bequeathing his personal estate to his wife, Emma Chant, subject to his debts, devised certain houses to his brother, E. J. Chant, and other houses to his sister, Elizabeth Brake, and he devised the residue of his real estate to his wife for her life, and after her death as to part thereof to Elizabeth Brake, and as to the rest to E. J. Chant. And he appointed certain persons executors and trustees of his will.

In 1895 the plaintiffs made an arrangement with the executors and the tenant for life, under which they received payments on account of their debt and interest out of the rents of the real estate given to the tenant for life.

These payments continued until 1903.

On February 6, 1905, the plaintiffs took out this summons on behalf of themselves and all other creditors against the executors, the tenant for life of the part of the real estate, and the devisees of the whole real estate subject to the estate of the said tenant for life, claiming administration of the real and personal estate of said testator.

The question in dispute was, whether the plaintiffs were entitled to have administration of the specifically devised and the residuary real estate of the testator as well as of the personal estate.

Lock, for the plaintiffs.—The simple contract creditors are entitled to have the devised real estate as well as the personal estate administered for the payment of the debts of the testator under the Administration of Estates Act, 1833 (3 & 4 Will 4. c. 104). Payment by a

devisee for life of interest on a simple contract debt of his testator is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder—*Hollingshead, In re*; *Hollingshead v. Webster* [1888].¹ It is not clear that any Statute of Limitation applies; but if it does the debt has been kept alive, and it is sufficient if the payments are made by any one interested. The debt is kept alive not only as regards the residuary estate, but also as regards the other real estate of which Mrs. Chant was not tenant for life—*Roddam v. Morley* [1857],² *Dibb v. Walker* [1893],³ and *Forreth v. Bristowe* [1853].⁴ It is admitted that payment by executors does not have this effect.

[He also referred to *Putnam v. Bates* [1826],⁵ *Brookhurst v. Jessop* [1835],⁶ *Fordham v. Wallis* [1853],⁷ *Coope v. Cresswell* [1866],⁸ *Astbury v. Astbury* [1898],⁹ and *Dickinson v. Teasdale* [1862].¹⁰]

E. S. Ford, for the executors.

Cozens-Hardy, for the residuary devisees. — The plaintiffs' debt is barred by the Statute of Limitation. To take the case out of the operation of that statute there must be a fresh promise to pay implied on the part of the person who is sued for the debt. The debt must be proved to be due and legally enforceable against the land. There was no debt enforceable against us in the first instance. The promise to pay can only be implied where the part payment is made by the person sued, or his agent, or some one through whom he claims—*Putnam v. Bates*,⁵ *Fordham v. Wallis*,⁷ *Bolding v. Lane* [1863],¹¹ *Dickinson v. Teasdale*,¹⁰ and *Astbury v. Astbury*.⁹ No promise to pay can be implied on the part of the devisees in remainder of the residuary estate from the part payment by the tenant for life, and still less on the

(1) 57 L. J. Ch. 400; 37 Ch. D. 651.

(2) 26 L. J. Ch. 438, 445; 1 De G. & J. 1, 19.

(3) 62 L. J. Ch. 536; [1893] 2 Ch. 429.

(4) 22 L. J. Ex. 255; 8 Ex. 716.

(5) 3 Russ. 188.

(6) 7 Sim. 438.

(7) 22 L. J. Ch. 548; 10 Hare, 217.

(8) 36 L. J. Ch. 114; L. R. 2 Ch. 112.

(9) 67 L. J. Ch. 471; [1898] 2 Ch. 111.

(10) 32 L. J. Ch. 37; 1 De G. J. & S. 52.

(11) 32 L. J. Ch. 219; 1 De G. J. & S. 122.

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part of the devisees of the other real estate. The facts in *Dibb v. Walker*² were different from those in the present case, and it was decided upon the Civil Procedure Act, 1833, and had no reference to the Limitation Act, 1623.

The decision in *Roddam v. Morley*³ was criticised both in *Coope v. Cresswell*⁴ and *Dickinson v. Teasdale*.¹⁰

[He also referred to *England, In re; Steward v. England* [1895],¹² and *Macdonald, In re* [1897].¹³]

Lock replied.

Cur. adv. vult.

May 24.—WARRINGTON, J., read the following judgment: The plaintiffs in this case are simple contract creditors of Thomas Chant. The defendants are—first, the executors; secondly, the tenant for life of a part of the real estate; and thirdly, the devisees of the whole real estate, subject as to the part just mentioned to the life estate of the tenant for life. The plaintiffs claim the administration of the real and personal estate of the testator. The devisees (other than the tenant for life) contend that the debt is barred as against them by lapse of time. Whether this is so is the question I have to decide. The debt is a simple contract debt, and the right of action is equitable only—arising under the Administration of Estates Act, 1833 (3 & 4 Will 4. c. 104). The suit contemplated is a suit against the real estate as a whole, not against any particular part, nor does the Act constitute the debts a charge on the estate. In 1895 the plaintiffs made an arrangement with the executors and the tenant for life under which they have received payments on account from time to time, as to which it is admitted that some of them at least, and at all events the more recent ones, were made out of the parts of the real estate, of which she was tenant for life. These payments continued until 1903. The action was commenced on February 6, 1905.

So far as any Statute of Limitation can be said to be applicable to a suit in equity, the statute in the present case is the Limitation Act, 1623. As regards the

¹²) 65 L. J. Ch. 21; [1895] 2 Ch. 100.

¹³) 66 L. J. Ch. 630; [1897] 2 Ch. 181.

estate which is subject to the life interest, the case is directly within the authority of *Hollingshead, In re; Hollingshead v. Webster*.¹ In that case it was decided that payment of interest by a devisee for life kept a simple contract debt alive against the devisees in remainder. The payment here is of principal as well as of interest. This cannot make any difference, and I must hold therefore that, so far as this part of the estate is concerned, the defendants' case fails.

The question then remains, has the debt been kept alive against the other real estate in which there was no tenancy for life? The point has not been expressly decided, but in my opinion the principles of the authorities which I am about to mention cover the case. In *Roddam v. Morley*² it was held by Lord Chancellor Cranworth, following the opinions of Mr. Justice Williams and Mr. Justice Crowder, that in the case of a specialty creditor payment of interest by a devisee for life kept the debt alive as against those in remainder. The case turned first on the question whether on the true construction of the Civil Procedure Act, 1833 (3 & 4 Will. 4. c. 42), s. 5, payment by a tenant for life was payment by a "party liable"; and secondly, what would be the effect of such payment? After holding that on the construction of the statute the tenant for life was a party liable, the Lord Chancellor proceeded as follows: "The question, however, still remains if the payment is made by one only of several persons liable; as, for instance, by a person having only a life interest, who is affected by the payment? Does it operate against the party only by whom the payment is made? or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved, not only against the party making the payment, but also against all other parties liable on the specialty."

In *Dibb v. Walker*³ Mr. Justice Chitty, applying the principles of *Roddam v.*

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Morley,² held that payment of interest by the tenant for life of an equity of redemption kept alive the right of action on the covenant, so as to enable the mortgagee to recover the balance of his debt which his security was insufficient to satisfy as against the general assets of the covenantor; that is to say, as against property other than that in which the tenant for life was interested. I think that *Hollingshead, In re*,¹ shews that as to the effect of part payment there is no material difference between the case of a simple contract debt and a specialty debt. All the devisees are liable in the sense that they may all be sued in equity; and in my opinion payment by any one of them is a payment by a person liable, and therefore, according to the decisions in *Roddam v. Morley*³ and *Dibb v. Walker*,³ sets free the action not only as against the person making the payment, but as against all other parties liable. I hold, therefore, that the part payment in the present case was sufficient to keep the action alive as against all the persons interested in the real estate.

It was argued that I ought not to follow *Roddam v. Morley*,³ having regard to the criticisms on it contained in *Dickinson v. Teasdale*¹⁰ and *Coope v. Cresswell*⁸; but on this point it is enough to refer to the remarks of Mr. Justice Chitty in *Hollingshead, In re*.¹ *Dickinson v. Teasdale*,¹⁰ moreover, was decided on a different statute altogether—namely, the Real Property Limitation Act, 1833. None of the other cases cited by the defendants seem to me to conflict with the opinion I have expressed. There must, therefore, be the usual judgment for administration of the real and personal estate.

Solicitors—J. Trevor Davies; Samuel Price & Sons; Robbins, Hay, Waters & Hay, agents for H. S. & S. Watts, Yeovil.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905. }
June 21. } GARNER v. WINGROVE.

Statute of Limitations—Real Property—Infancy—Adverse Possession—Subsequent Accrual of Infant's Title—Real Property Limitation Acts, 1833 (3 & 4 Will. 4. c. 27), s. 7, and 1874 (37 & 38 Vict. c. 57), ss. 1, 3, and 9.

Where the title of an infant to real property vests in possession at a time when a stranger is in adverse possession as against the infant's predecessor, the Statute of Limitations will continue to run against the infant, notwithstanding his infancy.

Murray v. Watkins (62 L. T. 796) followed.

Trial of action to recover possession of a plot of freehold land at West Ham, of which one Joseph Meek was owner in fee in and before 1883. In that year Meek made a verbal gift of the plot, which was then of trifling value, to the defendant, on the terms that it was to be given back to Meek should he ever ask for it; but he died without having done so, in 1888, and the defendant had remained in possession ever since.

The title of the plaintiffs was derived as follows: Meek made a general devise of all his real estate to trustees with a power of sale, under which they, in 1891, sold the plot, with other land, to Frederick Garner. On Garner's death, in 1892, the plot passed by residuary devise to trustees upon trust for his two sons, the plaintiffs Frederick William Harwood Garner and Stanley Harwood Garner, who were then infants, having been born respectively on June 8, 1881, and December 12, 1884. The elder, after attaining his majority, had been appointed a trustee; his co-trustee was also a plaintiff.

The defendant relied on the Real Property Limitation Acts.¹

(1) The material portions of the Real Property Limitation Act, 1874, are as follows:

Section 1: "After the commencement of this Act no person shall . . . bring an action . . . to recover any land or rent, but within twelve years next after the time at which the right to . . . bring such action . . . shall have first accrued to some person through whom he claims; or if such right shall not have accrued

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The plaintiffs in their reply relied on the infancy of F. W. H. Garner and S. H. Garner at the date of Frederick Garner's death, in 1892.

C. G. Church, for the plaintiffs.—Under section 7 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4. c. 27), the defendant's tenancy at will must be deemed to have terminated a year after its commencement—that is, some time in 1884. It cannot be denied that he has been in adverse possession from that time to this against Meek and his trustees and Frederick Garner and his representatives. But the Statute of Limitations, commencing to run in 1884, only ran till 1892, when it was arrested by the infancy of the plaintiffs F. W. H. Garner and S. H. Garner, who then became beneficially entitled. It is true the legal estate was in the trustees of Frederick Garner's will. In *Levin on Trusts* (11th ed.), p. 1086, it is observed: "Sir Joseph Jekyll is reported on one occasion to have laid down the rule that, 'the forbearance of the trustees in not doing what it was their office to have done should in no sort prejudice the *cestuis que trust*'; and hence it has been inferred that a right gained by a stranger through the neglect of the trustee shall be no bar in equity to the claim of the *cestui que trust*"; but this is

to any person through whom he claims, then within twelve years next after the time at which the right to . . . bring such action . . . shall have first accrued to the person . . . bringing the same."

Section 3: "If at the time at which the right of any person to . . . bring an action . . . to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy . . . then such person, or the person claiming through him, may, notwithstanding the period . . . hereinbefore limited shall have expired, . . . bring an action . . . to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened)."

Section 9 enacts that, except certain sections repealed and which do not affect the present case, the provisions of the Real Property Limitation Act, 1833, shall remain in full force and be construed together with this Act.

not the case generally as regards the operation of the statutes of limitation." After citing some remarks of Lord Hardwicke and Lord Mannors, the learned author proceeds (p. 1087): "... as a general rule, where both *cestui que trust* and trustee are out of possession for the time prescribed by the statutes of limitation, the former suffers for the neglect of the latter and is barred. But the question still remains, whether in cases where the *cestui que trust* would, if his title were legal, have more than the ordinary time to sue (as where he is under disability or entitled in remainder only), he will be allowed the same extended period for suing in equity, notwithstanding that the trustee may be barred." Then on p. 1088 he refers to the doctrine that he who enters without privity or authority upon lands belonging to an infant, must, whether the infant's title be legal or equitable, be regarded as a bailiff or receiver for the infant; but he points out, on the authority of *Crowther v. Crowther* [1857],² that this does not apply where the infant "has never been in possession by himself, his guardian, or agent, but the title"—that is, the possession—"was adverse to those through whom he claims."

*Crowther v. Crowther*² has, however, more than once been criticised. In *Quinton v. Frith* [1868]³ Chatterton, V.C., interprets the decision as applying "only to cases where there is a clear and plain adverse possession without any ground to charge the defendant as bailiff." And in *Howard v. Shrewsbury (Earl)* [1874]⁴ Jessel, M.R., expressed the opinion that the decision had been arrived at under a misapprehension, and was not supported by the authorities on which it purported to be founded. Trespassers were held liable to account as bailiffs to infants who were never in possession in *Pascoe v. Swan* [1859],⁵ *Wall v. Stanwick* [1887],⁶ and *Hobbs, In re; Hobbs v. Wade* [1887].⁷

(2) 26 L. J. Ch. 702; 23 Beav. 305.

(3) 2 Ir. Eq. 396, 414.

(4) 43 L. J. Ch. 495, 498; L. R. 17 Eq. 378, 398, 399.

(5) 29 L. J. Ch. 159; 27 Beav. 508.

(6) 56 L. J. Ch. 501; 34 Ch. D. 763.

(7) 57 L. J. Ch. 184; 36 Ch. D. 553.

GARNER v. WINGROVE.

[BUCKLEY, J.—Is there a case where the trespasser was in adverse possession before the infant's title accrued?]

In *Pascoe v. Swan*⁵ the trespasser, who was entitled to one-third, took possession also of the share of his sister, under whom the infant claimed; but as he maintained his sister till her death his possession could not perhaps be regarded as adverse. In *Wall v. Stanwick*⁶ the infant's title only arose on the re-marriage of her mother, who was the trespasser, so there was no adverse possession before. In *Hobbs, In re*,⁷ the father's adverse possession and the title of the infant under whom the plaintiff claimed both commenced at the mother's death. The principle, however, is the same.

[*Buckmaster, K.C.*, referred to *Murray v. Watkins* [1890],⁸ where Chitty, J., decided against an infant, who claimed under his mother, on whose property a trespasser had intruded.]

That case is not found in the text-books, and is distinguishable as being the case of a tenant in tail. In the present case the infants took by the devise of Frederick Garner, the person last entitled. They are persons whose right to bring an action first accrued when they were under disability, and consequently they are within section 3 of the Real Property Limitation Act, 1874.

Buckmaster, K.C., and *Mark Romer*, for the defendant, were not called upon.

BUCKLEY, J.—The decision in *Crowther v. Crowther*² was criticised and discussed in *Howard v. Shrewsbury (Earl)*⁴ by Sir G. Jessel, M.R., whose observations have been read to me by counsel for the plaintiffs. Those observations suggested the enquiry whether there is any reported case in which the facts were that the person against whom the claim for possession was made went into possession in the lifetime of an owner who was not under disability, and remained in possession after a person under disability—for example, an infant—had succeeded him as owner. Counsel admitted that in none of the cases relied on by him were those facts present. But they do exist in the present case. Here there was possession

by the defendant from 1883 or 1884 to 1891 against Meek and those claiming under him; and, further, until 1892 against Frederick Garner, none of those persons being under disability, and as from 1892 the possession has been against persons who were under disability. The decision of Mr. Justice Chitty in *Murray v. Watkins*⁸ is precisely in point. There the plaintiff's mother was tenant in tail of the property, and entitled to possession in 1871. She was under no disability until 1875. In that year she married. She died in 1882, having never obtained possession of the property. The plaintiff then became tenant in tail in possession, and in 1889 commenced an action to recover possession. It seems to have been conceded in argument that the mother gained nothing by her disability. She died after eleven years had run, and was then succeeded by the plaintiff, who was an infant. It was contended on his behalf that the disability arising by his infancy prevented the Statute of Limitations from running further against him.

The judgment of Mr. Justice Chitty turned on section 1 of the Real Property Limitation Act, 1874, which says that no person shall bring an action to recover land but within twelve years next after the time at which the right to bring such action "shall have first accrued to some person through whom he claims," and that person, in *Murray v. Watkins*,⁸ was the plaintiff's mother. The judgment was to the effect that you must look to the time when the statute commenced to run, and that it does not cease to run because some person subsequently falls under disability. I can only say that I follow that decision and adopt the reasoning on which it was founded, and I dismiss the action, with costs.

Solicitors—Prockter & Grimes, for plaintiffs;
Francis T. Jones, for defendant.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

KKEWICH, J. }
 1905. }
 May 11. }

ALDERSEY, *In re*;
 GIBSON v. HALL.

*Evidence — Presumption of Death —
 Person not Heard of for Seven Years —
 Onus Probandi — No Presumption of Con-
 tinuance of Life.*

*There is no presumption at law in
 favour of the existence of life, and when a
 person has not been heard of for seven
 years the burden of proving that he was
 alive at a particular date after that at
 which he was last heard of rests upon
 those who claim through him.*

*Phené's Trusts, In re (39 L. J. Ch.
 316; L. R. 5 Ch. 139), followed.*

*The title to the income and capital of a
 share of residuary estate passing under a
 will depended upon the exact date of A's
 death, and as to part, which came by way
 of accruer, whether he survived March 16,
 1896. A was last heard of on March 31,
 1895, and was presumed to have been dead
 on March 31, 1902. Neither of the different
 claimants was able to prove that A was
 alive at any particular date after March 31,
 1895:—Held, that the property in question
 was distributable on the footing that A
 must be taken to have died before March 16,
 1896, because he was not proved to have
 been then alive.*

By her will dated May 13, 1889, Jane
 Aldersey devised and bequeathed to trust-
 tees, who were also appointed executors,
 all her real and personal estate as therein
 mentioned upon trusts for payment of
 debts and a legacy, and then to stand
 possessed of the rest of her real and per-
 sonal estate upon trust to receive the
 rents and annual proceeds thereof, and to
 divide the same half-yearly into seven
 equal parts or shares, and to pay five of
 such equal parts or shares during their
 respective lives to her five nephews and
 a niece (one of such nephews being
 Edward Pattinson); one equal part or
 share during their lives equally between
 the children of her late niece Jane Hall;
 and one other equal part or share to be
 equally divided half-yearly to a great-
 nephew and three great-nieces during
 their lives; and the testatrix directed that

if any of her nephews and nieces therein-
 before named should die without leaving
 lawful issue, the half-yearly shares of
 him, her, or them so dying, as well as any
 accruing share or shares which he, she, or
 they might be entitled to under the will,
 should go and be divided amongst such of
 her nephews and nieces and great-nephews
 and great-nieces and the children of her
 late niece Jane Hall, or the issue of such
 of them as might be dead, as should be
 living at the death of such nephews and
 nieces respectively, so that her nephews
 and nieces should each take equal pro-
 portions of the share or shares of such
 deceased nephew or niece, her great-
 nephew and great-nieces one other equal
 proportion of the said share or shares
 equally between them, and the children of
 her late niece Jane Hall another equal
 proportion of the said share equally
 between them.

The testatrix died on August 31, 1890.
 Jane Hall, the niece of the testatrix, had
 six children, one of whom was John
 Joseph Hall. John Joseph Hall was
 married on November 16, 1876, and had
 five children, all of whom were still living.
 In July, 1883, John Joseph Hall left
 Edinburgh, where he had been residing
 with his wife and children, and came to
 London. His wife corresponded with
 him until November, 1888, but he had
 not been heard of since some time before
 March 31, 1895. One of the testatrix's
 nephews, Edward Pattinson, died on
 March 16, 1896, without issue.

A summons was taken out in July,
 1903, by the surviving trustee of the
 will of the testatrix to have it deter-
 mined *inter alia* (1) whether J. J.
 Hall was living or dead, and, if dead,
 when he died. (3) If J. J. Hall sur-
 vived the testatrix, but died before
 Edward Pattinson, whether any and
 which of the children or remoter issue of
 J. J. Hall took any and what interest
 (a) in the original one-seventh share of the
 residuary estate given to the children of
 Jane Hall; (b) in the one-seventh share
 of the residuary estate given over upon
 the death of Edward Pattinson without
 issue. (4) If J. J. Hall survived the
 testatrix and also Edward Pattinson,
 whether any and which of the children of

ALDERSEY, IN RE.

J. J. Hall took any and what interest in the same original or accrued one-seventh share of the residue.

By an order of the Court dated November 28, 1904, it was declared that J. J. Hall was to be presumed to have been dead on March 31, 1902, being the expiration of seven years from March 31, 1895. His widow, the defendant Mary Hall, represented his estate. It was now admitted that J. J. Hall survived the testatrix, but the question at issue was when he died, and whether or not he survived or predeceased the testatrix's nephew, Edward Pattinson. The property in question was retained in the hands of the trustee.

P. F. S. Stokes, for the surviving trustee of the will.

Mark Romer, for the children of J. J. Hall.—It is a matter of evidence as to when J. J. Hall died, and the onus is upon those claiming through him to establish it by affirmative evidence—*Phen's Trusts, In re* [1870],¹ *Green's Settlement Trusts, In re* [1865],² *Benjamin, In re; Neville v. Benjamin* [1902],³ *Rhodes, In re; Rhodes v. Rhodes* [1887],⁴ and *Doe d. Knight v. Nepean* [1833].⁵ The onus is therefore upon Mary Hall, as the representative of J. J. Hall, to substantiate her claim to the income of the share which the trustee has in his hands, and to prove that J. J. Hall was alive after March 31, 1895. As to the interest, therefore, the children of J. J. Hall are entitled to it from 1895 up to March, 1902, as well as from that date.

F. Russell, for Mary Hall.—Such burden of proof as lies upon Mary Hall has been discharged. There was a gift to the children of Jane Hall. Mary Hall represents one of them, J. J. Hall, and he is proved to have survived the testatrix, and is therefore included in the class of beneficiaries. It is for the children of J. J. Hall to make out a case to deprive

Mary Hall of the income from 1895 to 1902—*Lewes' Trusts, In re* [1871].⁶

KEKEWICH, J.—The question I am now called upon to decide is one which arises very frequently in Chancery chambers in the administration of estates, and especially of small estates; and it is whether somebody is dead, and, if dead, when he died. It frequently happens that, although the Court is bound to direct enquiries, yet in many cases that is often attended with very little result, and no evidence is obtained upon which the Master can act. These cases are usually disposed of in chambers with the assistance of counsel and solicitors, and I am not sorry that the case has arisen in which I have had counsel's arguments in Court on the cases to which I immediately refer when the matter comes before me in chambers. I will content myself with referring to the case of *Phen's Trusts, In re*,¹ which is an instructive case upon this point. It was shortly this. The testator there died on January 5, 1861, having made a residuary bequest to his nephews and nieces. In point of law that meant those living at the date of his death. He had a nephew who had gone abroad in 1853, and had been heard of from time to time up to June 16, 1860—that is, within seven months of the testator's death. He then deserted from an American ship, and had not been heard of again. The question was whether that nephew was entitled to share in the testator's bounty. There was not any other evidence as to what became of him afterwards.

The law would presume, whatever else was proved or concluded, that he was dead at the expiration of seven years from June 16, 1860. But that presumption gave no assistance towards solving the question whether he was alive at the date of the testator's death—namely, on January 5, 1861. Lord Justice Giffard, differing from the decision of Vice-Chancellor James, came to the conclusion not that he was dead on January 5, 1861, but that those who claimed his share must prove that he was in fact alive,

(6) 40 L. J. Ch. 602; L. R. 6 Ch. 356.

(1) 39 L. J. Ch. 316; L. R. 5 Ch. 139.

(2) 35 L. J. Ch. 252; L. R. 1 Eq. 288.

(3) 71 L. J. Ch. 319; [1902] 1 Ch. 723.

(4) 56 L. J. Ch. 825; 36 Ch. D. 586.

(5) 2 L. J. K.B. 150; 5 B. & Ad. 86. See also a.c., 7 L. J. Ex. 335; 2 M. & W. 894.

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and the burden was upon them; and that as they had not established that fact, the property was to be divided among the nephews and nieces who were proved to have survived the testator, exclusive of these claimants.

That was the case there, and of course it is not the case which I have here really. But it is not very far from it. There is a difference as to the facts; but the law as stated by Lord Justice Giffard enables me to dispose of this case, as it has enabled me to dispose of a good many others. In the headnote to the report it is said, "There is no presumption of law in favour of the continuance of life"; and although these very words do not occur in the judgment, I think the Lord Justice did so decide, and the headnote is perfectly accurate. He comments on the opinions expressed by Vice-Chancellor Kindersley in several decisions, and on the judgment in *Doe d. Knight v. Nepean*,⁵ and he says: "The Vice-Chancellor Kindersley appears to have acted on the passages in both these judgments, which are to the effect that the onus of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not and ought not to be any such presumption of law." He says again further on: "The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail."

If I can apply that to the facts in this particular case my difficulty comes to an end. But what is said is that he who asserts the right is the person on whom this burden of proof falls. Counsel for the widow of J. J. Hall says that J. J. Hall was alive at the date of the testator's death, but has since died, and at what date we do not know. He says, "there is a gift unto and equally between

the children of my late niece Jane Hall." J. J. Hall was one of the children of Jane Hall, and he was alive at the testator's death; therefore he is included in the class to whom a share in the testator's property was given, and he has discharged the burden of proof which lay upon him. It is upon those who assert that J. J. Hall is dead to shew that it is so. No doubt it is often difficult to say where the burden of proof rests. But I do not myself entertain any doubt upon the burden in this particular case, and for this reason: The gift is of this particular share unto and equally between the children of my late niece Jane Hall—that is only during their lives. There were six children of Jane Hall living at the death of the testator; the result is that this one-seventh part of the testator's property is divided among these six children during their respective lives, so that each will take one forty-second share of the income of the residue so long as he or she lives. Every person claiming through J. J. Hall is entitled to this one forty-second part during his life—his widow claims it on his behalf. It will be paid to her beyond question until March 31, 1895, up to which time he was heard of. At any time after the expiration of that period the trustee who has the money in hand will necessarily say, "You have not proved your title to this fund for the last half-year, because you have not proved that he was alive at the expiration of the half-year"; and the trustee would only be doing his duty in this respect, and the burden of proof would be thrown upon the representative of the claim of J. J. Hall. That burden would not have been discharged, it has not since been discharged, and it is not now capable of being discharged. The widow cannot say that J. J. Hall survived March 31, 1895.

It might be said he is not likely to have died the next day. The answer is, "Very likely not"; he might have lived for a very long time. But the Court is not concerned with probabilities, and it is for the person claiming his share to say how long. It is not presumed that he died on the next day, or the day after, or

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on any day whatever. The Court must hold, and the trustee fulfilling his duty must say, "We cannot recognise your title unless you prove that the tenant for life was alive and that his life endured; it must be taken to have no existence unless it is proved that the life did exist. There is no presumption in favour of the existence of life; it is entirely a matter of evidence in each case; and if the claimant fails to prove the continuance of the life, the claim must fail. Therefore, I think that the share of the income which belonged to J. J. Hall as long as he lived was undisposed of, so far as this gift is concerned, from March 31, 1895. There will be a declaration that the trustee is at liberty to divide the income of the share of which J. J. Hall was tenant for life on the footing that he died immediately after March 31, 1895.

The question of the title to the accrued share by reason of the death of the testatrix's nephew, Edward Pattinson, was then argued.

F. Russell, for the widow of J. J. Hall.—Neither of us can prove the exact date of the death of J. J. Hall. The original gift is, however, to him, and the onus of proof is upon the children to shew the date of death in order to succeed.

Mark Romer, for the children of J. J. Hall.

KEKEWICH, J.—I am about to pronounce a judgment which does not satisfy myself logically, and is at best only the cutting of a knot which is incapable of being untied. I am now dealing with the accrued share which came to the children of Jane Hall through the death of Edward Pattinson on March 16, 1896. If J. J. Hall were living at that date he would be entitled to take a share in the gift which I am about to read. He was last heard of on March 31, 1895, and there is no presumption of his having died at any particular time between that date and the expiration of seven years from it, or of his having lived for any part of that seven years. The share of Edward Pattinson is, according to the terms of the will, "to be divided among such of my nephews and nieces and great-

nephews and great-nieces, and the children of my late niece Jane Hall, or the issue of such of them as may be dead, as may be living at the death of such nephews and nieces respectively"—that is, living at the death of Edward Pattinson in March, 1896. Mary Hall, the widow of J. J. Hall, says, "Pay me my aliquot part of the share." I must hold, according to the judgment I have already delivered, that J. J. Hall must be proved to be one of the children of the niece, Jane Hall, living at the death of Edward Pattinson. That Mary Hall cannot do, and therefore her claim fails irretrievably. Then comes the question as to who is entitled. The children of J. J. Hall, who fortunately for them are the same in number now as they were on March 31, 1895, say that they are entitled, because they are the issue of one of the children who is dead. To be strictly logical, I ought to hold that the burden is upon them to shew that their father was alive at the date when Edward Pattinson died; that they are unable to prove, just as Mary Hall was unable to prove it. That gets one out of the dilemma. It is impossible to hold that there was an intestacy, because the testatrix has said that one of two classes of persons must take—either the children of her late niece, or the children of such one of them as might be dead. Under these circumstances I must hold that, with regard to this particular will, although there is no proof of the death of J. J. Hall, he must be taken to have been dead at the death of Edward Pattinson, because he has not been proved to have been alive.

Solicitors—Chester, Broome & Griffiths,
for all parties.

[Reported by G. Macan, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J. } GOULDER, *In re*;
1905. } GOULDER v.
May 3, 4. } GOULDER.

Will—Construction—Absolute Gift—Share of Residue—Gift Over if before "actual payment" Legatee has Deprived Himself of Benefit of Share—Contingency Definite and Certain—Gift Over not Void for Uncertainty.

Bequest of share of residue to J. G. for his own use absolutely, with a gift over in the event of J. G. being unable at any time prior to the actual payment of the share to give a receipt for the same by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share. Before the money was handed over, J. G. had committed an act of bankruptcy, which was followed by a receiving order and adjudication:—Held, that the contingency was described with definite certainty, and that consequently the gift over was not void for uncertainty, but took effect.

Johnson v. Crook (48 L. J. Ch. 777; 12 Ch. D. 639), *Chaston, In re*; *Chaston v. Seago* (50 L. J. Ch. 716; 18 Ch. D. 218), and *Wilkins, In re*; *Spencer v. Duckworth* (50 L. J. Ch. 774; 18 Ch. D. 634), *followed*.

Martin v. Martin (35 L. J. Ch. 679; L. R. 2 Eq. 404) and *Bubb v. Padwick* (49 L. J. Ch. 178; 13 Ch. D. 517) *not followed*.

Adjourned summons.

By his will dated November 22, 1894, the above-mentioned testator devised and bequeathed the residue of his real and personal estate to his trustees, the plaintiffs, upon trust for sale and conversion, and subject to the payment of his debts and funeral and testamentary expenses out of the proceeds to set apart thereout the sum of 1,200*l.*, and to invest the same and pay the income to his wife for her life, and after her decease to pay out of such sum a certain legacy; and the testator directed his trustees to stand possessed of the residue of his estate (including the residue of the said sum of 1,200*l.* after his wife's death and payment of the said legacy) upon trust to divide the same into eleven equal parts, and to pay two of

such parts to his brother John Goulder for his own use absolutely, provided that in the event of his brother John Goulder "being unable at the time of my decease or at any time prior to the actual payment to him of his share or any part of his share on the division of my estate to give a receipt to my trustees for his share by reason of his having committed or suffered any act whereby he has deprived himself of the right to the benefit of such share either in whole or in part then I direct my trustees to stand possessed of the share of such brother or that part of such share which my said brother is unable to receive for his own benefit" upon trust for the said John Goulder's children as therein mentioned.

The testator died on November 23, 1894, and his will was proved on February 19, 1895. The estate was insufficient to provide in full the 1,200*l.* fund, so that no residue became immediately divisible.

The testator's wife died on August 16, 1904.

The trustees then proceeded to realise the estate, and fixed November 2, 1904, as the day for distribution. On or before that day the trustees received information that John Goulder had already committed an act of bankruptcy, and they refused to pay over the two-elevenths share to him.

On November 3, 1904, a receiving order was made against John Goulder, and adjudication followed on November 16. A trustee was subsequently appointed who assigned the two-elevenths share to the defendant assignees.

This was a summons by the trustees for the determination of the question whether the shares in question had passed under the gift over or belonged to the defendant assignees.

The defendant assignees first contended that on the true construction of the will the words "actual payment" had reference to the time when the share became *de jure* payable; but his Lordship on this point held that the language of the will was too clear to permit of effect being given to that construction, and that the testator was referring to the actual time when the money would be handed over to his brother on the division of the estate.

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The defendant assignees further contended that the proviso was ineffective and void.

The arguments and judgment on this question are alone material for the purposes of this report.

Owen Thompson, for the plaintiffs, stated the case.

W. M. Hunt, for the defendants entitled under the gift over.—By non-compliance with the bankruptcy notice the brother “suffered” an act within the meaning of the proviso—*Throckmorton, In re; Eyston, ex parte* [1877].¹ The gift over is good. On the balance of the authorities there is no rule of law which prevents the testator from giving the shares over in such an event as this, which is definite and certain—*Johnson v. Crook* [1879],² *Chaston, In re; Chaston v. Seago* [1881],³ *Wilkins, In re; Spencer v. Duckworth* [1881],⁴ *Potts, In re; Hooley v. Fountain* [1884],⁵ and *Roberts v. Youle* [1880].⁶ *Kiallmark v. Kiallmark* [1856],⁷ which was the case of a settlement, also supports this view.

Gatey, for the defendant assignees.—There is an ambiguity here in the direction for division. The date at which the gift over is to take effect is not definite and certain, and the gift over therefore fails for uncertainty—*Hutcheon v. Mannington* [1791],⁸ *Martin v. Martin* [1866],⁹ *Minors v. Battison* [1876],¹⁰ and *Bubb v. Padwick* [1880].¹¹

SWINFEN EADY, J., after deciding the question of construction above-mentioned, continued: Then the question remains whether such a provision is legal or is ineffective and void. In *Johnson v. Crook*² Sir George Jessel examined the cases with great care and came to the conclusion that where the event was definite and certain, such a provision was lawful and that there was no rule of law to prevent

effect being given to it. Mr. Justice Fry, in the two cases of *Chaston, In re*,³ and *Wilkins, In re*,⁴ in terms approved of Sir George Jessel’s decision, and in the former case said, “I believe that all the earlier cases proceed simply on this inquiry: Is the contingency expressed with definite certainty? If it be, we will give effect to it; if it be not, we will not give effect to it. Lord Thurlow, in *Hutcheon v. Mannington*,⁸ came to the conclusion that the contingency was too indefinite.” Mr. Justice Fry in that case was of the same opinion and came to the same conclusion as did Sir George Jessel—namely, that where the event was definite and certain there was no rule of law against giving effect to the provision.

Counsel for the assignees relied on the case of *Martin v. Martin*,⁹ and certain observations in *Minors v. Battison*,¹⁰ but both these cases were previous to Mr. Justice Fry’s two decisions, and were fully dealt with by Sir George Jessel in *Johnson v. Crook*.² *Bubb v. Padwick*¹¹ was a later case in which Vice-Chancellor Malins differed from Sir George Jessel. I must, however, give effect to the views adopted by Sir George Jessel in *Johnson v. Crook*,² and by Mr. Justice Fry in *Chaston, In re*,³ and *Wilkins, In re*.⁴ If the event is described with sufficient certainty I cannot see why I should not give effect to it. There is nothing illegal in providing that a gift vested shall be divested on a given event; and if the event can be properly ascertained legal effect must be given to the proviso, so long as the rule against perpetuities is not transgressed.

In this case, as the act of bankruptcy happened before the actual payment of his share, the gift over took effect, and the children take the share which the father would have taken but for his bankruptcy.

Solicitors—Peacock & Goddard, agents for Vickers, Son & Brown, Sheffield; T. H. Aldous, agent for J. E. Wing, Sheffield.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

- (1) 47 L. J. Bk. 62; 7 Ch. D. 145.
- (2) 48 L. J. Ch. 777; 12 Ch. D. 639.
- (3) 50 L. J. Ch. 716; 18 Ch. D. 218.
- (4) 50 L. J. Ch. 774; 18 Ch. D. 634.
- (5) W. N. (1884), 106.
- (6) 49 L. J. Ch. 744.
- (7) 26 L. J. Ch. 1.
- (8) 1 Ves. 366.
- (9) 35 L. J. Ch. 679; L. R. 2 Eq. 404.
- (10) 46 L. J. Ch. 2; 1 App. Cas. 428.
- (11) 49 L. J. Ch. 178; 13 Ch. D. 517.

VOL. 74.—CHANC.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} KINNAIRD	
STERLING, L.J.		(LORD)
COZENS-HARDY, L.J.		v. FIELD.
1905.		
June 20.		

Practice — Frivolous and Vexatious Applications — Interlocutory Proceedings before Judgment — Order to Prevent — Costs.

Before the trial of the action the defendant made twenty-four interlocutory applications with reference to pleadings, discovery, and the like. Most of these applications had been dismissed with costs, and the remainder had proved abortive owing to some irregularity in service or the failure of the defendant to appear. None of the costs incurred in these applications had been paid by the defendant:— Held, that there was jurisdiction to make an order prohibiting any further application by the defendant under the summons for directions, or on any matters of procedure, without the leave of the Judge in chambers, and an order was made to that effect.

Grepe v. Loam (57 L. J. Ch. 435; 37 Ch. D. 168) *applied*.

Appeal from decision of Warrington, J.

The action was brought by three persons on behalf of themselves and all other the members of the Council of the Evangelical Alliance (British Organisation) against the defendant to enforce the carrying out of an agreement made between the council and the defendant by way of compromise of a former action. The defendant was defending the action, and had delivered a counterclaim.

The defendant was conducting his defence in person. Before the case came on for trial he made several interlocutory applications, said to be twenty-four, with reference to pleadings, discovery, and the like matters. Most of these applications had been dismissed with costs, and the remainder had proved abortive owing to some irregularity in the notice of motion or because the defendant had failed to appear. None of the costs incurred in these applications had been paid by the defendant.

The plaintiffs, with a view to stopping what they alleged to be a gross abuse of the process of the Court, took out a summons asking for an order that the defendant be not allowed to make any further application in the action without the leave of the Court first had and obtained, and that if notice of any such application should be given without such leave being obtained the plaintiffs should not be required to appear on such application, and it should be dismissed without being heard.

Warrington, J., made the following order: "This Court doth order that the defendant is not to be allowed without the leave of the judge in chambers to make any application under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order in chambers made on any such application as aforesaid, without such leave; and in case he shall, without such leave, serve notice of any such application or summons or notice of motion as aforesaid on the plaintiffs, they are not to attend unless the judge on the return thereof shall so direct; and unless the judge shall think fit to give such directions, the application shall be dismissed without being heard. And it is ordered that the plaintiffs' costs of this application be borne by the defendant in any event."

His Lordship was of opinion that *Grepe v. Loam* [1887]¹ was a sufficient precedent for the application and for the order which he made.

The defendant appealed.

The *Defendant*, in person.—*Grepe v. Loam*¹ is distinguishable. In that case the applications were all made with the same object—namely, either directly or indirectly to set aside a final judgment. In the present case the applications are all distinct interlocutory applications, all before judgment, and all for legitimate purposes. They are not frivolous or vexatious.

Buckmaster, K.C., and *H. Greenwood*, for the plaintiffs, were not called upon.

VAUGHAN WILLIAMS, L.J.—There can be no doubt as to the jurisdiction of Mr.

(1) 57 L. J. Ch. 435; 37 Ch. D. 168

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Justice Warrington to make the order which he has made; and when one looks at the series of summonses which were issued by the defendant in this action, and the nature of those summonses, it is quite impossible to doubt but that there was ample material upon which the learned Judge had the duty of exercising his discretion. In my judgment, nothing has been brought to our notice which would entitle us to question that the discretion was wisely and properly exercised by Mr. Justice Warrington.

The appeal must be dismissed, and I see no reason why it should not be dismissed in the ordinary terms, with costs.

STIRLING, L.J.—I am of the same opinion. It appears to me that *Grope v. Loam*¹ shews that there is jurisdiction in the Court to make such an order as has been made in this case by Mr. Justice Warrington, and that this is really an example of the mode in which the Court interferes to prevent abuse of its process.

The only question which remains is whether Mr. Justice Warrington was justified in making the order which he did, and in that respect it is really a question of discretion in the exercise of a jurisdiction which appears to me to be inherent in the Court. I am unable to differ from Mr. Justice Warrington as regards the merits of the case, and I think therefore that the appeal fails, and ought to be dismissed.

COZENS-HARDY, L.J.—I am of the same opinion. I have nothing to add.

Appeal dismissed.

Solicitors—Andrew, Wood, Purves & Sutton, for plaintiffs.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.

[IN THE CHANCERY DIVISION AND
IN THE COURT OF APPEAL.]

WARRINGTON, J.

1904.

Nov. 23.

VAUGHAN WILLIAMS, L.J.

ROMER, L.J.

STIRLING, L.J.

1905.

May 12, 15, 16.

June 6.

WOODALL v.
CLIFTON.

*Lease—Long Term—Option to Purchase
Fee-simple—Perpetuity—Covenant Run-
ning with Land—32 Hen. 8. c. 34.*

*S., the owner in fee of certain land, by lease dated July 6, 1867, demised it to W., his executors, administrators, and assigns, for ninety-nine years from June 24, 1866, at a yearly rent. The lease contained a provision that if the lessee, his heirs or assigns, should at any time during the term become desirous of purchasing the fee-simple in the land demised at the rate of 500*l.* per acre, and such further sum for the timber thereon as should be ascertained by a fair valuation, upon the receipt of the purchase-money, the lessor, his heirs or assigns, would execute a conveyance of the premises with the timber thereon in favour of the lessee, his heirs and assigns.*

*On July 14, 1869, S. demised another piece of land to W. for ninety-nine years from September 29, 1868, at a yearly rent. This lease also contained a provision giving the lessee an option to purchase the fee-simple in substantially the same form as in the former lease, except that the option to purchase was given to the lessee, "his executors administrators and assigns," and the price was to be 600*l.* per acre.*

The plaintiff was the assignee of the two leases, and he desired to exercise the option to purchase. The defendants were, as trustees of a settlement, the owners of the fee-simple subject to the leases:—

Held, by WARRINGTON, J., that the options to purchase created an estate or interest in land, and were void as infringing the rule against perpetuities.

Held, by the COURT OF APPEAL, that the provisions giving the option to purchase were concerned with something wholly out-

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vide the relations of landlord and tenant, and could not be said to run with the land under the statute 32 Hen. 8. c. 34, and therefore could not be enforced by the plaintiff.

A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute 32 Hen. 8. c. 34, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease.

London and South-Western Railway v. Gomm (51 L. J. Ch. 530; 20 Ch. D. 562) applied by WARRINGTON, J.

By a lease dated July 6, 1867, Nathaniel Strode, as owner in fee, demised to Viscount Walden, his executors, administrators, and assigns, a piece of land at Chislehurst for ninety-nine years from June 24, 1866, at the yearly rent of 142*l*. The lease contained the following provisions :

"Provided always and it is hereby agreed and declared that in case the said Viscount Walden, his heirs or assigns, shall at any time during the said term become desirous of purchasing the fee-simple of and in the said lands and premises hereby demised, or any portion thereof not being less than one acre (unless by previous purchase the land remaining subject to this present demise shall be less than one acre), at and after the rate of 500*l*. an acre, and such further sum for the timber thereon as shall be ascertained by a fair valuation thereof, and upon receipt of the amount of the purchase-money for the same, the said Nathaniel Strode, his heirs or assigns, shall and will execute a conveyance or other assurance of the said land and premises with the timber thereon in favour of the said Viscount Walden, his heirs and assigns, upon the same terms and stipulations as to title and otherwise as the said Viscount Walden and other purchasers of portions of the Camden Park estate have hitherto completed their purchases." And there was a provision as to the proportionate reduction of rent in case the lessee should exercise the option of purchasing as to a part only of the land demised.

By another lease dated July 14, 1869, Strode demised another piece of land at Chislehurst to Viscount Walden, his executors, administrators, and assigns, for ninety-nine years from September 29, 1868, at the yearly rent of 112*l*. The lease contained a provision (substantially in the same form as the corresponding provision in the former lease) that "the lessee his executors administrators and assigns shall at any time hereafter . . . during the said term . . . have the option of purchasing the fee-simple of and in the said land and premises hereby demised . . . at and after the rate of 600*l*. per acre . . . and upon the receipt of the amount of the purchase-money for the same the lessor his heirs or assigns shall and will execute a conveyance or other assurance . . . in favour of the lessee his heirs and assigns."

The land and property comprised in the two leases were now vested in the plaintiff as assignee for the residue of the terms granted by the leases respectively.

The defendants were, as trustees of a certain settlement made by order of the Court pursuant to directions in the will of Nathaniel Strode, owners of the fee-simple of the land comprised in the leases subject to the leases. The plaintiff, claiming to exercise the options contained in the two leases, gave notice to the defendants to purchase the whole of the property comprised in the leases. The defendants were advised that the options were invalid as against them on the ground that they infringed the rule against perpetuities; and also as regards the option contained in the first lease, that it was reserved to the lessee, "his heirs or assigns," and was not annexed to the lease, and they refused to carry out the sale.

The plaintiff thereupon commenced this action claiming a declaration that the two options to purchase were valid and subsisting options and had been duly exercised by him, and that he was entitled to the benefit thereof, and that upon payment by him of his purchase-money the defendants might be ordered to execute a proper conveyance to him of the premises.

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Cave, K.C., and *Marigold*, for the plaintiff.

Rowden, K.C., and *E. Beaumont*, for the defendants.

[The following authorities were referred to: *London and South-Western Railway v. Gomm* [1882],¹ *Cadell v. Palmer* [1833],² *Isted v. Stoneley* [1880],³ *Evans v. Walshe* [1805],⁴ *Hare v. Burges* [1857],⁵ *Simpson v. Clayton* [1838],⁶ *Spencer's Case* [1583],⁷ *Muller v. Trafford* [1900],⁸ *White v. Southend Hotel Co.* [1897],⁹ *Tulk v. Moxhay* [1848],¹⁰ *Friary, Holroyd & Healey's Breweries v. Singleton* [1899],¹¹ *Collison v. Lettison* [1815],¹² *Oliver's Settlement, In re; Evered v. Leigh* [1904],¹³ *Egerton v. Brownlow (Earl)* [1853],¹⁴ *Roe d. Hunter v. Galliers* [1787],¹⁵ *Adams and Kensington Vestry, In re* [1883],¹⁶ *Redington v. Browne* [1893],¹⁷ and *Manchester Ship Canal Co. v. Manchester Racecourses Co.* [1901]¹⁸; also, *Marsden on Perpetuities*, p. 14; *Prideaux's Precedents in Conveyancing* (15th ed.) vol. ii. p. 75; (17th ed.) vol. ii. p. 84; *Challis' Law of Real Property* (2nd ed.), pp. 171, 173; *Key and Elphinstone's Precedents* (5th ed.) vol. i. p. 703; (6th ed.) vol. i. p. 707; *Co. Lit.* p. 216a, s. 349; 42 Sol. J. 628; and *Gray on Perpetuities*, p. 144, ss. 251, 570.]

WARRINGTON, J. (after stating the facts).—The question turns upon whether, having regard to the fact that the option is one which may be exercised at any time during the period of ninety-nine

years from June 24, 1866—that is to say, a period exceeding twenty-one years—it is void as infringing the rule against perpetuities. The rule against perpetuities, with which we are all familiar, fixes a limit of time, now accepted as a life or lives in being and twenty-one years after, within which every executory limitation, not being a limitation subsequent to an estate tail, must necessarily vest, if it vests at all, on pain of being otherwise void. Does the option in the present case amount to an executory limitation within the meaning of that rule? The provision in the lease by which the option is granted amounts to an agreement or covenant on the part of the then owner of the fee-simple to grant that fee-simple to another person at a period of time which undoubtedly may infringe the rule against perpetuities. If the grant creates an interest in land, it seems to me that the effect of it is to render it something more than a mere covenant, and to create an interest in land which does not vest at the moment at which it is granted, but requires for its vesting the happening of another event—namely, the exercise of the option and the payment of the purchase-money, which event may happen beyond the limit. For the moment I do not propose to deal with any question as to whether the provision runs with the land or not. I take the provision by itself; and, looking at it by itself in the light of authority, I think it impossible to avoid the conclusion that it does create an estate or interest in land; and if it does, then, for the reasons I have stated, it is obnoxious to the rule against perpetuity.

The authority to which I have alluded is *London and South-Western Railway v. Gomm*.¹ In some way, it is a rather puzzling case, but I think this at least comes quite plainly out of it—that a covenant such as that with which I have to deal is one creating an interest in land. There by a deed dated in August, 1865, reciting that the plaintiffs, the London and South-Western Railway, were seised in fee-simple of certain land which was no longer required, the company conveyed the land to one George Powell in fee-simple, and the deed contained a covenant that Powell, his heirs or assigns, would at

(1) 51 L. J. Ch. 530; 20 Ch. D. 562.

(2) 1 Cl. & F. 372.

(3) 1 Anderson, 82.

(4) 2 Sch. & Lef. 519.

(5) 27 L. J. Ch. 86; 4 K. & J. 45.

(6) 8 L. J. C.P. 59; 4 Bing. N.C. 758.

(7) 1 Sm. L.C. (11th ed.), 55; 5 Co. Rep. 16a.

(8) 70 L. J. Ch. 72; [1901] 1 Ch. 54, 60.

(9) 66 L. J. Ch. 387; [1897] 1 Ch. 767.

(10) 18 L. J. Ch. 83; 2 Ph. 774; 11 Beav. 571; 1 Hall & Tw. 105.

(11) 68 L. J. Ch. 13, 622; [1899] 1 Ch. 86, 2 Ch. 261.

(12) 6 Taunt. 224.

(13) *Ante*, p. 62; [1905] 1 Ch. 191.

(14) 23 L. J. Ch. 348, 371; 4 H.L. C. 1, 125.

(15) 2 Term Rep. 133.

(16) 52 L. J. Ch. 758; 24 Ch. D. 199. On app.: 54 L. J. Ch. 87; 27 Ch. D. 394.

(17) 32 L. R. Ir. 347.

(18) 70 L. J. Ch. 468; [1901] 2 Ch. 37.

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any time thereafter, whenever the land might be required for the railway or works of the company, and whenever thereunto requested by the company, on six calendar months' notice and upon receiving 100*l.*, reconvey the land to the company. Taking the terms of that covenant, and comparing it with the terms of the covenant in the present case, they are for all practical purposes identical. In that case the defendant was not the covenantor, and he was not a person who was directly bound by the covenant. He was the then owner of the land, but it was said, notwithstanding that fact, he bought with notice of the covenant, and the covenant would be enforced against him. The matter first came before Mr. Justice Kay, and the result of his judgment was this: He came to the conclusion that, although the defendant was not the original covenantor, and was not a person who was bound at law by the covenant because it did not run with the land, he was a person who, having purchased with notice of it, was bound by it in equity. He further came to the conclusion that it did not create an interest in land, and the case, therefore, with which he had to deal was a simple case of contract, and not of property. Holding, as he did, that the defendant, although not a party to the contract, was bound by it, he felt himself compelled to enforce, and did enforce, the contract by specific performance. That is the result of Mr. Justice Kay's judgment. I will only say about it this, which is important for my purpose—that it is plain from the passages in his judgment which have been referred to in argument, that, if he had thought he was dealing not with a mere case of contract, but with a case where the effect of the contract was to create an estate or interest in land, his decision would have been the other way. I think it is clear in that case he would have held that the estate so created was obnoxious to the rule against perpetuities, and that on that ground the contract could not be specifically enforced.

The case was taken to the Court of Appeal, and the judgments there took a different line from that which was taken by Mr. Justice Kay. The general

effect of those judgments was this. On the point on which Mr. Justice Kay had decided in favour of the plaintiffs, all the learned Judges in the Court of Appeal came to the conclusion that the defendant was not a person bound by the contract in question—not at law because the covenant was not one that could run with the land, and not in equity because it was not a negative covenant, and therefore not one falling within the principle of *Tulk v. Moxhay*.¹⁰ That, one cannot help thinking, might have been an end of the case; but the learned Judges, and especially the Master of the Rolls, thought it right to deal with the other question—namely, the question whether, assuming that this was a covenant binding the defendant, it did or did not create an interest in land, and was therefore obnoxious to the rule against perpetuities. They all of them dealt with that point—the Master of the Rolls, Sir James Hannen, and Lord Justice Lindley—and the conclusion they all came to on that point was that the covenant did create an interest in land. There is a remarkable interlocutory observation of the Master of the Rolls, which shews quite plainly how his mind worked in arriving at that conclusion, in which he says, "What is the distinction between this case and a conditional limitation, that if A. B. pays 100*l.* at any time the estate shall vest in him?" That question was not answered. Having that question before him, he puts the point in this way: "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the

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land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land." Having come to that conclusion, he further proceeded to decide that the rule against perpetuities was one which applied to the interest so created. The other Lords Justices, who concurred in that judgment, took the same view. Sir James Hannen puts it in this way. He held first that it did create an interest in land, and then he went on to say: "If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from *Sanders*, 'a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee-simple of the property discharged of such future use or estate before the event is determined.' Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option." That exactly applies to the covenant in the present case. Lord Justice Lindley agreed with the observations both of the Master of the Rolls and of Sir James Hannen. All the three learned Judges, as I have said, also came to the conclusion (I need not read their judgments on that point) that the other defence of the defendant was well founded—namely, that he was not a person who was bound by the contract either in law or equity.

That being so, the only possible ground that I can see on which the plaintiffs

can escape from the decision in *London and South-Western Railway v. Gomm*¹ is that the covenant ought to be treated as an exception to the general rule against perpetuities; and the way they put it is this. They say that, in leases, covenants to renew—and even to renew in perpetuity—although the interest which they create may be one which arises outside the limits of the rule against perpetuities, have for some centuries been held to be valid; that this covenant, although it is a covenant to convey the fee-simple, is, for all practical purposes, nothing more than a covenant for perpetual renewal, and that, if those covenants are treated as valid, then this covenant ought also to be treated as valid. That raises this question. Covenants to renew are undoubtedly valid. As to that I think there can be no question. Am I to treat them as an exception to the general rule, or is there some ground on which the exception is founded which would apply to the present case? There is admittedly no authority on that point. The authority which has been most relied upon in order to induce me to say that the validity of these covenants depends on a ground applicable to the present case is *Muller v. Trafford*² before Mr. Justice Farwell—not the decision in that case, because the decision was against the plaintiff seeking to enforce the covenant, but *dicta* of the learned Judge in dealing with one part of the case. Those *dicta* amount to this—that the covenant to renew runs with the land, and, that being so, the doctrine of perpetuities has no application to it. I will assume for the present purpose (although I do not wish to decide it, because further questions may arise on which I prefer to reserve my opinion) that this covenant, being contained in a lease, does run with the land as being a covenant touching and concerning the thing demised. Supposing it does run with the land, I do not see why that fact takes it out of the mischief that it infringes the rule against perpetuities. I should have thought, on the contrary, it was just that fact which did create an interest in land—that if it was a mere personal and collateral

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covenant it might well be argued that it had no such effect; and it will be noticed that in *London and South-Western Railway v. Gomm*¹ the Master of the Rolls assumes for the purposes of his decision on that part of it that the covenant bound the defendant—that is to say, that it did either run with the land, or that the defendant was in such a position that, having notice of it, he was bound by it. The learned Judge did that in the passage to which I have already alluded. He said the company must admit that it somehow binds the land. Therefore, he dealt with the case in that part of his judgment on the footing that the covenant either ran with the land at law, or in some way bound the land in equity, which for all practical purposes comes to the same thing.

Mr. Justice Farwell was dealing in the passages which have been cited to me only with the covenant to renew (I think that is important to bear in mind); that is to say, with a covenant which was recognised as being one of the exceptions to the general rule. In the passage in question he says, "I will assume that this is a covenant for renewal running with the land: it is then in my opinion free from any taint of perpetuity, because it is annexed to the land." Then he refers to *Rogers v. Hosegood* [1900],¹⁹ as justifying the expression "annexed to the land." Then he goes on to say: "It must bind the land from its inception, because it would otherwise be an executory interest in land arising *in futuro*, and therefore obnoxious to the rules against perpetuity." When he says "it must" there, what he means is, I suppose, that it must be a condition of its enforceability that it should bind the land from its inception. Then he says, "Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or

interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to and form part of the land from the beginning of the term in such a sense that the doctrine of perpetuity has no application." I think what he means by that is that in the case which he is considering the interest which he acknowledges is created is so annexed to the land that it vests in the lessee in the first instance. I think he must mean that. I come to that opinion from those words which I have just read: "As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted." Take the covenant for renewal itself with which he was dealing. The lessor grants and the lessee accepts something more than the term actually granted—that is, a longer term depending, no doubt, on the happening of another event—namely, the application for renewal—but he regards it as something which belongs to the lessee from the beginning of the term. Can I apply that to the present case? I think it is impossible to do so. I think I must treat these covenants to renew as exceptions to the general rule—exceptions for which it is very difficult to find a logical justification, and exceptions which have been probably recognised because they were in existence long before the rule had been developed. I think therefore I must hold that there is nothing in the attempts which have been made to justify logically that exception that would bind me to apply it in the present case, even on the assumption that the covenant runs with the land. It appears to me that it is the very fact that the covenant runs with the land which makes it an interest which is not vested in the lessee at the moment of the lease, but one which comes into existence only on the happening of a future event—namely, the exercise of the option and the payment of the purchase-money.

I must therefore make a declaration

(19) 69 L. J. Ch. 652; [1900] 2 Ch. 888.

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that the two options to purchase, following the words of the declaration asked in the writ, are not valid and subsisting options.

The plaintiff appealed.

Upjohn, K.C., Cave, K.C., and Mari-gold, for the appellant.—If the contract creating the option is bad, then the new contract created by the exercise of the option on which alone the plaintiff can sue never comes into existence, and the plaintiff, therefore, is unable to claim either specific performance or damages; but as a matter of general law there is no objection on the ground of perpetuity to the contract which creates the option. The doctrine of remoteness is part of the law of property, not contract, and no estate in the land comes into existence until the exercise of the option. *London and South-Western Railway v. Gomm*,¹ is distinguishable. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*¹⁸ and *Edwards v. West* [1878]²⁰ shew that a mere option clause does not create any interest in the land till its exercise. Until it is exercised, the owner of the land can deal with it without reference to the lessee. See, too, *Walsh v. Secretary of State for India* [1863]²¹ and *Witham v. Vane* [1879].²²

The question here arises not on a conveyance, but on a lease, and a covenant for renewal in a lease is one which runs with the land, and to which the doctrine of perpetuity has no application; and there is no difference for this purpose between an option to renew for a long term like 1,000 years and an option to purchase the fee-simple—*Woodfall on Landlord and Tenant* (17th ed. 1902), pp. 183 *et seq.*; *Adams and Kensington Vestry, In re*,¹⁶ *Congleton (Mayor) v. Pattison* [1808],²³ *Roe d. Bamford v. Hayley* [1810],²⁴ *Friary, Holroyd & Healey's Breweries v. Singleton*,¹¹ *Bally v. Wells* [1769],²⁵ *Horsey Estate, Lim.*

v. Steiger [1899],²⁶ *Isteed v. Stoneley*,³ *Simpson v. Clayton*,⁶ *Williams v. Earle* [1868]²⁷; *Gray on Perpetuity*, s. 507, and *Spencer's Case*.⁷

The covenant here plainly concerns the land which is demised—1 *Smith's Leading Cases* (11th ed.) p. 70, citing *Anon. Case* [1584].²⁸ There is therefore privity of estate on which the lessee could sue under the statute 32 Hen. 8. c. 34.

In *Vernon v. Smith* [1821]²⁹ Best, J., says: "In 5 *Coke* 18 it is said 'that the 32 Hen. 8 was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants.' In *Spencer's Case*⁷ the same doctrine is laid down in the same terms, and this case is put by Gawdy, J., and assented to by all the Judges and serjeants, 'that a covenant that a lessor will, at the end of the term, grant another lease runs with the land.'" The case of a right to purchase cannot be distinguished from the right to renewal of a term or to bring the term to an end. The covenant is one for the benefit of the lessee—*Hyde v. Skinner* [1723].³⁰ The benefit of it, therefore, runs with the land and the burthen with the reversion. If that is so, there is no question of perpetuity here. The covenant would undoubtedly be good between the original lessor and lessee, and it runs with the land by virtue of the statute 32 Hen. 8. c. 34. Whether the covenant runs with the land or not depends on whether it concerns the land itself or the mode of occupation—*Congleton (Mayor) v. Pattison*²³ and *Collison v. Lettisom*.¹² The Conveyancing and Law of Property Act, 1881, s. 11, makes covenants "with reference to the subject matter of a lease" run with the land. That section is only declaratory of the existing law. As the covenant touches or concerns the land demised the assignee of the term can sue on it. If the benefit of it runs with the term the words "heirs or assigns," if used in the covenant, would be construed as equivalent to "executors, administrators, or assigns."

(20) 47 L. J. Ch. 463; 7 Ch. D. 858.

(21) 32 L. J. Ch. 555; 10 H.L. C. 367.

(22) Challis' Law of Real Property (2nd ed. p. 401), App. V.

(23) 10 East, 130, 136.

(24) 12 East, 464.

(25) 3 Wils. 25.

(26) 68 L. J. Q.B. 743; [1899] 2 Q.B. 79.

(27) 37 L. J. Q.B. 231; L. R. 3 Q.B. 739.

(28) Moore Q.B. 159.

(29) 5 B. & Ald. 1, 11.

(30) 2 P. Wms. 196.

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There is no contract till the option is exercised. In *Ranelagh (Lord) v. Melton* [1864]³¹ and *Weston v. Collins* [1865]³² it was not suggested that the right to exercise the option to purchase did not pass with the term—see also *Nicholson v. Smith* [1882].³³ In *London and South-Western Railway v. Gomm*¹ it was not really argued whether the contract bound the land, because the plaintiff's right only arose if it did so. We can sue here because the defendants are bound personally by 32 Hen. 8. c. 34, as if they had themselves entered into a contract. There is a distinction between a contract creating an interest in land and a contract running with land. Covenants to renew a lease are not anomalous, but fall within the rule which affects all covenants running with the land. They come within 32 Hen. 8. c. 34.

Rowden, K.C., and *E. Beaumont*, for the respondents.—This is not a case within 32 Hen. 8. c. 34. An option to purchase unrestricted in point of time is bad as a perpetuity—see the articles in 39 *Solicitors' Journal*, p. 618; 42 *Solicitors' Journal*, p. 628; and *Adams and Kensington Vestry, In re*.¹⁶ The covenant does not run with the land—*Doughty v. Bowman* [1848].³⁴ *Thomas v. Hayward* [1869],³⁵ and *Congleton (Mayer) v. Pattinson*.³⁶

Nothing that is destructive of the relation between landlord and tenant is within 32 Hen. 8. c. 34. This is merely a personal or collateral covenant which does not touch the subject-matter of the term. The option to purchase in *London and South-Western Railway v. Gomm*¹ cannot be distinguished from the one in this case. The very words used here were held in that case to create an executory interest in land. They must do so equally in a lease. The covenant to renew a lease is an exception to the general rule—*Moore v. Clench* [1875],³⁶ *Chandos (Dowager Duchess) v. Brownlow*

[1791].³⁷ A covenant to renew to a stranger does not run with the land, and is void as creating a perpetuity—*Hope v. Gloucester Corporation* [1855]³⁸ and *Redington v. Browne*.¹⁷ In *Challis' Law of Real Property*, p. 173, covenants for renewal are mentioned as an exception out of the rule against perpetuity. Covenants for renewal were common, and treated as valid before this rule against perpetuity was established, and may therefore have not fallen within the rule. In *Manchester Ship Canal Co. v. Manchester Racecourses Co.*¹⁸ there was not really an option to purchase at all. An option to purchase is not incident to the relation between landlord and tenant. The ground of the rule against perpetuity is that the law of England will not let it remain in uncertainty as to whom the land belongs. The rule is really only a development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances—*Oliver's Settlement, In re; Evered v. Leigh*.³⁹ If a covenant to purchase is allowed to operate in a lease for more than twenty-one years it will during the whole term until the option is exercised be uncertain to whom the land belongs. It was once doubted whether a proviso for re-entry is good in a lease, but in *Roe d. Hunter v. Galliers*¹⁵ it was decided to be good in a lease for twenty-one years. The effect of the option when exercised is to shift the ownership in fee—*Lawes v. Bennett* [1785],⁴⁰ *Edwards v. West*,²⁰ and *Townley v. Beddoell* [1808].⁴¹

Uppjohn, K.C., in reply, in addition to authorities before cited, referred to *Rose v. Watson* [1864],⁴² *Lewis on the Law of Perpetuity*, p. 164; *Hollis' Hospital Trustees and Hague, In re* [1899],⁴³ *Ashforth's Trusts, In re; Ashforth v. Sibley* [1905]⁴⁴; Conveyancing Act, 1881, s. 65;

(37) 2 Ridgeway P.C. 345.

(38) 25 L. J. Ch. 145; 7 De G. M. & G. 647.

(39) 74 L. J. Ch., at p. 65; [1905] 1 Ch., at p. 196.

(40) 1 Cox, 167.

(41) 14 Ves. 590.

(42) 33 L. J. Ch. 385, 387, 389; 10 H.L. C. 672, 678, 683.

(43) 68 L. J. Ch. 673, 679; [1899] 2 Ch. 540, 552.

(44) *Ante*, pp. 361, 366; [1905] 1 Ch. 535, 545.

(31) 34 L. J. Ch. 227; 2 Dr. & S. 278.

(32) 34 L. J. Ch. 353.

(33) 52 L. J. Ch. 191; 22 Ch. D. 640.

(34) 17 L. J. Q.B. 111; 11 Q.B. 444.

(35) 38 L. J. Ex. 175; L. R. 4 Ex. 311.

(36) 45 L. J. Ch. 80; 1 Ch. D. 447.

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Conveyancing Act, 1882, s. 11; and *The Conveyancer's Compleat Clerk* (ed. 1664), p. 646, where a precedent of a lease containing an option to purchase the fee-simple is to be found.

Cur. adv. vult.

June 6.—ROMER, L.J., read the judgment of the Court:

A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry 8, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase could be said to run with the land by virtue of the provision of the statute, then the plaintiff must fail. Now undoubtedly the statute is in its wording very wide; but it has long been held that some limitations must be implied—as, for example, that the statute does not apply to covenants which do not touch or affect the land demised, or to assigns where the covenants relate to things not *in esse*, and “assigns” are not purported to be bound. The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or provision as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is one aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to affect directly or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though

the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relations of landlord and tenant with which the statute of Henry 8 was dealing. And the results of allowing such a provision to come within the purview of the statute, and to be enforced as running with the land, would lead to very anomalous and, to our minds, most undesirable results as to perpetuities, conversion, and otherwise, which this Court should not validate unless it is obliged to do so. And we cannot think that the Court is so obliged on the true construction and effect of the statute.

It is strange that there is no direct authority on the point. There are cases where the option has been exercised by the tenant and accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by the Court—as, for example, the case of *Adams and Kensington Vestry, In re*.¹⁶ But such cases are really of no assistance for the decision of the present case. In our judgment the appeal should be dismissed.

Appeal dismissed.

Solicitors—Stow, Preston & Lyttelton, for appellants; Fladgate & Co., for respondents.

[Reported by Arthur Lawrence and A. J. Hall, Esqs., Barristers-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J. }
 ROMER, L.J. } WILLATTS,
 STIRLING, L.J. } *In re*;
 1905. } WILLATTS v.
 June 2. } ARTLEY.

*Will — Construction — Real Estate—
 Power to Widow to Sell—Gift of "what
 is left" to Some of Several Co-heiresses
 after Death of Widow.*

*Appeal from decision of FARWELL, J.
 (ante, p. 269; [1905] 1 Ch. 378), allowed
 on the construction of the words of the
 will, and order made by agreement with-
 out determining the questions of law de-
 cided by him.*

Appeal from decision of Farwell, J.

The testator, William Willatts, who died on August 28, 1903, by his will dated May 17, 1903, appointed his widow, the plaintiff Emma Willatts, and another person to be executrixes of his will, and he directed them to pay his debts and funeral and testamentary expenses, and he continued: "I give and bequeath to my wife Emma Willatts all my household effects absolutely and at my death the said Emma Willatts to have power to sell all property and land belonging to me and at her death what is left to be divided between Eliza and Emma Willatts my two daughters by my second wife so that no husband they may marry shall have power or control over the same."

Eliza and Emma Willatts were two only of several co-heiresses of the testator. They were both infants.

Farwell, J., held that the will did not confer a life estate by necessary implication upon the widow, and that the testator died intestate during the life of his widow as to his personal estate (other than his household effects), and as to his real estate.

The plaintiff appealed.

Having regard to the view which their Lordships took of the construction of the words of the will, and to an arrangement which had been come to between the plaintiff and her two daughters, the case does not require any full report.

Chubb, for the plaintiff.

Shabbear, for the two infant defendants Eliza and Emma Willatts, stated that the plaintiff and her two daughters were living together, and so long as the plaintiff received some benefit under the gift it was not desired on behalf of the daughters to argue the question whether her interest was limited to a life interest, or whether she had power to dispose of the property for her own benefit.

J. F. W. Galbraith, for the defendant Emma Bennett, another co-heiress.

Their LORDSHIPS said that the question was purely one of the intention of the testator to be gathered from the words of a very special and obscure will, and there was really no rule of law applicable to its construction. It was plain that the testator did not intend by the words "at my death the said Emma Willatts to have power to sell all property and land belonging to me" to give the plaintiff a power to sell *virtute officii* as one of the two executrixes of the will, nor as trustee, but that it was intended to give it to her individually for her own benefit. What the effect was of the words which followed, "at her death what is left to be divided between Eliza and Emma Willatts," it was not necessary for them to consider, as the plaintiff and her daughters were willing that that should not be decided so long as it was held that the plaintiff did take something; and they did decide that she took something.

Upon the application of counsel for the plaintiff and the two infant defendants, their LORDSHIPS made a declaration that, according to the true construction of the will, the plaintiff was entitled during her life to the residuary estate of the testator (being the net proceeds of sale of his real estate after payment thereof of his funeral and testamentary expenses and debts) with power during her life to expend such portion of the capital of such residuary estate as she might think fit, and that the defendants Eliza Willatts and Emma Willatts were entitled to such

WILLATTS, IN RE, App.

part of the said capital as might remain at the date of the death of the plaintiff.

Appeal allowed.

Solicitors—W. W. Young, Son & Ward, for plaintiff and her two daughters; G. A. Double, for defendant Emma Bennett.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
1905.
June 22, 23. }

EMSON, *In re*;
GRAIN v. GRAIN.

Will—Charity—Bequest to—Condition—“Subject to my trustees being made members”—Impossible Condition—Condition Precedent or Subsequent.

A testator bequeathed legacies to two charities, B. and S., “subject to my trustees being made members or governors . . . to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent.” The B. charity had no governors, but had members who were entitled to vote at general meetings. The S. charity had neither members nor governors. One of the trustees refused to become a member of the B. charity:—Held, that the condition was a condition precedent, not subsequent; that it referred to the obligation of the charities, not to that of the trustees; and that consequently the gift to B. was good and the gift to S. failed.

Originating summons.

By his will dated March 9, 1899, H. H. Emson bequeathed his residuary estate to his trustees upon trust for sale and to divide the proceeds into forty equal parts, of which six parts were to be paid to Dr. Barnardo's Homes for Waifs and Strays and four parts to the Stockwell Orphanage. And the testator declared as follows: “I direct and declare that the bequests herein contained to any charity or charities shall be subject to my trustees or the survivor of them

being made members or governors of such charities respectively as if the said bequests had been gifts from them respectively, to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent.” The testator died on December 19, 1904, and his residuary estate amounted to about 3,000*l.*

At the date of the will Dr. Barnardo's charity was under the exclusive control of the founder, Dr. Barnardo; but in April, 1899, it was registered as a limited company. By clause 4 of the articles of association any one executor of a testator who should in accordance with the will of the testator pay to the association a legacy of not less than twenty guineas was eligible as a member. Clause 6 provided that no one should become a member unless he signed a declaration that he held the Protestant faith and agreed to the clause in the articles empowering the council to strike any name off the register of members without giving a reason. By clause 17 all the arrangements and work of the association were to be under the sole control of Dr. Barnardo. The articles also provided for the holding of general meetings at which the members were to be entitled to speak and vote, but otherwise they had no voice in the management of the charity. One of the trustees declined to sign the declaration, the other was willing to sign if required to do so by the Court.

The Stockwell Orphanage was regulated by a trust deed, and the whole management of the charity, including the power to nominate children, was vested in the trustees, who were constituted a committee of management. There were no governors of the institution nor any members who had any voice or vote in the management of its affairs, other than the committee of management.

The next-of-kin of the testator raised the contention that the condition in the testator's will could not be fulfilled, and therefore the gifts to the two charities failed. This summons was taken out to determine the question.

H. M. Humphry, for the trustees of the will.

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T. A. Herbert, for Dr. Barnardo's Homes.—The clause in question is not an absolute condition. The testator merely intended that his trustees should be in the same position as if they had themselves made the gift. If the testator had intended to make an absolute condition he would have said so. We are willing to make the trustees members of the association. If it is a condition at all it is a condition subsequent. The Court will prefer to construe a condition as subsequent rather than as precedent—*Greenwood, In re; Goodhart v. Woodhead* [1903].¹ Further, the condition is impossible because one of the trustees refuses to sign the declaration; it is therefore not binding—*Croxon, In re; Croxon v. Ferrers* [1904].² It is also not binding because no time is fixed for its fulfilment.

Edward Ford, for the Stockwell Orphanage, adopted the same argument.

Owen Thompson, for the next-of-kin.—The trustees cannot as a fact comply with the condition. The testator intended that they should take an active part in the management of the charities.

[KEKEWICH, J.—The will says “to the intent that they may,” not that they shall.]

It is an essential part of the gift that they shall become members or governors. In the case of the Stockwell charity the sole management is in the trustees, and the executors cannot become trustees of the charity. In the case of the Barnardo charity, even if they become members they may be struck off the register the next day. They must be willing to become members—if not, the condition becomes impossible and the gift fails—*Lowther v. Cavendish* [1758].³

KEKEWICH, J.—I am called upon to construe a difficult clause in a will which disposes of certain parts of residue in favour of two charities. Different considerations apply to the two institutions, but it is necessary in the first place to consider the will generally. The difficulty arises from the condition which the testator has attached to the gifts. It is

said that it is a condition subsequent and that the gifts are good notwithstanding the condition. I cannot accede to that view. Upon the proper construction of the will, I think that the testator intended that the gifts should not take effect unless the condition was fulfilled.

As regards Dr. Barnardo's Homes the difficulty arises in this way: There are two trustees of the will, and the testator directed that his trustees or the survivor of them should be made members or governors of the charity. It is said that that cannot be done because one of the trustees is unwilling to sign the declaration necessary to entitle him to membership. I do not think, however, that the condition was intended to refer to the obligation of the trustees, but to the obligation of the charities. The gift is made subject to the trustees being made members and not to their making themselves members. The institution is quite willing to perform its part and to admit these two gentlemen as members. Then there is this further difficulty: What is the meaning of the words “members or governors”? The draftsman of the will has used language which is puzzling. He uses the words “members or governors” as being the most common words applicable to persons connected with a charity, without regard to any question whether the subscribers to any particular charity can properly be so called. I think that the testator merely meant that his trustees should be made members of the particular institution, whether they are called members or governors or by any other name. It would not, in my opinion, be right to say that because the words “members or governors” are not to be found in the instrument of any particular institution, therefore the gift cannot take effect. I think it is enough for me to hold that the condition is observed if the trustees become members, and that subscribers may be rightly called members. Indeed, the word “member” is peculiarly apposite in the case of the Barnardo institution, because that institution has been duly registered as a limited company.

Then there is a still further difficulty arising from the words “to the intent

(1) 72 L. J. Ch. 281; [1903] 1 Ch. 749.

(2) 73 L. J. Ch. 170; [1904] 1 Ch. 252.

(3) 1 Eden, 99.

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that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent." What is meant by that? Is it a condition that the trustees are to have votes and voices in the management to the fullest possible extent? In my opinion the testator only meant to require that the several societies should admit his trustees as members or governors so that, as far as the rules of the societies would permit, they should, in common with other members and governors, have votes and voices in the management, neither more nor less. The testator did not mean that his trustees were to have the predominant authority or any special influence or power. If this were the case of a society which was willing to admit the trustees as members or governors, but without giving them any vote or voice in the management, that would be another matter.

It remains to apply these principles to the two charities. In the case of Dr. Barnardo's Homes the trustees are obliged as a condition of membership to sign a declaration which binds members to a particular religious faith, and which enables the council to strike the name of any member off the register without disclosing the reason for so doing. It is said that this is a farce, because a person might become a member to-day and be struck off the register to-morrow. I cannot take that view. The trustees would be in the same position as all the other members, and I see no ground for assuming that this power would be used arbitrarily in the sense of causing any wrong or injustice. Then what power would the members have? Probably not much. But they might attend the general meetings, and they would then have an opportunity of using their voices and recording their votes. In my opinion, there is no reason why the trustees should not be made members of this institution in the sense intended by the testator. Therefore the gift to this charity is good.

As regards the Stockwell Orphanage, I regret that I cannot come to a like conclusion. There is no possibility of membership there. Everything is vested in the trustees, and the subscribers cannot

interfere at all. The trustees of the will could not be admitted as members or governors in any sense of the term, and unless they were admitted as trustees of the charity they could have no voice or vote in the management. The machinery of the charity does not provide for their admission. It is impossible therefore to say that this particular institution can comply with the condition in the will, and consequently there is an intestacy as to the gift to the Stockwell Orphanage.

Solicitors—Gribble, Oddie, Sinclair & Johnson, agents for A. J. Lyon, Cambridge; Gilbert Robins; Nisbet, Daw & Nisbet; J. Alexander Aldred.

[Reported by S. E. Williams, Esq.,
Barrister-at-Law.

WARRINGTON, J. }
1905.
April 10.

KELLY v. SELWYN.

Conflict of Law—Assignment—Chose in Action—Reversionary Interest in Personality—Assignment made Abroad—Property in England—Notice—Priority.

An Englishman executed in New York (where he was temporarily domiciled) an assignment to his wife of a reversionary interest in personality in England in the hands of trustees. By the law of New York notice to the trustees was not necessary to complete the assignee's title. He subsequently executed in England a mortgage of the same property to the plaintiff. The plaintiff gave to the trustees notice of his mortgage before notice of the assignment was given:—Held, that the mortgage had priority over the assignment.

Under the will of his father, who died in March, 1888, Arthur Hammond Selwyn was entitled to a share of his residuary estate.

Arthur Hammond Selwyn and Julius Meyer were trustees of the will, and so continued till May, 1904, when Arthur Hammond Selwyn retired from the trust

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and a new trustee was appointed in his place jointly with Julius Meyer.

The estate consisted of a miscellaneous trust fund. The will contained a trust for sale. The estate was converted before the events about to be mentioned, and was invested in English trust securities.

By a deed dated June 8, 1891, and made in the State of New York, Arthur Hammond Selwyn, being then a domiciled American, assigned to his wife absolutely all his interest under the will except a protected life interest in a legacy of 20,000*l*. According to the law of the State of New York, notice to the trustees was not necessary to complete the title of the assignee in such a case.

By a deed of August 10, 1894, made in England, Arthur Hammond Selwyn mortgaged his share in the estate, except the protected life interest, to one Kelly, to secure 400*l*. No notice of Mrs. Selwyn's assignment had been given to the trustees at that time. Kelly gave to the trustees notice of his mortgage on August 14, 1894.

Arthur Hammond Selwyn subsequently made certain puisne mortgages in favour of Julius Meyer and his wife. Notice of those mortgages was duly given to the trustees.

In September, 1903, notice of the assignment to Mrs. Selwyn was given to the trustees.

A reversionary interest in the estate having fallen in, a portion of which would be payable to Arthur Hammond Selwyn or persons claiming under him, Kelly commenced this action claiming a declaration that he was entitled by virtue of his security of August 10, 1894, to a first charge on Arthur Hammond Selwyn's interest in his father's estate in priority to any right or claim of Mrs. Selwyn under the assignment of June 8, 1891.

H. Terrell, K.C., and Chubb, for the plaintiff.—The validity of the respective assignments must be determined by the law of the country where the property is situated, and, as the English law requires the assignee of a *chose in action* to perfect his title by giving notice, the assignment of 1894, of which notice was given to the trustees at once, has priority over the

assignment of 1891, of which notice was not given till 1903—*Queensland Mercantile and Agency Co., In re* [1891].¹

[They also referred to *Dicey's Conflict of Laws*, pp. 530–533; *Foot's International Jurisprudence* (3rd ed.), p. 264; *Westlake on Private International Law* (3rd ed.), pp. 183–185; *Maudslay, Sons & Field, In re*; *Maudslay v. Maudslay, Sons & Field* [1900],² *Castrique v. Imrie* [1870],³ and *Lloyd's Bank v. Pearson* [1901].⁴]

Cave, K.C., and Henry T. Thomson, for second mortgagees, adopted the plaintiff's argument, and referred to *Newman v. Newman* [1885].⁵

Norton, K.C., and A. H. Jessel, for Mrs. Selwyn.—The assignments must be governed by the law of the place where they were made; and, as the assignment of 1891 is fully valid by the law of New York without notice, it being prior in date is entitled to priority over the assignment of 1894 and subsequent mortgages—*Lee v. Abdy* [1886]⁶ and *Alcock v. Smith* [1892].⁷

[They also referred to *Fitzgerald, In re*; *Surman v. Fitzgerald* [1903].⁸]

Henry T. Thomson, for the newly appointed trustee, also referred to *Lee v. Abdy*.⁶

WARRINGTON, J.—The important question in this case has really resolved itself into one of law, and one about which there does not seem to be any direct authority, but which I think comes within certain well-known principles. [His Lordship stated the facts, and continued:] The question arises whether priority ought to be given to the assignment to Mrs. Selwyn or to the mortgage of the plaintiff and the subsequent second mortgages of the defendants, the Meyers, who also gave notice to the trustees. But for one circumstance, which I shall mention directly, there can

(1) 60 L. J. Ch. 579; 61 ib. 145; [1891] 1 Ch. 536; [1892] 1 Ch. 219.

(2) 69 L. J. Ch. 347; [1900] 1 Ch. 602.

(3) 39 L. J. C.P. 350; L. R. 4 H.L. 414.

(4) 70 L. J. Ch. 422; [1901] 1 Ch. 865.

(5) 54 L. J. Ch. 598; 28 Ch. D. 674.

(6) 17 Q.B. D. 309.

(7) 61 L. J. Ch. 161; [1892] 1 Ch. 238.

(8) 72 L. J. Ch. 430; [1903] 1 Ch. 933.

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be no doubt at all as to how the Court would deal with this matter. Here is an English trust fund created by an English testator; the present trustees are now in England, although for some time one of the trustees, Selwyn, was domiciled in America. There can be no doubt that by the law of England (if that is the proper law to apply to this case) the mortgagees, having first given notice of their securities, would take priority over the secret assignment (as I may call it) in favour of the wife, who did not give notice of it till later. But it is said that, owing to the accident of the assignment in favour of the wife having been executed in the State of New York, where the English doctrines of notice are not recognised or are not in force, the law which I ought to regard myself as administering is not the law of England, but the law of New York—at any rate as far as that assignment is concerned.

A number of cases have been cited to me. I do not think any of them are actually in point; in fact, I do not think they are at all in point on the actual question which I have to determine. The first case—*Queensland Mercantile and Agency Co., In re*¹—merely decided that, where there was a *chose in action* owing from persons residing in a particular country—in that case Scotland—an assignment by process of law of the *chose in action*, valid according to the law of Scotland, would be valid elsewhere. I do not think it decided anything more. If it is of any value in assisting me in the present case—I do not think it is—it is rather in favour of Mrs. Selwyn than of the plaintiff. The assignment in New York is valid; but what I have to determine is in what order I, administering an English trust fund constituted by an English testator, who may be taken to have made his will with the English law in his mind, am to treat the several claimants who come here claiming the trust fund? The doctrine of notice, as I understand it, is that until notice is given the assignee of a share in a trust fund is not completely constituted a *cestui que trust*, and that the order in which the fund is to be administered is the order in which the several

claimants claiming to be assignees completely constituted themselves *cestuis que trust*.

Another case that was cited is *Lee v. Abdy*.⁶ It seems to me that case is like *Queensland Mercantile and Agency Co., In re*,¹ and amounts merely to this, that the question whether an assignment of a *chose in action* is valid will be determined by the law of the place where it is executed—the question there being whether an assignment made by husband to wife, which, according to the law of Cape Colony, was for that reason void, was to be treated as a good assignment of an English policy of assurance.

I have listened to the citations from *Foot's International Jurisprudence*, *Dicey's Conflict of Laws*, and *Westlake on Private International Law*, but I do not find anything that actually guides me in what I have to decide in this case. The ground on which I decide this case is that, this being an English trust fund and this being the Court which the testator may be taken to have contemplated as the Court which would administer that fund, the order in which the parties are to be held entitled to the trust fund must be regulated by the law of the Court which is administering that fund. On that footing it seems to me that the mortgagees come before the assignee, Mrs. Selwyn.

Solicitors—Farrar, Porter & Co., for plaintiff
and defendants other than Mrs. Selwyn;
Lewis & Yglesias, for Mrs. Selwyn.

[Reported by Arthur Lawrence, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
 1905. }
 June 27, 28. } GARNETT, *In re*;
 RICHARDSON v.
 GREENEP.

Settlement — Nullity of Marriage — Covenant to Pay if Marriage be "solemnised" — Effect of Decree Absolute.

By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his executors would, within twelve months from his death, pay 25,000l. to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his executors were directed to pay and did pay over the 25,000l., being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Court declaring the marriage to have been and to be absolutely null and void on the ground of the impotence of the husband:— Held, that, inasmuch as the marriage had been declared null ab initio, it had never been "solemnised"; consequently the covenant to pay the 25,000l. never became operative, and the money in question must be repaid to the executors of the testator.

By his will dated June 21, 1891, Joseph Richardson appointed his daughter Mary Beatrice Richardson and the defendants Robert Hodgkinson and Francis Michael Greenep executors and trustees, and after making certain specific bequests and legacies the testator devised and bequeathed all his real and personal estate to his trustees upon trust for conversion, and after the payments therein mentioned to invest the residue and pay certain annuities, and subject thereto the testator directed his trustees to pay the income of his residuary estate to his daughter Mary Beatrice Richardson during her life for her own use and benefit without power of anticipation, and after her death to hold his residuary trust funds and the income thereof in trust for her children or remoter issue as she should appoint, and in default in trust for all her children on attaining twenty-one or marrying, and if there were no such child the trustees were to stand possessed of his residuary trust funds in

trust for the persons who, under the Statutes for the Distribution of the Estates of Intestates, would, on the decease of his said daughter, have been entitled to the same if she had died intestate and without having been married. The will also contained a power to the daughter to appoint 500l. a year to any husband who might survive her during his life.

By a settlement dated July 13, 1891, made in contemplation of the marriage of Mary Beatrice Richardson with Henry Percy Garnett, Joseph Richardson, who was the first party thereto, covenanted with the trustees of the settlement "that if the said marriage be solemnised" his executors or administrators would within twelve calendar months after his decease pay to the trustees 25,000l. with interest at 4 per cent. on the 25,000l. from the date of marriage to the date of payment; and it was thereby agreed that, upon receipt of the principal sum of 25,000l., the trustees should invest the same as therein mentioned and pay the interest to Mary Beatrice Richardson during her life for her separate use but without power of anticipation, during any coverture, and after her decease should pay thereout the yearly sum of 500l. to any husband who might survive her during his life, and subject thereto should transfer the trust premises to the children or other issue of Mary Beatrice Richardson by her then intended or any future husband as she should appoint, and subject thereto to transfer the trust funds to such children as should attain twenty-one or marry under that age; and if there were no child who should attain twenty-one or marry under that age, then the trustees were to hold the unappointed and unapplied trust premises in trust for Joseph Richardson, his executors, administrators, and assigns.

The marriage took place on July 14, 1891, at Brompton Oratory, in regular form according to the rites of the Roman Catholic Church. Joseph Richardson died in October, 1894, and until his death the interest on the 25,000l. was paid to the trustees of the settlement.

On February 24, 1896, a decree for the administration of the estate of Joseph Richardson was made in an action in

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which Mary Beatrice Garnett was plaintiff and the trustees of the will defendants. An enquiry as to debts only was prosecuted, and by the certificate of the chief clerk dated July 22, 1896, the only debt of the testator which was allowed was the sum of 25,000*l.* due under the covenant in the settlement of July 13, 1891, with interest thereon.

By an order made on further consideration dated December 15, 1896, it was ordered that the testator's executors and trustees should pay the 25,000*l.* and interest to the trustees of the settlement. This was done, and the money was invested by them and the income paid to Mary Beatrice Garnett until her death on December 12, 1904. In January, 1896, Mary Beatrice Garnett commenced proceedings in the Divorce Court against Henry Percy Garnett, and by a decree nisi made on June 4, 1896, it was ordered that the marriage which had been in fact solemnised on July 14, 1891, should be "declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of the impotence of the said respondent, and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent." A decree absolute was made on December 14, 1896, the day before the above-mentioned order on further consideration under which the 25,000*l.* was paid over, but the fact of the decree having been made was not brought to the knowledge of the Court.

By her will made on December 12, 1904, Mary Beatrice Garnett bequeathed all she died possessed of to the defendant, the Rev. Henry Cutajar, and appointed him her sole executor. She died without ever having had any issue, and without having made any appointment. Upon her death questions arose as to who was entitled to her share under the will of the testator, and also as to the effect of the decree absolute upon the covenant in the settlement.

An originating summons was taken out by Philip John Sampy Richardson, who claimed to be beneficially entitled to part of the testator's residuary estate, as

one of the next-of-kin of Mary Beatrice Garnett, asking *inter alia*—first, that it might be declared that the covenant by the testator to pay 25,000*l.* to the trustees of the settlement never became operative by reason of the decree of nullity of the marriage, and that such sum and the investments representing the same were never in fact subject to the trusts of the settlement.

Ingpen, K.C., and *Austen-Cartmell*, for the plaintiff.—The effect of the decree absolute of nullity of the marriage is to put an end to the settlement altogether, except for the purpose of any application to vary the trusts of the settlement under section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), as amended by the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 3. That question arose in the case of *Dormer v. Ward* [1900],¹ although it was there held that the marriage was void and a covenant to pay a sum did not take effect. In the present case the sum of 25,000*l.* comes back into the testator's residuary estate and should be repaid to his executors.

P. O. Lawrence, K.C., and *Fawcus*, in the same interest, for some of the next-of-kin of the testator and of the daughter.—It was necessary to go to the Divorce Court to extinguish the interest of the husband. The case of *Chapman v. Bradley* [1863]² is an authority in our favour that the settlement has become wholly inoperative. Questions of varying a settlement were discussed in *Addington v. Mellor* [1885]³ and *Thomson v. Thomson* [1896].⁴

Peterson, for other next-of-kin in the same interest, referred to *Attwood v. Attwood* [1902].⁵

Stewart-Smith, K.C., and *Parikh*, for the legal personal representative and beneficiary under the daughter's will.—The decree of nullity has no effect upon the covenant, which is by a third party. The settlement is therefore good. The

(1) 69 L. J. P. 144; [1901] P. 20.

(2) 33 L. J. Ch. 139; 4 De G. J. & S. 71.

(3) 33 W. R. 232.

(4) 65 L. J. P. 65; [1896] P. 263.

(5) 71 L. J. P. 129; [1903] P. 7.

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marriage was in fact solemnised in proper legal form, and the parties lived as man and wife. Clearly, until the decree of nullity was pronounced five years after the marriage, it was a good settlement, and the parties acted under it. That distinguishes this case from that of *Chapman v. Bradley*,² where the marriage was illegal from the first on the ground of the relationship. The cases on variation of settlements have nothing to do with the present case. It would be extraordinary if this settlement was upset, having regard to its terms. The order on further consideration of December 15, 1896, was valid, and has not been appealed from; under that order the money was properly paid over. The 25,000*l.* must now pass under the will of the daughter.

Ingen, K.C., replied.

KEKEWICH, J.—There is no occasion upon the present application to enter into a consideration of the question whether a settlement made upon a marriage necessarily fails altogether by reason of that marriage not taking effect either because there has been no valid ceremony or because the marriage has been annulled by a decree of the Divorce Court. It would, to my mind, be going much too far to say that a marriage settlement necessarily fails by reason of the non-solemnisation of the marriage, or by reason of the marriage having been solemnised and then set aside. It is quite possible that a settlement might be drawn which would stand, even if the marriage were no marriage at all. I do not for a moment suppose that Lord Justice Vaughan Williams meant anything to the contrary when he says in *Dormer v. Ward*,¹ “for, as I have already said, inasmuch as all marriage settlements are subject to the condition of marriage. . . .” The learned President of the Divorce Division avoided this large question in the case of *Attwood v. Attwood*.⁵ He says, “It is not, I think, necessary for me to decide whether or not the settlement has come to an end on the pronouncing of the decree absolute annulling the marriage.” Counsel for the legal representative of the daughter has given me good reason for holding that this

marriage settlement could very well stand, even if no marriage were solemnised or if it were annulled. Of course the settlement does stand, notwithstanding the annulment of the marriage, for the purposes of the application of section 5 of the Matrimonial Causes Act, 1859. There is a distinct decision to that effect in the case of *Dormer v. Ward*,¹ decided by the Court of Appeal. So that for some purposes the settlement must be regarded as standing, even if it is ineffectual by reason of there having been no valid marriage. But I am not deciding any question of that kind. Nor am I concerned in the least degree to criticise the application of section 5 of the Act of 1859, as amended by the Act of 1878, to a settlement made on the occasion of a marriage where such marriage has been annulled. It has been decided that, notwithstanding the annulment, the power of the Court to vary the settlement stands; and it must be for the Court to consider in every case not only whether the jurisdiction ought to be exercised, but whether it can be exercised, and it is for the Court of Probate to consider whether the trust of the funds brought into settlement by the husband or wife, or, as the case may be, directed to be held in trust for a husband or wife until the solemnisation of the marriage, is equally open to the application of that power to which I have referred, and whether the Court cannot vary it under the provision of the statute. It has been left to the Court to consider in each particular case how to vary it. I gather from a perusal of the report in *Attwood v. Attwood*⁵ that trusts of the kind are within its jurisdiction, and it can vary the trusts if it is necessary to do justice. That being so, it is not for me to say whether the form given in *Addington v. Mellor*,³ which was obviously well considered, may not be the better form. That form seems to me to work out the rights of the parties in that particular case with perfect accuracy, but for other cases it may not be perfectly adapted.

I am prepared to decide this case upon the particular meaning and effect of the settlement before me. It is a settlement made on the marriage of Mary Beatrice Richardson, one of the daughters of Joseph

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Richardson; and he entered into a covenant in contemplation of the intended marriage, that if such marriage were solemnised his executors were, within twelve calendar months after his death, to pay to the trustees of the settlement 25,000*l*. He bound himself to pay that money if the marriage was solemnised, and not otherwise. He reserved power to pay during his lifetime, but it was not paid in his lifetime, but by his executors after his decease. Counsel for the legal personal representative of the daughter says on behalf of those claiming under her will that the trustees are to hold this money upon the trusts of the settlement, and all that it means is that the ceremony of marriage shall be gone through. Counsel feels himself to be a little embarrassed by the decision in *Chapman v. Bradley*,² to which I am about to refer, but he says that there the marriage ceremony was not gone through, in the sense that the ceremony was futile, being one which the law would not recognise. Here it is said that a different rule must apply to those marriages which are void altogether and those which are not. He says it would be monstrous to say that the marriage here failed, and had not been solemnised, when the parties had gone through the ceremony and intended to become man and wife, and believed that they were. All that depends upon the meaning of the word "solemnised." I agree that the decision in *Chapman v. Bradley*² proceeded upon a different state of facts. There the parties were married in Switzerland, and honestly believed that they were legally married. But the law of England did not recognise their marriage, and it was annulled. The trusts there were also a little different in form, because there the trustees were to hold the money in trust for the settlor until the intended marriage should be solemnised, and then, after the solemnisation thereof, upon the trusts in the usual manner. The judgment of Lord Justice Knight-Bruce, which is concurred in by Lord Justice Turner, turned upon the meaning of the word "solemnised"; but whether you find it in a trust or in a covenant seems to me to be utterly immaterial. Lord Justice Knight-Bruce

says: "The first question is, what is the meaning to be ascribed to the word 'solemnised' as used in that instrument? As used in that instrument it must, in my judgment, mean validly and effectually solemnised." The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England and this domicile had not been changed, and the lady was the niece of the gentleman's deceased wife. Therefore the marriage ceremony, although it took place at Neufchâtel, was as ineffectual as if there had never been any such ceremony at all. And Lord Justice Turner says, "The word marriage must be taken to mean a valid and effectual marriage." What is the difference between a marriage such as that now in question here, which has never been valid by reason of the incapacity of the parties, and a marriage in which the relationship has been too close, or where the ceremony was conducted by some unauthorised person, or by one who was not in a position to celebrate it in a particular church, or by a person who pretended to be a Registrar and was not? There are many ways in which a marriage may fail to be solemnised. I believe that I am right in saying that no year passes in which the Government do not find it necessary to give legislative sanction to marriages which have been solemnised in churches or chapels which were not properly licensed for that purpose, or in the case of marriages which have been gone through but are not valid through some inadvertence; and, if the Legislature did not intervene, the result would be that no marriage in such cases as these would have been solemnised. The form of the decree *nisi* in the Divorce Court in the present case is that the marriage in fact had and solemnised at a certain date was pronounced and declared "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, by reason of the impotence of the said respondent, and the said petitioner be pronounced to have been and to be free from all bond of marriage with the said respondent." Therefore there never was a marriage, although the ceremony was gone through, and the parties lived

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together as man and wife after that date. The marriage is pronounced null and void *ab initio*. Not only are they not now married, but they never were. In other words, as Lord Justice Turner says in *Chapman v. Bradley*,² "there has never been any valid marriage." I have nothing to do with the trusts of the settlement. There never was any obligation to pay under the settlement, as the covenant never took effect.

My conclusion is that there is no subject-matter upon which the trusts of the settlement can operate. The trusts may be perfectly good, but they are not enforceable by any one, and there is no money to be applied. Mr. Richardson died without having availed himself of the power of paying the money in his lifetime, and at his death the trustees of the settlement became entitled, as they thought, to be paid the 25,000*l.* The testator's estate was administered in an action, and in that action the trustees brought forward their claim for 25,000*l.* Unless this particular point had been raised their claim would have been unanswerable, as it was a solemn covenant. The question was not raised at the time; the claim was admitted, and in due course an order on further consideration was made, and the money was directed to be paid and it was paid to the trustees of the settlement, and they still hold it and desire to know what they are to do. The decree absolute was only made a day before the order on further consideration, and it occurred to no one to raise this point. This money was clearly paid to the trustees under a mistake of fact, and it is the duty of the Court to see that justice is done and to put the parties back into the position they would have occupied if the claim had never been made. It is said that the parties assented to the payment; but if any such assent was given it was in ignorance of the real state of things—namely, that no marriage had been solemnised, and the covenant had not become operative. The right thing to do is to put right what has gone wrong, and to provide that the 25,000*l.*, less the costs, charges, and expenses of the trustees, shall be repaid to the executors of the

testator on the ground that the covenant never became operative.

Solicitors—Waples Canwarden; Merriman, White & Thomson; J. H. Smith; W. J. Payne; T. Russel Kent, for the various parties.

[Reported by G. Macan, Esq.,
Barrieter-at-Law.

FARWELL, J. }
1905. }
June 6, 7. }

SHEPHERD v. HARRIS.

Trustee—Fraud of Co-trustees—Inscribed Stock—"Stock receipt"—Negligence—Liability.

One of two co-trustees, who was also a stockbroker, had in his hands a certain sum of money which it was intended to invest in inscribed West Australian stock. In due course he shewed his co-trustees the usual bought-note for this stock, and also the usual "stock receipt" signed by the vendor and by the bank clerk at the time of the purchase. The co-trustees did not attend at the time of the purchase, nor did he afterwards make enquiries at the bank as to whether the stock had actually been transferred into the names of himself and of the broker-trustees. It appeared, however, from the evidence that it was not the usual practice among business men either thus to attend at the time of the transfer or to institute such subsequent enquiries; but that they were content to rest upon the evidence of the "stock receipt," though this was not a document of title. It was finally discovered that the "stock receipt" was a forgery, that no such purchase of West Australian stock had ever been made, and that the broker-trustees had embezzled the money:—Held, that the co-trustees was not liable for the loss of the trust money resulting from the fraud of the broker-trustee, as he had taken all the precautions that were usually taken in such a case by an ordinary prudent man of business in the conduct of his own affairs.

Trial of action.

In April, 1905, the plaintiff Shepherd was tenant for life (*inter alia*) of a sum of

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2,191*l.* 5*s.* 5*d.* inscribed Tasmanian 3½ per cent. stock under the will of his father, the late Charles L. Shepherd. At the date in question the defendants Harris and Janvrin were the trustees of the will. Harris was a member of the London Stock Exchange, and a broker of standing and repute; Janvrin was at that time clerk to a firm of brokers on the half-commission system, but was not then himself a member of the Stock Exchange.

In the early part of April, 1900, the plaintiff had an interview with the defendant Janvrin, in which he said that he was anxious to sell out the 2,191*l.* odd inscribed Tasmanian stock and to purchase in the place thereof a sum of West Australian 4 per cent. inscribed stock, which he believed would prove a more profitable investment. The defendant Harris was willing to concur in this transaction, and Janvrin also consented. Subsequently Harris informed Janvrin by telephone that he had sold the Tasmanian stock, in his capacity as a broker, and had purchased a corresponding amount of West Australian stock. At the same time he made an appointment with Janvrin for the same day to meet him at the London and Westminster Bank (in whose books the Tasmanian and West Australian stocks are inscribed) to sign the transfer of the Tasmanian stock. Janvrin accordingly met him, and the transfer of the Tasmanian stock to its new purchaser was there and then effected. On this occasion also Harris shewed Janvrin the bought and sold notes of the new Australian stock, and gave him a fee of five guineas as half-commission. He also informed him that he had not yet got delivery of the new Australian stock. During the next ensuing fortnight Janvrin met Harris on two or three occasions, and on each he asked him whether he had yet obtained delivery of the new Australian stock. On the last of these occasions Harris produced a so-called "stock receipt" for the Australian stock from his pocket.

These stock receipts are brought by the broker to the transferor to the bank when it is intended to effect a transfer of inscribed stock. The transferor there signs the transfer book, and subsequently the stock receipt; and the latter is also

signed by the bank clerk. Ultimately this receipt reaches the broker for the buyer, either directly or through the medium of the Stock Exchange clearing-house, and it is then handed by this broker to the purchaser himself. The "stock receipt" contains the following marginal note: "The proprietors to protect themselves from fraud are recommended to accept by themselves or their Attorneys all transfers made by them." It appeared from evidence that this note, which was partly inserted for the protection of the bankers, is, in practice, consistently ignored, and that only in, perhaps, two or three cases out of every two thousand does the transferee attend, in person or by attorney, at the moment of the transfer. It also appeared from the evidence that it is subsequently open to the transferee to present himself at the bank in person—if personally known to the bank unaccompanied, but, if not personally known, accompanied by a broker known to the bank, to assist in his identification; to state to the bank that he is holder of such or such an amount of inscribed stock; and to ask them to inform him whether this statement is correct. The bank would then answer a verbal enquiry of this nature; but they would not answer enquiries by post, nor would they correct the amount of the stock should this be wrongly given by the enquirer. It appeared, however, from the evidence, that enquiries of this nature are very seldom made, and certainly not as a usual practice by investors of ordinary caution. In accordance with the common practice Janvrin failed to attend at the time of the transfer of the new Australian stock; nor did he, till after the occurrence of the events next mentioned, think it necessary to make enquiries at the bank.

The first dividend on the Australian stock became due on October 15, 1900, and a few days after this date the plaintiff called on Janvrin and said that he had had an interview with Harris; that the latter had shewn him the "dividend voucher" for the stock in question; that he had checked the amount; and that Harris had then paid it to him.

Subsequently, on October 7, 1902, Janvrin heard that Harris had been

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expelled from the Stock Exchange. He therefore made enquiries at the bank, and found that no sum whatever of Australian stock was standing in the joint names of the trustees. It now appeared that the "stock receipt" shewn to Janvrin by Harris was in reality a forgery; and that Harris had embezzled the proceeds of the sale of the Tasmanian stock.

Janvrin, in the meanwhile, had himself become a member of the Stock Exchange in March, 1902. Since the commencement of the present action, which was begun by the plaintiff to recover from Harris and Janvrin the proceeds of the sale of the 2,191^l. Tasmanian stock, the defendant Janvrin had repaid to the trust estate the sum of five guineas received by him as half-commission from the defendant Harris.

The defendant Harris did not appear at the trial of the action.

Upjohn, K.C., and *Beddall*, for the plaintiff.—Janvrin is liable for the default of his co-trustee. The law affecting a case like this was considered in *Speight, In re; Speight v. Gaunt* [1883],¹ and it was there laid down that a trustee employing a broker was not liable for the fraud of the latter, provided that he had followed "the usual and regular course of business adopted by ordinary prudent men." The question is accordingly one of fact—Did Janvrin follow this usual and regular course? We submit that he did not, for a prudent man of business would not have been satisfied with the precautions that satisfied Janvrin. The only possible excuse that Janvrin could set up is the excuse of necessity—*Joy v. Campbell* [1804],² per Lord Redesdale—and this he cannot allege in the present case. He ought not to have trusted Harris so implicitly, and he ought not to have rested satisfied with the mere production of the receipt.

He has also put himself in a worse position by his acceptance of the half-commission of five guineas.

Eve, K.C., *Jenkins, K.C.*, and *Clawson*, for the defendant Janvrin.—Janvrin is

not liable, for he took all the precautions—as is shewn by the evidence—of an ordinary prudent man of business—*Mendes v. Guedalla* [1862],³ and *Brier, In re; Brier v. Evison* [1884].⁴ The receipt by him of the five guineas for commission cannot affect his non-liability.

T. B. Napier, for three other defendants.

Upjohn, K.C., replied.

FARWELL, J., after stating the facts, continued: The question is whether Janvrin is responsible for the loss of this 2,191^l. 5s. 5d. Tasmanian inscribed stock. That depends upon the application of the law laid down in *Speight, In re; Speight v. Gaunt*,¹ which I take to be, so far as the point now in question is concerned, that a trustee sufficiently discharges his duty if he takes, in managing trust affairs, all those precautions that an ordinary man of business would take in managing similar affairs of his own. I think that Lord Blackburn, if I may venture to say so, makes a most excellent remark in his judgment in that case: "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are." Now I ask myself, What more could the trustee, Janvrin, have done in the present case, not being unduly suspicious, than to see the bought and sold notes, and to see this receipt, which is accepted, as he knew, as sufficient by all the people on the Stock Exchange, and, on the evidence before me, by one hundred and ninety-nine people out of every two hundred—as to which, moreover, it is impossible to make any enquiry, except by going to the bank in person, and by getting oneself identified there by a broker, if one does not happen to be otherwise known? Perhaps I ought to go on further, and add that the bank does not answer all enquiries. It is useless, for instance, to write them a letter of enquiry, for such a letter it is not their practice to answer. They keep the registers secret—quite rightly, of course—and reveal their contents to no one; and all they will do is to inform a man who is a stockholder, and who is known to them

(1) 52 L. J. Ch. 503; 9 App. Cas. 1.

(2) 1 Sch. & Lef. 328, 341.

(3) 31 L. J. Ch. 561; 2 J. & H. 259.

(4) 26 Ch. D. 238.

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to be a stockholder, or is introduced to them as such by a broker whom they know—all they will do, if such a man come to them and state to them that he is the holder of such and such stock, is simply to verify that statement for him. They will not give an answer to the question, How much stock have I?—even though it come from a genuine stockholder. They will only tell him whether his statement is correct or incorrect; and they will not correct his statement if he make a mistake in his figures. Therefore, all that Janvrin neglected to do, if neglect it be, is this: he neglected to go into the bank with a broker to identify him—for he was not at that time a broker himself, and I do not gather that he was known to the bank—and to state that he was the transferee of this sum, and to enquire whether the sum was correctly stated or not. No doubt it would have been better, looking at the matter in the light of what has subsequently happened, had he then adopted this course. The question, however, that has now to be determined is this: Is he liable for not having done so? That I have already said depends on this: whether in the ordinary course of business it is usual for the ordinary prudent business man to do it; and, in my opinion, on the evidence it is plainly not. Practically no one ever dreams of doing so. The result is that, down to this point, I can see no ground for holding Janvrin liable.

I ought, moreover, to add that there is one other matter which Janvrin is entitled to rely on. It is within the experience of most of us, that we rest more happy in making an investment—let us say, in inscribed stock—when we receive the first dividend afterwards. Now it appears from the evidence that the plaintiff came to Janvrin in October, 1900, when the first dividend should have been paid, and said that he had seen either the dividend warrant, or the counterfoil of the warrant, and that he was not satisfied as to the amount of his income. That certainly was enough to make an ordinary person reasonably satisfied that the investment had actually been made. If

I received the receipt of inscribed stock I might not perhaps rest quite secure—after this case, at any rate—without going to make enquiries, until I received the first dividend; but after receiving the first dividend I should then consider myself—and I hope quite rightly—to be perfectly safe.

Then it is said that Janvrin is somehow in a worse position because of the receipt of five guineas, as half-commission, which he afterwards accepted from Harris. He did not ask for this money—he was surprised when he got it; but he took it, being a clerk on half-commission, and regarding it, I suppose, as a windfall. I do not quite understand what he had done for it; but anyhow its acceptance was quite wrong, and he has since repaid it to the trust estate, after the issue of the writ, but before the present trial of the action. I have found some little difficulty in following the argument by which it is said that this payment can possibly make any difference. The transaction, as I understand it, was this: Harris was retained to act as broker, and, being entitled to charge for professional services under the will, was paid for his services as broker in respect of the sale of the stock now in question. He shewed the receipt to Janvrin as joint principal with himself in instructing his own firm. Janvrin, being satisfied as such joint principal that the transaction was duly completed, handed back the receipt, as I think he was bound to do, to Harris, who, as senior trustee, had the custody of the certificates and whatever receipts or title-deeds there might be. There is nothing, so far as I can see, to impose any liability on Janvrin by this conduct; nor can I see that the subsequent receipt by him of five guineas can convert this non-liability into liability. The liability arises, if it arises at all, from neglecting his ordinary duty; and cannot see that greater duty was imposed upon him by his subsequent receipt of this money. Lord Justice Romer has held, in *Jobson v. Palmer* [1892],⁵ that, in the case of a creditor's deed of settlement, a trustee who was an accountant, and remunerated for his professional services,

(5) 62 L. J. Ch. 180; [1893] 1 Ch. 71.

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and who was robbed of the trust estate by one of his employees, was not liable for the act of his servant, and was not to be disallowed the benefit of the rule in *Speight v. Gaunt*¹ simply because he was remunerated. I do not see myself why this remuneration should make any difference in this case.

Solicitors—Churchman & Winser, for plaintiff;
Freeman, Cooper & Freeman, for defendant Janvrin; T. Haynes Reed, for other defendants.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
1905. } BRUCE, *In re*;
June 28, 29. } HALSEY v. BRUCE.

Settled Land—Trustees—Leaseholds—Purchase of Freehold Reversion—"Enfranchisement"—Capital Money Required—Mortgage of Settled Land—Infant—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 18 and 21, sub-s. (vi.)

The purchase by the trustees of settled property of a freehold reversion of leaseholds comes within the meaning of the word "enfranchisement" in section 18 of the Settled Land Act, 1882, and the raising of money upon mortgage of the settled property in order to make such purchase may be authorised.

Summons taken out by the trustees of the will of Edgar Bruce asking that a conditional contract entered into by them with Alexander Arnold Hannay for the purchase from him at the sum of 27,500*l.* of the freehold ground-rent of 1,000*l.* per annum, secured on premises known as the Prince of Wales' Theatre, in Coventry Street, Haymarket, London, and a shop and chambers adjoining, might be approved and carried into effect, and that the applicants might be at liberty to raise the purchase-money of 27,500*l.* by mortgage of the ground-rent and the leasehold interest in the same property belonging to the testator's estate, subject to certain existing charges.

The contract in question was dated June 17, 1905, and was subject to the approval of the Court or a Judge.

The testator held the premises under a lease dated September 4, 1883, for a term of eighty-five years from August 12, 1882, at a ground-rent of 1,000*l.*, and the premises were subject to mortgages amounting to 32,690*l.* 17*s.* 7*d.* The surplus income arising from the testator's estate amounted to about 2,000*l.* per annum, which was applied in paying off the mortgages under an order of the Court dated March 29, 1904. There was evidence that the proposed purchase would be greatly to the advantage and benefit of the infant defendant, Sybil Etonia Bruce, who was fourteen years of age.

Under the will of Edgar Bruce dated January 7, 1893, the infant was, according to the construction put upon the will by the Court, absolutely entitled to the whole of the testator's estate. The trustees of the will had the fullest discretionary power of realising the testator's estate, and were trustees for the purposes of the Settled Land Act.

P. O. Lawrence, K.C., and *Crossfield*, for the trustees of the will.—The leasehold is settled land within the Settled Land Act, 1882, and the trustees are to exercise the powers of the tenant for life—sections 59 and 60. The question is whether they have power under the Act to enfranchise this property by acquiring the freehold reversion and to raise the required money by mortgage. Under section 18¹ money can be raised, when required, for three different purposes, one of these being for an "enfranchisement." What is proposed to be done here is an "enfranchisement," as the word applies equally to leaseholds as to copyholds—*Murray's Oxford Dictionary*. It is a

(1) Settled Land Act, 1882, s. 18: "Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple, or other estate or interest, the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act."

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making the land free from rent according to *Coke upon Littleton*, 137a, b. The word is used in connection with leaseholds in the Ecclesiastical Commissioners Act, 1860 (23 & 24 Vict. c. 124), ss. 30, 35, 36, and 37, and more especially in section 36, where money is authorised to be raised for the purpose of purchasing the reversion or "otherwise enfranchising" leaseholds. That being so, this money is properly "required," according to section 18, for an enfranchisement. The word "required" must mean conveniently and reasonably required in the administration of the estate. There is power under section 21, sub-section (vi.), to apply capital money in the purchase of the reversion on leaseholds, and there is nothing in section 18 to restrict the meaning of enfranchisement to copyholds only. This conditional contract may therefore be sanctioned by the Court.

A. F. Peterson, for the infant.—If the word "enfranchisement" in section 18 includes the enfranchisement of leaseholds, then the argument of the applicants is unanswerable. But the word, when used in the other sections of the Settled Land Act, 1882, is always used in connection with copyholds—for instance, in section 3, sub-section (2), and section 4, sub-section (7), and it is so used in section 18. It is similarly used in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. (2).

Whitmore Richards, for other parties, did not oppose the application.

P. O. Lawrence, K.C., in reply.—The word "enfranchisement" has come to be commonly used in connection with leaseholds, and the Court will not be disposed to put a narrow construction on it in this Act, but will give it the wider construction which is contended for.

KEKEWICH, J.—This is, so far as I am aware, practically a new point, and is obviously one of considerable importance, because, although the particular event which arises here is not likely to occur again, there may be other cases to which any construction which I put upon the section will necessarily apply.

The facts are simple enough. The infant in the present case is entitled to a

long lease of a theatre which is held at a rental of 1,000*l.* a year, payable to the owner in fee, and an opportunity occurs to buy that rent and convert the leasehold interest into a freehold. It is said that it is of the greatest importance to the infant that that should be done. The question is how it can be done. There is no capital money available, although the estate is perfectly solvent, and a sum of 27,500*l.* is required to purchase this reversion. Can it be done?

It is important to see exactly what the question is. If there were capital money in the hands of the trustees available for the purpose, there would be no doubt that the Court could properly sanction the application of that money to the purchase of this reversion, because the infant has the powers of a tenant for life within the meaning of the Settled Land Act, 1882, s. 59, and the trustees of the settlement could exercise the powers on her behalf, and are expressly authorised by section 21 of the Act of 1882, sub-section (vi.), to apply capital money "in purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life." Here the settled property is leasehold, of which the reversion in fee is to be bought.

There is no question that it is within the meaning of that section. So far there is no difficulty at all. The question then arises, Can the money be raised? Can the trustees be authorised to mortgage the settled land, which must necessarily include that which they have contracted to purchase, so as to raise the money to enable this purchase to be carried into effect? It is now well settled that the policy of the Settled Land Act—namely, to allow settled property to be sold, and to enable a tenant for life, or those having the powers of a tenant for life, to convert property into money—must be borne in mind in construing the Act, and the Court is bound to give a wide interpretation to any words in the Act when such a wide interpretation is required in order to assist the policy of the Act. That, unfortunately, does not apply here, where the object is not to sell, but to acquire other settled land.

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The valuable statements made by the Judges in the Court of Appeal and elsewhere are of no assistance upon this particular point. I am thrown back upon the words of the Act of Parliament, which have to be construed in the ordinary way, and I think I am not going too far in saying that the construction put upon those parts of the Act which deal with the raising of capital money has been stricter than the construction put upon those parts of the Act which deal with the selling of land. I think it is necessary to take care not to be led into giving too liberal a construction to the provisions in question in this case by reason of any notion that the Legislature must have intended to make it easy to do what is here proposed to be done, and which, under certain circumstances, is authorised.

The question is this. Section 18 of the Settled Land Act, 1882, does allow money to be raised by mortgage of the settled land under certain circumstances, and for certain purposes. The words are "where money is required." The word "required" creates no difficulty whatever. It does not mean more than this: where there is something proposed to be done which ought to be done, and the money is not forthcoming to do it, and therefore is "required" for this purpose, then you obtain it by means of a mortgage. That is what it means. If a good object arises falling within the section, you may raise money for the purpose of effecting that object, and therefore it is required. About that there is no doubt. Then the section says, "where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof."

The question is whether the particular transaction which I have here can be classed under "enfranchisement," as it does not come under the head of "equality of exchange or partition." This section 18 must be read with reference to the rest of the Act. You find it provided in section 21 of the Act that "capital money arising under this Act" may be applied (sub-section iv.) "In payment

for equality of exchange or partition of settled land." There you find two of the objects grouped together which are recognised in section 18 as objects for which money may be required. Where is "enfranchisement" the third object? The word is not used in sub-section (v.) of the same section, "In purchase of the seigniority of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land."

These cases are grouped together where the lands are not held in common socage. It seems to mean this—that where land is not held in common socage then you may apply capital money in getting rid of the burdens which intervene between yourself and the fee-simple, and you may convert your tenure into fee-simple. Now, that undoubtedly is "enfranchisement." Every lawyer knows that you "enfranchise" copyholds; but is that necessarily all? The next sub-section (vi.) is this: "In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life." Is the purchase of the reversion in fee also strictly "enfranchisement," as it has nothing to do with copyholds?

In neither of these sub-sections of section 21 is the word "enfranchisement" used, although the word does occur elsewhere in the Act, and no assistance is given in determining what it means here. Can I extend the meaning of the word beyond that of enfranchisement of copyholds? There are two considerations bearing upon that point. I have been referred to an Act of Parliament where the word "enfranchisement" is certainly used as referring to the purchase of the reversion of a leasehold. In the Ecclesiastical Commissioners Act, 1860, sections 20, 35, 36, 37 refer to enfranchisement, and all go upon the same lines and use the same language. I take the words used in section 36. The Legislature there authorises the raising of "a sufficient sum for the purpose of purchasing the reversion of, or otherwise enfranchising, the property comprised in such lease or grant." The Legislature says there in plain terms that purchasing

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the reversion is one way of enfranchising property. That is a distinct recognition by the Legislature of that meaning which I am asked to attach to the word here. It also follows the etymological meaning of the word as expressed in dictionaries to which reference has been made, and also in *Coke upon Littleton*, shewing that the word means "obtaining freedom," and that, as applied to leasehold land, means freedom from rent, as that is all you can free it from. And certainly I think one must not ignore the fact that the enfranchisement of leaseholds is a matter which concerns a very large number of people at the present day, and I have myself been concerned at the Bar in many transactions for the purpose of enabling tenants of a lease to acquire the freehold, and in all these cases it would have been a case of "enfranchisement." I think it would be wrong to ignore that, and I am bound to take judicial notice of the use of the term, which has been common enough, where the result is that the leasehold tenant acquires the fee and gets rid of the rents and services, and becomes master of the property. Now, having regard to the fact that there is nothing in section 18 in any way restricting the meaning of the word "enfranchisement," and nothing to point to its referring to copyholds only, and having regard to the fact that sub-section (vi.) of section 21 distinctly contemplates the conversion of leaseholds into freeholds as an object for which capital money may be applied, it is, at any rate, not unlikely that the Legislature meant that money might be raised under section 18 for that good purpose. It seems to me, therefore, that I ought not to hesitate to hold that the word "enfranchisement" in section 18 must have a wide construction and will include the application of money for the purchase of a reversion of leaseholds within the meaning of section 21, sub-section (vi.).

Solicitors—Valpy, Peckham & Chaplin, for all parties.

[Reported by G. Macan, Esq.,
Barrister-at-Law.

[IN THE CHANCERY DIVISION AND
IN THE COURT OF APPEAL.]

SWINFEN EADY, J.

1905.

June 7.

VAUGHAN WILLIAMS, L.J.

STIRLING, L.J.

COZENS-HARDY, L.J.

July 12.

MEARS v.
WESTERN
CANADA PULP
AND PAPER CO.

Company—Shares—Allotment—Minimum Subscription—Cheques for Application Moneys—Allotment before Cheques Cleared—Dishonoured Cheques—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4, sub-s. 1; s. 5, sub-s. 1.

In response to the issue of a prospectus the company received applications for the full amount of the minimum subscription named, accompanied by cheques for the application money, and it went to allotment. At the time of allotment a considerable number of the cheques sent for the application money had not been credited to the company's banking account, and certain of those cheques were after the allotment dishonoured:—Held, that the sum payable on application for the amount fixed by the prospectus as the minimum subscription had "not been paid to and received by the company" within the meaning of sub-section 1 of section 4 of the Companies Act, 1900, and the allotment was voidable.

Glasgow Pavilion, *Lim. v. Motherwell* (6 Ct. of Sess. Cas. (5th Series), 116) discussed and distinguished.

Per COZENS-HARDY, L.J., and SWINFEN EADY, J.—The intention of sub-section 1 of section 4 is that no allotment should be made until the company has actually received payment of the application money, and if cheques are sent with the applications they ought to be cleared before an allotment is made.

Appeal from decision of Swinfen Eady, J.

The company was registered on March 8, 1905, with a capital of 450,000*l.*, divided into 300,000 6 per cent. cumulative preference shares of 1*l.* each, and 150,000 ordinary shares of 1*l.* each.

On February 16, 1905, the plaintiff entered into an underwriting contract to

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underwrite 300 of the preference shares of the company.

On April 29, 1905, the company issued a prospectus offering the 300,000 preference shares for subscription, the amount payable on application being 2s. 6d. per share. The prospectus stated that the minimum subscription on which the directors would proceed to allotment was 200,000 of preference shares so offered for subscription.

On May 12, 1905, the company went to allotment, and the plaintiff was allotted and paid the application moneys on 283 preference shares.

At the date of the allotment the company had received applications from the public and underwriters for the minimum subscription of 200,000 shares named in the prospectus, but a considerable number of the cheques forwarded with the applications for the moneys payable on such applications had not at the date of the allotment been credited to the company's banking account. Three of such cheques, amounting together to 500*l.*, were subsequently to the allotment dishonoured on presentation, but two of them were afterwards taken up and the amounts paid to the company.

On May 24, 1905, the plaintiff issued his writ in the present action, claiming—first, rescission of the contract to take the 283 preference shares; secondly, rectification of the register of the company and return of the moneys paid by him to the company in respect of such shares; and thirdly, an injunction to restrain the defendant company from parting with or otherwise dealing with such moneys.

He moved for an interim injunction to the effect of the third claim in his writ.

In his affidavit in support of the motion the plaintiff alleged that under the circumstances the sum payable on application for the minimum amount named in the prospectus had "not been paid to and received by the company" at or prior to the time of the allotment of the shares, and that the directors of the company were not therefore entitled to make an allotment of the preference shares so offered for public subscription, as the provisions of sub-section 1 of section 4 of the

Companies Act, 1900, had not been complied with.

The material provisions of the Act are set out below.¹

Macnaghten, K.C., and *A. H. Jessel*, for the motion.

Eve, K.C., and *A. R. Kirby*, for the company.

SWINFEN EADY, J., stated the facts and continued: I am of opinion that, according to the true construction of section 4 of the Companies Act, 1900, in order to enable an allotment to be made the sum payable on application must have been "paid to and received by the company." That means payment in cash. The cash must have been paid to and received by the company. Of course payments may be made in the ordinary course by cheques, but then the cheques must be cleared before the allotment. The money has not been

(1) Companies Act, 1900, s. 4, sub-s. 1: "No allotment shall be made of any share capital of a company offered to the public for subscription, unless the following conditions have been complied with, namely,—

"(a) the amount (if any) fixed by the memorandum or articles of association and named in the prospectus as the minimum subscription upon which the directors may proceed to allotment; or

"(b) if no amount is so fixed and named, then the whole amount of the share capital so offered for subscription,

has been subscribed, and the sum payable on application for the amount so fixed and named, or for the whole amount offered for subscription, has been paid to and received by the company."

Sub-section 2: "The amount so fixed and named and the whole amount aforesaid shall be reckoned exclusively of any amount payable otherwise than in cash, and is in this Act referred to as the minimum subscription."

Section 5, sub-section 1: "An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up."

Section 12, sub-section 1: "Every company limited by shares and registered after the commencement of this Act shall, within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called the statutory meeting."

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paid to and received by the company if the company merely holds a cheque which may or may not afterwards be honoured.

In the present case three of the cheques sent for deposits were dishonoured. In my opinion, according to the true construction of this statute, it is a condition precedent to a valid allotment that the amount should have been paid to and received by the company in cash—not in negotiable instruments, which may or may not be met. Any means by which money may be remitted may be used, but the actual cash must be received by the company, and remittances must have been cleared before the date of allotment.

Under these circumstances the plaintiff, having repudiated in time, is entitled to the order he asks for.

The company appealed.

Gore-Browne, K.C., and *A. R. Kirby*, for the appeal.—The decision of the learned Judge comes to this—that cheques sent for application money must be cleared before the company goes to allotment. There is no English case on the point, but in a Scotch case—*Glasgow Pavilion, Lim. v. Motherwell* [1903]²—it was held that payment by cheques which could not be presented until the day after allotment was payment within section 4 of the Companies Act, 1900.

A bill of exchange, until it is dishonoured, even though it is for a smaller amount than the debt, is accord and satisfaction, though that might not be payment—*Spargo's Case* [1873].³

The Act does not expressly say that payment must be in cash. A bill at six months might, perhaps, not be payment; but a cheque payable on demand is. It is a conditional payment, and suspends the right of action. If the cheque is dishonoured, the debt revives; but that had not happened when the company went to allotment, so that at that time the company were entitled to treat the cheque as payment. It would be so treated if it were sued upon—*Belshaw v. Bush* [1852],⁴ *Griffiths v. Owen* [1844],⁵ *Currie v. Misa*

[1875],⁶ and *Matthew, Ex parte; Matthew, in re* [1884].⁷

[COZENS-HARDY, L.J., referred to *Bottomley v. Nuttall* [1858].⁸

[STIRLING, L.J., referred to *Cohen v. Hale* [1878].⁹

In two cases the cheques were paid by persons by whom they were indorsed. It cannot be necessary that the cheque should be paid by the drawer. It is sufficient for this purpose if it is paid by a person who is liable to pay.

[VAUGHAN WILLIAMS, L.J., referred to *Bullen and Leake's Precedents of Pleadings* (3rd ed.) p. 559, (5th ed.) p. 658.]

A. H. Jessel (Macnaghten, K.C., with him) was not called upon.

VAUGHAN WILLIAMS, L.J.—I think that we ought to affirm the judgment of Mr. Justice Swinfen Eady, and dismiss this appeal. [His Lordship read the judgment above set out from the beginning down to the words “afterwards be honoured,” and said:] One observation which the learned Judge makes there it would, I think, be well to emphasise, because it gets rid of any argument which might be put forward—I do not say rightly put forward, but which might be put forward—on the ground of hardship. As he points out, there is no real hardship resulting from holding that the payment intended by this Act of Parliament, which speaks of money being “paid to and received by the company,” must be a payment in cash, because the company can always, if they choose, clear every cheque that they receive in payment of the application money before making the allotment, and thus put themselves in a position to know for certain that they have got the cash. [His Lordship then read the rest of the judgment down to the words “cleared before the date of the allotment.” He continued:] I wish now to say a word about the case of *Glasgow Pavilion, Lim. v. Motherwell*.² In that case, as in this, the payment of the application money had been made by cheque; but in that case,

(6) 44 L. J. Ex. 94, 100; L. R. 10 Ex. 153, 163, 164.

(7) 12 Q.B. D. 506.

(8) 28 L. J. C.P. 110, 118; 5 C. B. (N.S.) 122, 144.

(9) 47 L. J. Q.B. 496, 497; 3 Q.B. D. 371, 373.

(2) 6 Ct. of Sess Cas. (5th Series), 116.

(3) 42 L. J. Ch. 488, 492; L. R. 8 Ch. 407, 414.

(4) 22 L. J. C.P. 24; 11 C. B. 191.

(5) 13 L. J. Ex. 345, 348; 13 M. & W. 58, 64.

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differing from the present, the cheques were all duly honoured, and it was held by the Scottish Court that there had in that case been a payment to and receipt by the company of the application money within the meaning of section 4 of the Companies Act, 1900. It was said in argument that the crucial time was, and necessarily must be, under this section, the time of going to allotment, and that at the moment when the allotment was made there had not in that case been payment of the application money in cash; and the true inference to be drawn from the judgment of the Scottish Court was that there need not be receipt in cash, because at the moment of the receipt of the application money in that case it was uncertain whether the cheques would be honoured or not, although ultimately they were honoured; but I do not think that in the present decision we are deciding anything contrary to that which the Scottish Court held. It may very well be that the Scottish Court decided the case before it upon the ground that the giving of the cheques was conditional payment, and that, as the event had happened of the cheques being honoured, on that state of facts, the *prima facie* presumption arising of payment had never been displaced, and therefore, in effect, there was a payment from the first. We have not to decide any such question here, because in the present case the cheques were not all honoured; and whatever may be the true effect to be given to the fact that, according to the English law, the giving of a negotiable instrument, whether it be a cheque or a bill of exchange, operates as conditional payment, it is sufficient to say that it so operates only unless and until that happens which will put an end to the conditional payment—that is, the dishonouring of the cheque. I say, without having to decide the question as to what the situation would be if a cheque had been given, and a question of this sort were raised, without the cheque having been dishonoured, that in the present case the cheque has been dishonoured, and therefore it is not possible for those who received it, and to whom the cheque was paid, to say that at

any moment of time there in fact had been a payment to and a receipt by the company.

Under these circumstances, I think that the judgment of Mr. Justice Swinfen Eady was quite right, and that this appeal must be dismissed with costs.

STIRLING, L.J.—I am of the same opinion. The question is whether in this case the conditions imposed by the Legislature in sub-section 1 of section 4 of the Companies Act, 1900, have been complied with. At the time of the allotment there had been paid to and received by the company certain cheques. Of these cheques, three were afterwards dishonoured; and the question therefore is whether, in these circumstances, the sum payable on application was paid to and received by the company. The company had only cheques, and they had not presented them at the time when the allotment was made. When they did present them, some of them were dishonoured. In these circumstances, looking at the matter entirely apart from any technicality, it seems to me that it cannot be said that the sum payable on application was paid to and received by the company.

As regards the effect of the receipt of the cheque, a very similar point arose in the case of *Cohen v. Hale*.⁹

There a garnishee order was made attaching a debt. At the time the order was made the garnishees had given the judgment debtor a cheque for the amount of the debt; but afterwards the cheque was stopped, and it was held that upon the cheque being stopped it was as if it had never been given, and that there was therefore an existing debt capable of being attached. The argument which was put forward in that case was singularly like that which has been urged before us on the present occasion; but it was overruled, the Court saying that the giving of the cheque only suspended the remedy. It did not extinguish the debt, and therefore when the cheque was stopped it was as if it had never been given. I am unable to differ from that, and on these grounds I think that the appeal must be dismissed.

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COZENS-HARDY, L.J.—I am of the same opinion. It is not, in my view, necessary that we should express any opinion as to what would have been the result if the cheques which were received by the company had all been honoured when presented for payment. The Scottish Court held that that was good payment within this section—I presume on the ground, that the acceptance of the cheques was regarded as a conditional payment, and that nothing had happened to destroy the effect of that. But that principle, assuming it to be applicable at all to a case under the section, can have no application to a case where the cheque which has been accepted has been dishonoured. The effect of the dishonour of the cheque is that from that moment the condition has become inoperative, and there is no payment of it at all.

I should prefer really to look at the matter, not on those technical grounds, but on grounds of substance. I think the Legislature meant in section 4 of the Companies Act, 1900, that no allotment should be made until the company had actually received, in the ordinary mercantile business sense, the amount of the allotment money. No difficulty will arise from a business point of view if companies will but wait and postpone their allotment until the cheques which they have received have been cleared in the ordinary way.

I think that this appeal must be dismissed, with costs.

Appeal dismissed; and if the company agreed to treat this as the hearing of the action, declaration made that the allotment was voidable and had been duly voided, and order for rectification of the register and repayment of the moneys paid.

Solicitors—Blundell, Gordon & Co., for plaintiff;
Christopher & Roney, for company.

[Reported by W. Ivimey Cook and
A. J. Hall, Esqs., Barristers-
at-Law.

BUCKLEY, J. }
1905. }
June 27. }

EDMUNDSON v. RENDER.

Contract—Restraint of Trade—Breach—Solicitor—Covenant not to Practise—Prohibited Area—Acts Done Within by Letters from Without.

A covenant by a solicitor that he will not do any professional work within a radius of so many miles from a place is broken if he writes as a solicitor and sends to addresses within the radius, letters, for example, demanding payment from the addressee or giving advice to the addressee, for in such case the demand is made or the advice given at the place at which the letter is received.

Trial of action to restrain breach of a covenant not to practise as a solicitor within a certain area.

The plaintiff was a solicitor practising in Yorkshire, and having his principal office at Masham, in that county, with offices at other places, all within the radius hereinafter mentioned.

The defendant had for ten years prior to 1893 been employed as a clerk by the plaintiff, to whom he became articled in that year. His articles, by special indulgence, were for three years only; but he entered into a contemporaneous agreement to serve the plaintiff or his firm as a clerk for two years more in consideration of not being required to pay any premium.

His articles contained a covenant that he would not "at any time hereafter either on his own behalf or as a clerk or partner or otherwise on behalf of any other person or persons who practise or who may practise or carry on the business or profession of a solicitor, do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross, without the written permission of" the plaintiff or his firm, or their successor or successors.

In 1899 the defendant left the plaintiff's service, and in 1901 was admitted a solicitor, whereupon he opened an office at Harrogate, just outside the prohibited area. He continued, however, to live

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within a mile and a-quarter of Masham Market Cross.

Among the acts complained of as breaches of the covenant were the following:

Negotiating a purchase of land for the site of a chapel at Masham on behalf of the Primitive Methodist Connexion by means of letters written to and received from the purchasers, the vendors, and the latter's solicitors, the letters so written by the defendant being sent by him to the parties at their addresses within the radius. Also causing the conveyance to be registered at the Registry at Northallerton, within the radius.

Writing and sending letters to R. King and other persons, either asking payment of money due, or demanding apologies for alleged slander, such letters being sent to addresses within the radius.

Writing a letter to a person within the radius, to obtain evidence as to the estate of a deceased person.

These acts were admitted by the defendant; but he denied that they constituted breaches of the covenant, seeing that the letters were written and posted outside the radius. As to the work done for the Primitive Methodist Connexion, he further alleged that he had acted as a friend, and had received no payment for it.

The plaintiff had already obtained nominal damages against the defendant in the action of *Edmundson v. Render* [1904]¹ in respect of acts of a character somewhat similar to those now complained of.

Buckmaster, K.C., and *Maugham*, for the plaintiff.—The essence of the covenant is that while the defendant is at liberty to receive instructions from persons living within the radius, provided they come to him outside, he is not free to perform work within. Here his instructions were received outside, but they were carried out by letters which he wrote collecting debts, demanding apologies, and doing other professional work, and which were sent to persons inside the radius. He has in fact been doing acts of the same class as those in respect of which judgment was given against him in the former action, and

(1) 90 L. T. 814.

which he undertook not to repeat, though his undertaking seems to have been overlooked when the judgment was drawn up.

Astbury, K.C., and *Owen Thompson*, for the defendant.—The defendant is within his right if he gives advice to, or does work for, clients within the radius, provided he does it by letters from outside on instructions received outside. The work is done where the letter is posted—*Taylor v. Jones* [1875].² The purchase of the chapel site was an isolated act of charity. We do not say the defendant has the right to act habitually as a solicitor for nothing.

[*Buckley, J.*—The fact that no charge was made makes no difference.]

What he did as to the registration would have to be done by the purchaser's solicitor wherever he practised, for the Registry at Northallerton is the only one for the whole of the North Riding. But registration is really the act of the officials, and not of the solicitor, who only writes a letter and incloses a stamp. The covenant on its true construction has not been broken.

Buckley, J.—The defendant has only himself to blame for the result that I am now bound to grant an injunction and order him to pay the costs of this action.

The action is brought upon a covenant, the relevant part of which is that the defendant will not do any work or act for or on behalf of any person or persons usually done by solicitors within a radius of fifteen miles from Masham Market Cross. I hold—in fact, it is not disputed—that this language means that he will not, within the radius of fifteen miles, do any work or act, for or on behalf of any clients, usually done by solicitors; in other words, that the words “within a radius of fifteen miles” are not words of qualification of the words “person or persons,” but words of qualification of the words “do any work or act.” I have to look to see whether he has within the prohibited district done any work usually done by solicitors.

The defendant has an office at Harrogate, which is outside the radius, but he lives at Nutwith Cote Farm, within a

(2) 45 L. J. C.P. 110; 1 C.P.D. 87.

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mile and a-quarter of Masham Market Cross, and therefore close to the centre of the prohibited district. I only mention that for the purpose of saying that, living thus within the prohibited area, and so being necessarily brought into contact with persons there, he ought to have been additionally careful to avoid any breach of his covenant.

There are certain matters alleged in the statement of claim and admitted, upon which I adjudicate, but I will, for the purpose of assisting the defendant, go a little further, and point out what, as regards other matters, it seems to me that he may and may not do.

The particular matters stated and admitted on which I proceed are these: that he has, on behalf of clients, written and posted to persons at addresses within the prohibited district, letters demanding an apology for an alleged slander with costs and expenses, or demanding payment of a debt. Was that an act done as solicitor within the district? In my opinion it was. The man who writes a letter and posts it to another necessarily addresses that other at the place of receipt. This defendant's letter of demand addressed to, let us say, R. King, within the radius, was an act of demand made by him as a solicitor within the district. For the purpose of making a demand you may either go in person, in which case there is no room for argument; or you may go by your agent, as by sending a clerk, which is just the same thing; or you may go by a communication handed to the post-office, and carried by the post-office as the agent of the sender to the person to whom it is addressed, and reaching him as a demand within the radius at his address. A demand thus made for a debt within the radius is an act done within the radius, such as is usually done by a solicitor. The place of residence of the client is irrelevant. Suppose that the client had an estate lying within the prohibited area. The solicitor could not go and collect or distrain for the rents within the area. It does not matter whether he goes himself. If he sends his clerk to do it, he is equally doing the act within the area. Does it make any difference that, instead of going in person or by a clerk

to collect a rent or execute a distress or demand possession, say, from a tenant, he writes to the tenant? I think not. He has addressed to the person within the area a demand on behalf of his client. He has acted as a solicitor within the district.

Let me add a little more for the assistance of the defendant. It is said there are two classes of cases which may arise. One is that which I have dealt with, the case of acts done for a client by way of demand made upon a person within the area. The other, which would I think be equally a breach, is as follows: Suppose a client residing within the prohibited area comes to Harrogate to consult the solicitor, and the solicitor, after taking time to consider the matter, advises him by letter sent to him at his address within the prohibited area, is he acting as solicitor within the area? In my opinion he is. It does not matter whether he goes in person to the man's house and says "I advise you" so and so, or whether he writes him a letter and says "I advise you" so and so. A client residing within the area may come to Harrogate and consult the solicitor, and there and then receive advice. This is no breach if the solicitor does nothing within the area. The test is whether there is an act done by the solicitor within the area, such as is usually done by solicitors. I hold that an act is done within the area if it is done by a letter posted at Harrogate to an addressee within the area, for in such case the communication is made by the solicitor to the client at the place to which the post-office as agent of the sender carries the letter.

I must grant an injunction in the terms of the covenant, and I must order the defendant to pay the costs.

Solicitors—Arthur Toovey, for plaintiff; Edgar Robins & Clark, for defendant.

[*Reported by R. Hill, Esq.,
Barrister-at-Law.*]

SWINFEN EADY, J. { MARSHALL'S SETTLEMENT, *In re*;
1905. { MARSHALL v.
June 6. July 15. { MARSHALL.

Settled Land — Tenant for Life — "Settlement" — Trusts for Settlor for Life—Remainder to Settlor subject to Rentcharge to Wife and Term for Securing Portions to Children—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2, sub-ss. (1) and (5).

By a settlement dated in 1862, and made upon the marriage of the plaintiff, certain lands and hereditaments were limited by the plaintiff to the use of himself for life, with remainder to the use that if his wife should survive him she might receive a jointure during her life, and to further uses limiting powers of distress and entry for the purpose of enforcing payment of such jointure, and subject and charged as aforesaid to the use of trustees for the term of one hundred years, to commence from the decease of the plaintiff, upon trusts for raising portions for the children of the marriage, and subject thereto and to the trusts of the term to the use of the plaintiff, his heirs and assigns for ever:—Held, that under or by virtue of the settlement the lands in question, or some estate or interest in them, stood "limited to or in trust for persons by way of succession" so as to create a "settlement" within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882, and that under sub-section (5) the plaintiff was the tenant for life of those lands for the purposes of that Act.

Mundy and Roper's Contract, *In re* (68 L. J. Ch. 135, 141; [1899] 1 Ch. 275, 290), applied.

Originating summons.

By a settlement dated November 29, 1862, and made upon the marriage of the plaintiff Thomas Horatio Marshall with Lucy Martina Bree, certain lands and hereditaments were limited by the plaintiff to the use of himself for life, with remainder to the use that if his wife should survive him she might receive a jointure of 400*l.* a year during her life, reducible to 200*l.* a year in the event of her second marriage, and to further uses

limiting powers of distress and entry for the purpose of enforcing payment of such jointure, and subject and charged as aforesaid to the use of the trustees for the term of one hundred years, to commence from the decease of the plaintiff, upon the trusts thereby declared to raise 5,000*l.* for portions for the children of the marriage, and subject thereto and to the trusts of the term to the use of the plaintiff, his heirs and assigns for ever.

This was an originating summons taken out by the plaintiff for the determination of the question whether under the marriage settlement he was a tenant for life, or had the powers of a tenant for life under the Settled Land Act.

H. Johnston, for the plaintiff.—The deed of November 29, 1862, is a "settlement" within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882.¹ The words "stands for the time being limited to or in trust for any persons by way of succession" in that sub-section include the case of a jointure and portions limited to arise on or after the death of the tenant for life and the terms of years limited to secure them—*Mundy and Roper's Contract, In re* [1898],² and *Wimborne (Lord) and Broune's Contract, In re* [1904].³

The query raised in *Wolstenholme's Conveyancing and Settled Land Acts* (8th ed.),

(1) Settled Land Act, 1882, s. 2, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires."

Sub-section 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement."

(2) 68 L. J. Ch. 135, 141; [1899] 1 Ch. 275, 283, 290.

(3) 73 L. J. Ch. 270; [1904] 1 Ch. 537.

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at p. 307, in the note to section 2, sub-section (1) of the Act of 1882, that this might not be the case if the husband were the settlor and the ultimate limitation were to the settlor in fee, is unfounded. In the cases there cited there was only one person interested in the settled land. It was not limited to "persons" in succession.

If this is a "settlement" within the meaning of the Act, it follows that the plaintiff is the tenant for life under it. Although in law his life estate and the ultimate remainder in fee may merge subject to the intervening charge and term, yet in fact he is for the time being under the settlement beneficially entitled to possession of the settled land for his life. He is therefore under section 2, sub-section (5) of the Settled Land Act, 1882,¹ the tenant for life.

[He also referred to *Pocock and Pranker's Contract, In re* [1895],⁴ and *Castle Bytham (Vicar), Ex parte* [1894].⁵]

F. G. Champernowne, for the trustees of the deed of November 29, 1862.—There is a distinction to be drawn between *Mundy and Roper's Contract, In re*,³ and *Wimborne (Lord) and Brown's Contract, In re*,³ on the one hand, and the present case on the other. Although the existence of jointures may be sufficient to keep a settlement alive which has once existed, their existence is not sufficient to create one. The language of Chitty, L.J., in *Mundy and Roper's Contract, In re*,³ is inapplicable to the present case, for the plaintiff has never been a tenant for life, but has from the commencement been a tenant in fee-simple who has created incumbrances.

The determination of the question whether land is settled land for the purposes of the Act, or not, is governed by the state of the facts and the limitations at the time of the settlement taking effect—section 2, sub-section (4) of the Act.

H. Johnston, in reply.—The plaintiff has shewn not only that there is a settlement, but also that he is a person beneficially entitled for life to possession. He

therefore comes within section 2, sub-section (5) of the Act.¹

Cur. adv. vult.

July 15.—*SWINFEN EADY, J.*, delivered a written judgment.—The question raised by this summons is whether the plaintiff is a tenant for life, or has the powers of a tenant for life under the Settled Land Act. [His Lordship referred to the provisions of the settlement, and continued:] It will be observed that the husband, who is the settlor, takes an estate for life, and also the remainder in fee, subject to the jointure and portions; and the question is whether there is a settlement within the meaning of the Act, or whether there is an estate in fee-simple in possession in the plaintiff, subject to the charge of jointure and portions.

In considering this question I bear in mind what was said by Lord Justice Chitty in delivering the judgment of Sir N. Lindley, M.R., and himself in *Mundy and Roper's Contract, In re*²: "The broad policy on which the Act is founded is laid down by the House of Lords: *Bruce (Lord Henry) v. Ailesbury (Marquis)* [1892].⁶ The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of the fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with the land by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale by shifting the settlement from the land to the purchase-money which has to be paid into Court or into the hands of trustees. The Act of 1882 and the subsequent Acts ought, then, to

(4) 65 L. J. Ch. 211; [1896] 1 Ch. 302.

(5) 64 L. J. Ch. 116; [1895] 1 Ch. 348.

(6) 62 L. J. Ch. 93; [1892] A.C. 336.

MARSHALL'S SETTLEMENT, IN RE.

be construed by the Court with regard to these broad principles and in a spirit of wise and reasonable liberality." The question in that case was whether it was necessary for the jointress and younger children to join in the conveyance for the purpose of releasing their rights. The learned Judge then proceeded to consider the provisions of sub-section 1 of section 2 of the Settled Land Act, 1882, and said: "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life. I state this proposition generally, and without reference to the Acts imposing a duty on successions; but such Acts if referred to would support this proposition. It may be that conveyancers, when they employ the phrase that the lands stand limited to uses, often mention only the leading estates in the land, namely, the estates of freehold, and refer to jointures and portions as charges or encumbrances to which the freehold estates or some of them are subject. Such a mode of reciting title is often sufficient for the purpose which it is intended to serve. But it is quite correct in point of law to set out among the limitations to which the land stands limited the limitations in favour of the jointress and the portioners and the terms for securing them, and this is often done by conveyancers." That reasoning is directly applicable in the present case. The jointress and portioners will succeed to their interests upon the death of the tenant for life, and the trustees of the term to secure the portions will then become entitled in possession to the term of years thereby limited to them to

commence from the decease of the plaintiff.

Under these circumstances, I am of opinion that under or by virtue of the settlement of November 29, 1862, the lands in question, or some estate or interest in them, stand limited to or in trust for persons, by way of succession, within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882, and that under sub-section (5) the plaintiff is the tenant for life of those lands for the purposes of the Act.

In my judgment, the doubt expressed in the last edition of *Wolstenholme's Conveyancing and Settled Land Acts* (8th ed.), at p. 307, as to whether there is a "settlement" in such a case as the present, where the husband is the settlor, is not well founded.

My decision leaves open the question, upon which Lord Justice Vaughan Williams expressed a doubt in *Mundy and Roper's Contract, In re*,⁷ whether the land will continue to stand limited by way of succession after the death of the tenant for life, and when the remainder shall have fallen into possession, subject to any terms previously created.

My decision in the present case is in entire conformity with what was said by Mr. Justice Farwell in *Phillimore, In re; Phillimore v. Milnes* [1904].⁸ There Captain Phillimore, being the owner in fee of certain freeholds and absolutely entitled to certain leaseholds, declared trusts under which he made himself tenant for life, with trusts in remainder to pay certain annuities and subject thereto for himself absolutely. That, said the learned Judge, is obviously a settlement within the meaning of the Act.

Williamson, Hill & Co., agents for Trafford & Cook, Northwich, for all parties.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.]

(7) 68 L. J. Ch., at p. 144; [1899] 1 Ch., at p. 298.

(8) 78 L. J. Ch. 671; [1904] 2 Ch. 460.

KEKEWICH, J. }
1905.
July 8.

BROWN v. HAIG.

Practice—Summons for Directions—Notice of Application—Security for Costs after Judgment—Proceedings before Official Referee—Jurisdiction—Rules of the Supreme Court, Order XXX. rules 1, 2, and 5—Order LXV. rule 6.

A summons for directions taken out under Order XXX. of the Rules of the Supreme Court ceases to operate with the trial of the action, so that an application for security for costs for subsequent proceedings—for example, the taking of an account before an official referee ordered at such trial—must be made by separate summons, and cannot be made on notice under rule 5 of Order XXX.

But the Court has jurisdiction under Order LXV. rule 6 to order security for such costs in a proper case on a proper application.

Application by each of two defendants, Haig and Oxley, in an action brought against them by the plaintiff Brown that Brown might be ordered to give further security for their respective costs; and the first question was whether such an application could properly be made on notice under a summons for directions under Order XXX. of the Rules of the Supreme Court,¹

(1) Rules of the Supreme Court, Order XXX. rule 1 (a): "Except in the cases mentioned in paragraph (d) the plaintiff in every action shall take out a summons for directions returnable in not less than four days.

(b) "Such summons shall be taken out after appearance and before the plaintiff takes any fresh step in the action other than application for an injunction, or for a receiver, or the entering of judgment in default of defence under Order XXVII."

Rule 2: "Upon the hearing of the summons the Court or a Judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters:—Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial . . ."

Rule 5: "Any application subsequently to the original summons and before judgment for any directions as to any interlocutory matter or

where an order had been made at the trial of the action for an account to be taken before one of the official referees.

The plaintiff claimed a declaration that the defendant Haig held a certain concession and licence from the Egyptian and Sudan Government for prospecting for minerals and precious stones referred to in a letter dated September 13, 1901, for the joint benefit of himself and both the defendants as partners, and asked for dissolution of the partnership.

The plaintiff was resident out of the jurisdiction, and on April 11, 1905, was ordered to pay in a certain sum for security for costs upon an application by the defendants.

On June 8, 1905, at the trial of the action, no witnesses were heard, but it was ordered that "it be referred to one of the Official Referees to take an account of all dealings and transactions in connexion with the concessions mentioned in the letter of the 13th September, 1901, and the Official Referee is to be at liberty to report to the Court specially upon any point arising on the account and it is ordered that the further consideration of this action be adjourned and any question as to costs be reserved with liberty to the parties to apply as they may be advised, but this order is to be without prejudice to any question arising on the pleadings which each party (without affecting the power of the Official Referee to take the full account directed) is to be at liberty to raise on further consideration."

By a "notice of application" dated June 15, 1905, each of the defendants stated to the plaintiff that he intended to apply in chambers "for further directions in this action" for further security for costs in respect of the impending proceedings before the official referee.

The printed form of a summons for directions in universal use among solicitors enumerated all the matters specified in rule 2, and then added the following words: "any other interlocutory matter or thing."

The plaintiff objected that the relief could not be sought on such a notice, as thing by any party shall be made under the summons by two clear days' notice to the other party stating the grounds of the application."

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the summons for directions ended with the trial of the action; and also raised the question whether it was competent for the Court to order security at all.

P. O. Lawrence, K.C. (Ashton Cross with him), for the defendant Haig.—The Court has only directed an account to be taken, and not given a final judgment. The defendants now ask for further security. On such a mere question of procedure, when the action is still going on, why should the utility of the summons for directions be curtailed? The rules of practice do not require a separate summons to be issued.

G. C. Rankin, for the defendant Oxley.—The wide language of Order XXX. covers an application under the present circumstances—see also the decision in *Tomlinson v. Land and Finance Corporation* [1884].²

A. d'B. Terrell, for the plaintiff.—A separate summons is necessary, as the language of Order XXX. does not permit the form of application here used.

KEKEWICH, J.—These are two applications, one by each defendant, for further security for costs, and the costs for which the security is wanted are for proceedings before the official referee. The case came on for trial on June 8, 1905, but no witnesses were heard, and by way of arrangement an order was made by which it was referred to one of the official referees to take an account of all dealings and transactions in connection with the concessions mentioned in the letter of September 13, 1901, and the official referee was to be at liberty to report to the Court specially upon any point arising on the account, the further consideration of the action being adjourned and the costs reserved.

To my mind that order is technically a judgment, even if it is not a final judgment. At any rate, it is very common to refer to chambers something which has to be gone into. In that sense it is not a final judgment, but it is "the judgment" in the sense that what takes place afterwards in Court will be on "further consideration." The materiality of this is that this order has disposed of the case so far as the Court could dispose of it at the

trial, the further consideration being reserved. Even if not technically a judgment, it is the same as the trial, and would be treated by the Court of Appeal as the final judgment and go into the final judgment list of appeals.

Now, after the trial, an application is made for security for costs. Before 1897—that is to say, before the summons for directions came into vogue—a litigant would have to issue a summons for this, as for other things. The question is, Do the rules as to the "summons for directions" alter the matter? There is nothing much to help in rule 1 of Order XXX., but rule 2 gives a summary of what has to be done. "Proceedings . . . in the action" includes proceedings before the referee, and "costs" have been held to include security for costs. My own opinion has been, and is, that on that rule the summons for directions comes to an end when you come to the trial. Rule 5, as it now stands, accentuates this view, that being the rule under which we dispose now of scores of applications weekly; but that provides that those must be applications "subsequently to the original summons," because obviously it may be necessary to make an application before the summons for directions has been issued, as, for example, for the appointment of a receiver, and in such a case it must be made by summons. After the summons for directions has been issued, the application must be by notice, and to issue a summons when a notice is sufficient would be to run the risk of being ordered to pay any additional costs incurred thereby. But then the rule says "and before judgment," which points directly to the conclusion that after judgment nothing is to be done under that rule. The rule does not expressly say that notice must not be given after judgment, but it seems to me to be implied that notice is not then to be given.

It is argued that I ought not to cut down the utility of this mode of procedure by restricting it to matters before the trial. I do not wish to cut down the utility of the summons, but I must deal with the practice under the rules as they stand. I have been supplied with a copy of the printed form of summons for directions which is now in universal use. I

(2) 53 L. J. Q.B. 561; 14 Q.B. D. 539.

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observe that it enumerates all the interlocutory proceedings specified in rule 2, and then the words "any other interlocutory matter or thing" have been ingeniously added. Those words would no doubt include applications for security for costs. It seems to me that, whether the defendants are entitled to an order for security for costs or not, I ought to make no order on these notices, except that the costs be costs in the action.

A. d'B. Terrell, for the plaintiff, then asked for an expression of opinion by the Court whether the plaintiff could be ordered at all to give further security for costs in connection with the taking of the account by the referee after the judgment of the Court in the action.

KEKEWICH, J.—Upon this part of the case I may accede to the argument that the Court ought not to cut down the utility of a useful provision. Rule 6 of Order LXV., which is the only rule dealing with the security for costs, speaks of "any cause or matter." Why should I say "any cause or matter" does not mean any proceedings directed by the judgment to be taken before an official referee or before the Judge in chambers? In my opinion, the words are wide enough to include that; and one must remember that an application for security for costs does not preclude a second application if the costs mount up, or if any further proceedings are directed. It is for the Court to consider these matters from time to time. Why, if after judgment enquiries are directed, those proceedings should not be covered, I cannot see. It seems to me that, assuming that the plaintiff is resident out of the jurisdiction, and that the security already ordered is insufficient to meet the costs of the proceedings before the official referee, a good case can always be made for an order for security. If these applications are made by summons they will be in form and must be attended to.

Solicitors—Hammond & Benningfield; Swann, Bradley & Co.; W. H. Smith & Sons.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. }
1905.
June 6, 9. July 12. }

ALLEN, *In re*;
HARGREAVES v.
TAYLOR.

Charity—Gift for "charitable, educational, or other institutions of the town of K."—Validity.

Testator by his will bequeathed a fund "upon trust for such charitable, educational, or other institutions of the town of K., and also for such other general purposes for the benefit of the town of K., or any of the inhabitants thereof, as my trustees shall in their absolute uncontrolled discretion think fit." And he desired, without in any way binding his trustees thereto, that the following institutions should be carefully considered by them in such distribution—namely, first, the K. Memorial Hospital; secondly, the K. Grammar School; and thirdly, the K. Public Free Library:—Held, that the benefits conferred by the gift were limited to general and public purposes of the town of K. and the persons dwelling in that town, and that the whole of the gift was a valid charitable gift.

Dolan v. Macdermot (L. R. 5 Eq. 60; L. R. 3 Ch. 676) followed.

Originating summons.

James Allen, by his will dated January 4, 1896, after appointing executors and trustees thereof and making various specific and pecuniary bequests, gave a moiety of his residuary estate to his trustees to hold upon trusts for the benefit of his nephew, A. T. J. Walker, and his family, and subject thereto he bequeathed as follows: (Clause 8) "Subject to the trusts contained in the preceding paragraphs of my said will, I direct my trustees to stand possessed as well of my nephew's settled trust fund as also of my niece's settled trust fund, and of the two half parts of the trust fund given under Clause 6 of this my will upon trust for such charitable, educational, or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal, or any of the inhabitants thereof, as my trustees shall in their absolute uncontrolled discretion think fit. And I desire, without in any way binding my trustees thereto, that the following institutions shall be carefully considered by them in such distribution

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—namely: (1) the Kendal Memorial Hospital, either by way of endowment or by way of enlargement, or otherwise as to my trustees shall seem best; (2) the Kendal Grammar School, either by way of establishing one or more exhibition or exhibitions (to be called the James Allen Exhibition) to the Universities of Oxford or Cambridge, or otherwise for the benefit of or the general endowment of the said Grammar School as to my trustees shall seem best; and (3) the Kendal Public Free Library. I declare that any moneys dealt with under this clause may be paid over by my trustees to the treasurer, committee, or governing body of any institution or body which may be intended to be benefited, and the receipt of such treasurer, committee, or governing body shall be a sufficient discharge to my trustees, or the moneys may be retained by my trustees, and the income applied by them for the purposes aforesaid, or any of them."

The testator died on February 28, 1896.

The testator's nephew, A. T. J. Walker, died on February 10, 1905, without leaving a widow or any issue.

This was an originating summons taken out by the surviving trustees of the will for the determination of the question whether upon the true construction of the will, and in the events which had happened, any and which of the gifts under clause 8 thereof were to any and what extent good charitable and valid gifts.

T. T. Methold, for the summons.

Eve, K.C., and *Martyn*, for the next-of-kin.—The gift in clause 8 of the will is bad. It is a gift for certain purposes, some of which are not charitable. Under the gift the trustees have such a wide discretion given them that they may apply the whole of the fund for the benefit of institutions which are not charitable. The testator has in effect allowed his trustees to make his will for him after his death, and that the Court will not allow—*Grimond v. Grimond* [1905].¹

The following gifts have been held void for uncertainty: a bequest to be "applied for such charitable or public purposes as

(1) 74 L. J. P.C. 35; [1905] A.C. 124.

my trustee thinks proper"—*Blair v. Duncan* [1901]²; a bequest to be "applied in charity or works of public utility"—*Langham v. Peterson* [1903]³; a bequest for objects of benevolence and liberality as the trustee in his own discretion shall most approve—*Morice v. Durham (Bishop)* [1805]⁴. In *Hunter v. Att.-Gen.* [1899]⁵ Lord Halsbury said, "It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void."

[They also referred to *Kendall v. Granger* [1842],⁶ *Macduff, In re; Macduff v. Macduff* [1896],⁷ and *Dutton, In re; Peake and Beech, ex parte* [1878].⁸]

The Attorney-General (Sir R. B. Finlay, K.C.), and *R. J. Parker*, for the Crown.—The objects of the gift are charitable. Clause 8 of the will must be read as a whole. It is beyond dispute that the three objects—namely, the hospital, the school, and the free library—are all charities. The words "or other institutions," following the words "for such charitable, educational," must be taken to mean institutions *ejusdem generis* with those subsequently mentioned, and they must be for the benefit of the town of Kendal. A gift for the public benefit of a town is charitable. The purposes must be general purposes for the benefit of the town of Kendal—*Macduff, In re; Macduff v. Macduff*.¹ In that case Lindley, L.J., laid stress on the fact that there were there only general words. Here the general words must be construed in the light of the particular words which follow them. There is a difficulty in defining generally what objects of public utility are charitable, but a different principle applies where they are confined to a particular locality—*Mitford v. Reynolds* [1842].⁹

(2) 71 L. J. P.C. 22; [1902] A.C. 37.

(3) 87 L. T. 744.

(4) 9 Ves. 399; 10 Ves. 521.

(5) 68 L. J. Ch. 449, 451; [1899] A.C. 309, 315.

(6) 11 L. J. Ch. 405; 5 Beav. 300.

(7) 65 L. J. Ch. 700; [1896] 2 Ch. 451.

(8) 49 L. J. Q.B. 350; 4 Ex. D. 54.

(9) 12 L. J. Ch. 40; 1 Ph. 185.

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It is admitted that where trustees have power to apply a gift for charitable or other purposes the whole gift is void—*Morice v. Durham (Bishop)*.⁴ There is, however, another series of cases in which it has been held that a gift for the benefit of a parish or town or for the benefit of a class of the inhabitants of a parish or town is charitable—*Goodman v. Saltash Corporation* [1882]¹⁰ and *St. Stephen, Coleman Street, In re* [1888],¹¹ approved of in *Church Patronage Trust, In re; Eauris v. Att.-Gen.* [1904].¹²

Here there is a combination of the two classes of gifts. Inasmuch therefore as a gift for the benefit of a class of the inhabitants of a parish or town is charitable, it does not cease to be so because it is also for the general purposes of the inhabitants of such parish or town—*Dolan v. Macdermot* [1867, 1868].¹³

The controlling intention of the testator was to benefit the town or a class of the inhabitants of the town of Kendal, and it is immaterial that he has mentioned in the gift objects which, if taken alone, would not be charitable.

[SWINFEN EADY, J., referred to *Townley v. Bedwell* [1801],¹⁴ as shewing that the report of *Mitford v. Reynolds*⁹ was correct.]
Cur. adv. vult.

July 12.—SWINFEN EADY, J., delivered a written judgment.—The testator James Allen died on February 28, 1896. The question raised by this summons is whether the funds dealt with by clause 8 of his will were validly given to charity. Clause 8 is as follows: [His Lordship read the clause, and continued:] It is first necessary to consider what is the true construction of the will. The trust for “such charitable, educational, or other institutions for the town of Kendal” is followed by the words “such other general purposes for the benefit of the town of Kendal or any of the inhabitants thereof as my trustees shall think fit.” The context shews that the testator when

specifying “other institutions of the town of Kendal” meant institutions of a public character for the general benefit of the town or its inhabitants. The enumeration of particular institutions which follows further shews the kind of objects which he was contemplating; he mentions an institution of each kind, not in any way binding his trustees thereto, but asking that they should carefully consider each one in the distribution. The first mentioned is the Kendal Memorial Hospital, which is a charitable institution for the benefit of the town or its inhabitants, intended for the use of the suffering poor. The next mentioned—the Kendal Grammar School—is an example of an educational institution for the benefit of the town or its inhabitants. The third is the Kendal Public Free Library, and that is an example of another institution of the town of Kendal of a public character and for the general benefit of the town and those inhabiting it. The testator describes himself as of Kendal, and his obvious intention was to benefit the town in which he dwelt. In my opinion, the benefits conferred by clause 8 are (as a matter of construction) limited to general or public purposes for the town of Kendal and the persons dwelling in that town.

Now a gift for public purposes in a specified locality is a valid charitable trust; although a gift for public purposes generally is void as being so general and undefined that it cannot be executed by the Court. *Vezey v. Jamson* [1822]¹⁵ is an instance of the latter class of gift. This decision of Sir John Leach’s was referred to with approval by Lord Davey in *Hunter v. Att.-Gen.*⁵ Lord Davey there said that there is a long series of authorities extending from *Morice v. Durham (Bishop)*⁴ to *Macduff, In re*,⁷ in which it has been held “that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them (such as ‘charitable or benevolent,’ or ‘charitable or philanthropic,’ or ‘charitable or pious’ purposes), or where the description includes purposes which may or may not be charitable (such as

(10) 52 L. J. Q.B. 193, 195; 7 App. Cas. 633, 639.

(11) 57 L. J. Ch. 917; 39 Ch. D. 492.

(12) 73 L. J. Ch. 712; [1904] 2 Ch. 643.

(13) L. R. 5 Eq. 60; L. R. 3 Ch. 376.

(14) 6 Ves. 194.

(15) 1 Sim. & S. 69.

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'undertakings of public utility'), and a discretion is vested in the trustees, the whole gift fails for uncertainty." The cases of *Blair v. Duncan*,² where the gift was "for such charitable or public purposes as my trustee thinks proper," and *Grimond v. Grimond*,¹ where the gift was to and among "such charitable or religious institutions and societies" as the trustees might "select," may be mentioned as subsequent authorities of the same series as that to which Lord Davey referred.

The reason why a trust for public purposes generally is void was pointed out by the Lord Chancellor in *Grimond v. Grimond*.¹ He said: "the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow."

On the other hand, a trust for public works or objects of public utility at a particular place is sufficiently certain, definite, and limited to be valid. In *Goodman v. Saltash Corporation*¹⁰ Lord Selborne stated that the fishery there in question might have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as they had been accustomed to do, in every year from Candlemas to Easter. He then continued: "In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. . . . A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust." There are many instances in the books in which such gifts have been held to be valid charitable trusts. In *Mitford v. Reynolds*⁹ the testator left the remainder

of his property to the Government of Bengal, to be applied to charitable beneficial and public works at and in the city of Dacca, in Bengal, for the exclusive benefit of the native inhabitants in such a manner as they and the Government might regard as most conducive to that end. Lord Lyndhurst held that such bequest was a valid charitable bequest, within all the authorities, and referred to the case of *Jones v. Williams* [1767],¹⁶ before Lord Camden—where there was a bequest of 1,000*l.* to supply water to the town of Chepstow for the use of the inhabitants, which was considered a charitable bequest within the Statute of Elizabeth—and to the case of *Howes v. Chapman* [1799],¹⁷ where Lord Loughborough decided that a gift for the improvement of the city of Bath was, from its general nature, a good charitable bequest.

Again, in *Dolan v. Macdermot*¹³ the bequest was for "such charities and other public purposes as lawfully might be in the parish of Tadmerton, in the county of Oxford." It was objected that the gift was bad on two grounds—first, because it was for public purposes, which were not charitable; and secondly, because these purposes were simply defined to be in the parish, and not for the benefit of it, and that the gift was therefore too wide. Lord Romilly, however, pointed out that, although the will made a distinction between "charities" and "public purposes," yet numerous public purposes, such as mending or repairing the roads of a parish, supplying water for the inhabitants of the parish, making or repairing bridges over any stream or any culvert that might be required in the parish, although they are public purposes in the ordinary sense of the term, as distinguished from charities like almsgiving, hospitals, and the like, yet are in a legal sense charities, as they are all charities within the Statute of Elizabeth. Therefore, if the testator meant to promote public purposes for the benefit of the parish of Tadmerton, they were charities which could be carried into execution and were sufficiently defined. He then held that the words of the gift meant "for

(16) 2 Amb. 651.

(17) 4 Ves. 542.

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such public purposes for the benefit of the parish of Tadmarton as my trustees shall think fit," and that the gift was accordingly valid. This decision was affirmed by the Lord Chancellor (Lord Cairns) on appeal. He said it was clear that the testator, when he used the word "charities," did not point to private charities, because he accompanied the term with the words "and other public purposes," evidently implying that the word first used meant public charities; therefore that the will meant that the residue was to be laid out for the benefit of the parish of Tadmarton in "public charities," using that term in the popular sense, and in other public purposes *ejusdem generis*, being charities within the Statute of Elizabeth and the technical doctrine of the Court, although not within the popular meaning of the word "charities." That case bears a close resemblance to the present, and in principle is in no way distinguishable from it.

There is one other case to which I will refer, as it is closely in point—*Wrexham Corporation v. Tamplin* [1873].¹⁸ The testator there bequeathed to the mayor, aldermen, and burgesses of the borough of Wrexham "a legacy or sum of 1,000*l.*, to be spent and applied in the discretion of the said mayor and corporation in the best way, for the use or benefit of the said borough town, or of the inhabitants thereof, or of the institutions in the said borough." The question was whether this was a good charitable gift. In opposition to the gift, reliance was placed on the alternative words "or of the institutions in"; and it was contended that there was nothing to limit the institutions to charitable institutions, in the legal sense of the term, but that the gift might be applied to a club or a co-operative store, and that, as consistently with the will the gift might be applied to other than strictly charitable purposes, the gift was bad. Vice-Chancellor Wickens, however, decided otherwise. He thought it was clear that public institutions were meant, and that to hold that the expression might include a private institution would be to do what is deprecated by Lord Cairns in *Dolan v. Macdermot*¹⁹; and

(18) 21 W. R. 768.

that the practical rule is whether, on the fair and natural construction of the words used, all the purposes are charitable or public purposes. If so, the gift would be good; and he held it to be so in that case. I am of the same opinion in the present case, and determine that the whole of the gift in question contained in clause 8 of the will is a valid charitable gift.

Solicitors—Helder, Roberts & Co., agents for Arnold & Greenwood, Kendal, for trustees; Trass & Taylor, agents for T. B. Green, Halifax, for next-of-kin; Treasury Solicitor, for the Crown.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.]

WARRINGTON, J. }
1905. }
June 21. }

"CHIC," LIM.,
In re.

Company—Winding-up—Petition by Judgment Creditors—Debenture-holders' Action—Business Carried on by Receiver on Behalf of Debenture-holders—No Allegation of Surplus Assets—"Just and equitable"—Compulsory Order—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 79, sub-ss. 4 and 5—Companies (Winding-up) Rules, 1903, rule 186.

On a petition for a compulsory winding-up order by judgment creditors, it was shewn that the debenture-holders of the company had appointed a receiver of all the assets of the company. The receiver carried on the business and incurred further liabilities. The assets were more than covered by the debentures, and it appeared that there would be no surplus assets, so that the petitioners would derive no advantage from the winding-up.—Held, that it was "just and equitable," under section 79, sub-section 5 of the Companies Act, 1862, that a winding-up order should be made.

Petition by a judgment creditor for a compulsory winding-up order.

The company was incorporated in 1902 with a nominal capital of 16,000*l.*, of

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which 14,622*l.* was paid-up or credited as paid-up. The objects of the company were to acquire the copyright and goodwill and continue the publication of a newspaper called *Chic*.

The petitioners, Messrs. Harrison & Sons, were a firm of printers, and on March 17, 1904, they recovered judgment against the company for 924*l.* 6*s.* 2*d.* for work done. This sum was still unpaid, Messrs. Harrison & Sons now presented a petition, founded on this debt, for the compulsory winding-up of the company.

The company had issued debentures to the amount of 4,700*l.*, the whole of which, together with interest, was still due; the debentures were all in the same form, and contained a charge on the undertaking of the company and on all its property present and future, including its uncalled capital for the time being. By the conditions the holders were entitled to appoint a receiver of the assets of the company, and on May 21, 1904, they accordingly appointed Ramsay Colles to be receiver. Colles took possession of the undertaking and accounts of the company, and proceeded to carry on the business. In doing so he incurred liabilities, for which the company was liable to the extent of 1,360*l.* 10*s.* 11*d.*, of which 1,000*l.* remained outstanding.

On September 27, 1904, the debenture-holders removed Colles and appointed W. R. T. Carr to be receiver in his place. He continued to carry on the business, and incurred on behalf of the company further liabilities to the extent of 2,752*l.*, which were still outstanding.

The assets of the company consisted of the value of the goodwill of the paper (for which a purchaser could not be found), office furniture valued at 36*l.* 11*s.* 4*d.*, and book debts estimated to produce 800*l.*

In a case of *Robinson Printing Co. v. "Chic," Lim.* [1905],¹ Warrington, J., held that a charge which the Robinson Printing Co. had on the advertising book debts of the company was valid.

It therefore seemed to be certain that the petitioners could recover nothing in a winding-up.

(1) *Ante*, p. 399; [1905] 2 Ch. 123.

J. W. Manning, for the petition.—The business is now being carried on by the debenture-holders for their own benefit, and they are incurring fresh liabilities. It may be that the petitioners will not get any benefit from the winding-up, but it is "just and equitable" within section 79, sub-section 5 of the Companies Act, 1862, that the company should be wound up. That sub-section is not confined to matters *ejusdem generis* with the grounds for winding-up mentioned in the earlier parts of the section—*Amalgamated Syndicates, Lim., In re* [1897].²

The decision in *Chapel House Colliery Co., In re* [1883],³ is not always followed. Rule 186 of the Companies (Winding-up) Rules, 1903, does not forbid the making of the order. This is a similar case to *London Pressed Hinge Co., In re; Campbell v. Company* [1905].⁴

Ashton Cross, for the company.—The petition does not allege that there will be any assets to administer, therefore the Court will not make an order to wind up the company. The debenture-holders are entitled to carry on the business.

J. W. Manning replied.

WARRINGTON, J.—This is a somewhat unusual case. The petition is presented by judgment creditors for a debt of 924*l.* 6*s.* 2*d.*, the judgment having been recovered on March 17, 1904. Immediately on the judgment being recovered, or rather on execution being put in, on May 21, 1904, a receiver was appointed on behalf of the debenture-holders. He carried on business and incurred debts to the extent of 1,360*l.* 10*s.* 11*d.* On September 27, 1904, he was removed by the debenture-holders, and Carr was appointed in his place. He has carried on the business since then, and incurred further liabilities to the extent of 2,752*l.* It is said—and this is the only answer to the petition—that the assets of the company are all charged to the debenture-holders, that these assets are insufficient to pay even the debenture-holders, that in a winding-up there will be no assets to

(2) 66 L. J. Ch. 783; [1897] 2 Ch. 600.

(3) 52 L. J. Ch. 934; 24 Ch. D. 259.

(4) *Ante*, p. 321; [1905] 1 Ch. 576.

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administer, and therefore that a winding-up order ought not to be made.

This is one of those cases in which a company has been carrying on business not for the purpose for which and not the business for which the company was constituted, but a similar business for the benefit of somebody else—namely, for the debenture-holders. The question is whether in these circumstances I ought to make the order. A winding-up order is the only way by which a company which is now merely *nominis umbra* can be got rid of. If an order is to be made at all it must be under sub-sections 4 and 5 of section 79 of the Companies Act, 1862. This company is clearly liable to pay its debts within sub-section 4. It has been the practice—and Mr. Justice Buckley at one time laid down a practice rule—that every petition must contain an allegation that the company has surplus assets; and it has been the general rule not to make a winding-up order unless the petitioner shews a reasonable probability that he will get something. At the same time, it must be borne in mind that by rule 186 of the Companies (Winding-up) Rules, 1903, "Where a company against which a winding-up order has been made has no available assets, the official receiver shall not be required to incur any expense in relation to the winding-up without the express directions of the Board of Trade." That seems to contemplate a state of things in which, although there are no available assets, it may be desirable to make a winding-up order. The question now is what I ought to do. Before I state my view, I will refer—not as an authority for the course I intend to take, but as an expression of opinion by a learned Judge of great experience in these matters—to the decision of Mr. Justice Buckley in *London Pressed Hinge Co., In re; Campbell v. Company*.⁴ Mr. Justice Buckley there drew attention to what he called the injustice that a company could incur any amount of debt, and that directly a creditor tried to enforce payment of his debt the debenture-holders could take possession of the whole of the assets and carry on the business without being under any lia-

bility for the debts of the company. That is the state of things in this case. The business is now really the business of the debenture-holders. I think that under sub-section 5 of section 79 it is "just and equitable" that this company should be wound up. It is true that the petitioning creditors cannot shew that they will get any advantage by a winding-up; but this is, I think, a special case, in which I ought to make the usual compulsory winding-up order.

Solicitors—Claremont & Haynes;
H. Nelson Paisley.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

FARWELL, J.

1905.

March 28, 29.

April 4, 5, 6, 11, 12, 19.

ATT.-GEN. v.
ANTROBUS.

Highway—Ancient Monument—Stonehenge—Free User and Access by Public—Trust—Presumption—Absolute Ownership—Thoroughfare—Cul de Sac—Evidence—Reputation—Tithe Map and Award—Deposited Plans—Admissibility.

Where the owner of an ancient monument of great public interest produces his title deeds shewing that he holds under conveyances made to him and his ancestors without any trust for the free user of and access to the monument by the public, it is impossible for the Court to presume a lost grant or lost Act of Parliament in order to establish such a trust.

On the evidence at the trial,—Held, that, with the exception of the Netheravon Way, admittedly a public highway, there were no roads or tracks subject to public rights of way running up to and through the circle of stones at Stonehenge.

The rights of the public in relation to a cul de sac in a town and in the country discussed.

A tithe map and award produced from the proper custody and acted upon, and the deposited plans of a proposed railway, though subsequently abandoned, are admissible as evidence of reputation on a

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question whether there was or was not a public road across two fields appearing on such documents.

Action by the Attorney-General at the relation of Frank Tucker, Thomas Merchant (chairman and clerk respectively of the Amesbury Rural Council), the Right Hon. George John Shaw-Lefevre, Sir John Tomlinson Brunner, and William Matthew Flinders Petrie, and by the said relators to restrain the defendant, Sir Edmund Antrobus, from obstructing certain alleged public rights of free access to Stonehenge.

Stonehenge is situate on and forms part of the West Amesbury estate, which in 1825 was purchased in fee-simple by the defendant's great-grand-uncle and predecessor in title, who died in 1826, having by his will devised the estate to the defendant's grandfather for life, with remainder to the defendant's father for life, with remainder to his eldest son (the defendant) in tail male. The defendant's grandfather died in 1870. In 1886 the defendant and his father concurred in barring the defendant's estate tail, and on his father's death in 1899 the defendant became entitled to the estate in fee-simple in possession.

Stonehenge lies in the angle or fork formed by, and is situated a short distance from, the junction of two roads, the northernmost of which leads from Shrewton to Amesbury, and the other from Winterbourne Stoke to Amesbury. The outer ring of the *vallum* is within a few yards of the Shrewton road and within about two hundred yards of the Winterbourne Stoke road. On the west of the stones, running north and south and crossing the Shrewton and the Winterbourne Stoke roads, there is a way, which all parties admitted to be a public way, known as the Netheravon Way, which intersects the *vallum* and passes within a few yards of the circle of stones.

The plaintiff claimed that in addition to the Netheravon Way there was a public way called the Well House Way, which he alleged led from Durrington along the Packway, whence it turned and crossed the downs by the Well House, and ran up the avenue to the Shrewton

road, which it entered on the north side opposite to the Friar's Heel. The plaintiff alleged that it then crossed the Shrewton road and entered the circle at the Friar's Heel and then bifurcated, one branch going to the north of the stones and running into the Winterbourne Stoke road, and the other branch going to the south of the stones and bifurcating into a track leading into the Winterbourne Stoke road and a track leading into the Netheravon Way.

The plaintiff also claimed another right of way from a point close to Stonehenge Bottom (near the junction of the Shrewton and Winterbourne Stoke roads) running alongside the Shrewton road and entering the *vallum* on the east side and joining the other roads claimed by him within the *vallum*.

In 1901 the defendant, for the better preservation of Stonehenge, erected a wire fence round the land lying inside the triangle formed by the Shrewton-Amesbury road, the Winterbourne Stoke-Amesbury road, and the Netheravon Way, and he had also built a caretaker's hut near the Friar's Heel, and had made a charge of one shilling per head for the admission of visitors desirous of inspecting the stones.

The plaintiff subsequently commenced this action, alleging that the ways in question which had been obstructed by the wire fence were public highways, and claiming an order for the removal of the obstruction and an injunction restraining the defendant from erecting any such obstruction; and the plaintiff also alleged that Stonehenge was subject to a trust for the free user thereof and access thereto by such highways on behalf of the public, created by a lost grant or declaration of trust or lost Act of Parliament.

The defendant, on the other hand, alleged that Stonehenge was, and from time immemorial had been, private property, and was not, and never had been, national or public property or subject to any trust, and that resort and access thereto by the public had always been by permission of the owner; and he also denied that the tracks alleged by the plaintiff to run up to and through Stone-

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henge ever existed either in law or in fact.

Upjohn, K.C., and *Gurdon*, for the plaintiffs.—The plaintiffs claim the rights of way in question as being public highways running up and through Stonehenge. The evidence shews that traffic has worn down the surface of the downs along the track as much as four feet in some places. There may be highways across downs which have never been touched by the pick—*per Erle, C.J.*, in charging the jury in *Mildred v. Weaver* [1862].¹ The avenue was a sort of *via sacra* giving an easy access from Durrington and other places to the north. It enters through the *vallum* and bifurcates before reaching the stones, the forks going on either side of the stones and meeting again. Even if the Well House track is proved not to exist, there are tracks from the Nether-avon track through the circle to the Shrewton road, and a right of way over such tracks exists for the purpose of passing to and from the Shrewton road irrespective of the stones. Moreover, Stonehenge was originally a place of public worship and meeting, and became later a place for admiration, and the public have a right of access for the purpose of visiting the monument, though not necessarily a right to leave the path—*Giant's Causeway Co. v. Att.-Gen.* [1898].² These public rights were enjoyed long before the site became private property, and now that it is private property it is subject to a trust allowing the exercise of those public rights. The Court will presume a lost grant subject to a trust, as in *Goodman v. Saltash Corporation* [1882],³ or a lost Act of Parliament; and if the latter is presumed, all difficulty as to *ius spatiandi* not being known to the law disappears, for Parliament can make any right. But the plaintiffs will not press the point that there has been a lost trust unless the contention that these tracks are highways fails.

[During the course of the trial a tithe map and award made in 1847 by the Tithe Commissioners for the parish of

Durrington, and produced from the proper custody, were tendered on behalf of the defendant as evidence on the question whether there was or was not a public road (alleged to be the Well House track) across two fields (referred to at the trial as Pinkney's fields), which appeared in the tithe map and award. The tithe map was not a sealed plan, but was obviously only a repetition of the award plan.

There were also tendered in evidence on behalf of the defendant the deposited plans relating to a light railway projected in 1897, but subsequently abandoned, running through Amesbury and crossing the alleged Well House track. The deposited plans shewed that it was proposed to carry the railway behind an embankment across the alleged public road, but made no provision for the continuance of the road.

The plaintiffs' counsel objected to the admission in evidence of all these documents.]

Radcliffe, K.C. (*Warmington, K.C.*, and *Vaughan Hawkins* with him), for the defendant.—These documents are admissible as evidence of reputation—*Smith v. Lister* [1895].⁴ The tithe map and award are public documents prepared under statutory provisions, and the question whether the alleged track in fact existed was material to the preparation of the award and plan—*Dyce v. Hay* [1852].⁵ The deposited plans are admissible on similar grounds. Moreover, under section 26 of the Local Government Act, 1894, the district council is under a statutory duty to prevent obstructions to public rights of way, and no objection was taken by the district council to these plans. The proceedings of a local authority on a question of obstruction is evidence—*Young v. Cuthbertson* [1854].⁶

Gurdon (*Upjohn, K.C.*, with him), for the plaintiffs.—The tithe map is not admissible except on a question relating to tithe—*Wilberforce v. Hearfield* [1877].⁷ It is only a second-class map and not a sealed copy, and consequently the contents may have been derived from any

(1) 6 L. T. 225; 3 F. & F. 30.

(2) *Freeman's Journal* for June 15, 1898.

(3) 52 L. J. Q.B. 193; 7 App. Cas. 633.

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(4) 64 L. J. Q.B. 154.

(5) 1 Macq. 305.

(6) 1 Macq. 455.

(7) 46 L. J. Ch. 584; 5 Ch. D. 709.

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source whatever, however unreliable. They were never accepted by the district council, which only discussed the site of the railway station. The project for the railway never went through, but was abandoned, and therefore the deposited plans were never subjected to the test of publicity, and are not admissible.

FARWELL, J.—The first objection is taken to a tithe map and award produced from the proper custody, and acted upon according to the witness's evidence since 1863, and doubtless acted upon from the time it was made in 1847. It is tendered in evidence on the question whether there was or was not a public road across two fields which appear in that tithe map and award. In my opinion it is admissible on that question, and for this reason: In the first place the document is a public document. It is prepared under the provisions contained in the Tithe Commutation Act, 1836. The Commissioners under that Act have power to examine witnesses on oath. An agreement may be come to and ratified by the Commissioners as to the amount of tithe rentcharge to be apportioned on various lands within the parish. Such parts of the land as are not tithable are matters which concern all the parish. It is certainly to the interest of any one who has land, part of which is not tithable, to put forward his claim and establish it if he can; and the question in this case is whether the particular piece of land over which a road is said to run is a road or not. In the one case, if it was a road it would not be tithable, and if it was not a road then it would be tithable as part of the land; and as regards Pinkney's, it is obvious that it was material to him, if he could, to say that there was a road there, in order to escape the tithe. It is therefore one of the matters material to the preparation of the award and the plan. It is also a matter of publicity; and I find Vice-Chancellor Stuart, in *Giffard v. Williams* [1869],⁹ referring to a tithe commissioners' award and map, says: "But the Act of Parliament requires these things to be done, not in a corner, but upon

notices in all the most public places; so that it is impossible to treat this document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts." I do not refer to the actual decision; it is, perhaps, unnecessary to cite what the Vice-Chancellor says to shew that it is a matter of publicity. I must not be understood as deciding that in my opinion the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview and the authority of the Commissioners who made it. I think they have to attend to their business, and I guard myself against being supposed to say that I should hold that the tithe map was evidence of something it was not their business to ascertain.

As regards the objection to the deposited plans, in my opinion they are evidence on the general ground of publicity. The Local Government Act, 1894, made the district council and the parish council in fact the guardians of the public roads. Whether the plans are of any weight or not is another question. It may very well be that what counsel for the plaintiffs urged is material in considering whether I can attach much weight to them; but the fact that these plans were really published for the purpose of persons interested seeing them and ascertaining how and to what extent they objected to anything that therein appeared, and the fact that it appears on the face of the plan that this particular alleged public road is not shewn at all, and that the proposal was to carry the railway behind an embankment across it, without any provision for continuing the road, makes the plans, to my mind, admissible as evidence, although, inasmuch as the railway was abandoned, they may not be very material. The result is that I admit them both.

Radcliffe, K.C. (Warmington, K.C., and Vaughan Hawkins with him), for the defendant.—The plaintiff's evidence has not proved user as highways of the tracks claimed. To establish such a user it must be shewn that the particular

(8) 38 L. J. Ch. 597, 604.

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track in question "has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right"—*per* Blackburn, J., in *Greenwich Board of Works v. Maudslay* [1870].⁹ All that the evidence proves is that visitors have been driven to the stones, and, after inspecting them, have returned either by the same or another way; and the inference from that is that in so doing they were availing themselves of the owner's permission to visit the stones, and not in any way exercising any public right. Dedication to the public cannot be presumed from such user, and the right claimed is a larger right than any known to the law—*Blundell v. Catterall* [1821],¹⁰ *Smith v. Andrews* [1891],¹¹ *Abercromby v. Fermoy Town Commissioners* [1900],¹² *Dyce v. Hay*,⁵ *Young v. Cuthbertson*,⁶ *Bourke v. Davis* [1889],¹³ and *Simpson v. Att.-Gen.* [1904].¹⁴ Moreover, the practice which took place and is relied upon as establishing a highway would, if taking place on a highway, be an improper use of it, and indeed a nuisance—*Harrison v. Rutland (Duke)* [1892]¹⁵ and *Hickman v. Maissey* [1900].¹⁶ Dedication as a highway cannot be inferred from user such as that.

Further, there is no such thing as the dedication of a *cul de sac* in the country. The *Giant's Causeway Case*² is the only case in which a pleasure resort has been held to be a good terminus for a highway, but then in that case the road in question had been "presented" by the grand jury so long ago as 1814, and had been repaired by the public authority; and the same Judges decided in *Abercromby v. Fermoy Town Commissioners*¹² that dedication of a public right of way could not be inferred from user as a place of recreation. A public right of way must be from one public place to another—*Jenkins v. Murray* [1866]¹⁷ and *Duncan*

v. Lees [1870].¹⁸ Those are cases decided under the law of Scotland, where the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption, for forty years. That is the only respect in which the Scotch law on this question differs from the law of England, as pointed out by Lord Blackburn in *Mann v. Brodie* [1885].¹⁹ A *cul de sac* can be a highway—*per* Lord Kenyon, C.J., in *Rugby Charity Trustees v. Merryweather* [1790].²⁰ That proposition was questioned in *Woodyer v. Hadden* [1813]²¹ and *Wood v. Veal* [1822],²² but was affirmed in *Bateman v. Bluck* [1852].²³ But where a *cul de sac* is a highway it must be in a town, and be repaired, sewered, and lighted by the public authority—*per* Kay, J., in *Bourke v. Davis*,¹³ and *Att.-Gen. v. Richmond Corporation* [1903].²⁴ A *cul de sac* in the country cannot be a highway.

Upjohn, K.C., in reply.—There can be a *cul de sac* in the country which is a highway. That appears from Wills, J.'s remark in *Eyre v. New Forest Highway Board* [1892],²⁵ when, speaking of a *cul de sac* in the country, he says, "I have known it successfully established in a beautiful walk leading to a cliff end or a place on the sea shore"; and there was no thoroughfare in the case of *Abercromby v. Fermoy Town Commissioners*.¹² In *Greenwich Board of Works v. Maudslay*⁹ the user had been partly for the purposes of pleasure. The fact that acts were done off the tracks which would not be a reasonable user, of a highway ought not to affect the character of the user of the tracks themselves, and such user, according to the evidence, has established that these tracks were public highways.

April 19.—FARWELL, J.—The Attorney-General claims an order against the defendant to remove certain fencing wherewith

(9) 39 L. J. Q.B. 205; L. R. 5 Q.B. 397.

(10) 5 B. & Ald. 268.

(11) [1891] 2 Ch. 678.

(12) [1900] 1 Ir. R. 302.

(13) 44 Ch. D. 110.

(14) *Ante*, p. 1; [1904] A.C. 476.

(15) 62 L. J. Q.B. 117; [1893] 1 Q.B. 142.

(16) 69 L. J. Q.B. 511; [1900] 1 Q.B. 752.

(17) 4 Ct. Sess. Cas. (3rd Series), 1046.

(18) 9 Ct. Sess. Cas. (3rd Series), 274.

(19) 10 App. Cas. 378.

(20) 11 East, 375n.

(21) 5 Taunt. 125.

(22) 5 B. & Ald. 454.

(23) 21 L. J. Q.B. 406; 18 Q.B. 870.

(24) 89 L. T. 700; 2 L. G. R. 628.

(25) 56 J. P. 517.

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he has inclosed Stonehenge, and an injunction to restrain him from erecting any such fencing. The claim is based on two grounds—first, that Stonehenge is a national monument of great interest and is subject to a trust for its free user by the public; secondly, that there are public roads running up to and through Stonehenge, and that those roads have been blocked by the defendant's fencing. The plaintiff produces no evidence in support of his first claim, but he asks the Court to presume a lost grant or a lost Act of Parliament because for many years past the public have been in the habit of visiting Stonehenge. The defendant, on the other hand, produces his title-deeds shewing a purchase in fee by his great-great-uncle from the trustees of the Duke of Queensberry more than seventy years ago, and an absolute fee-simple title in himself. It is impossible for the Court, under these circumstances, to make any such presumption as is suggested. The public as such cannot prescribe, nor is *jus spatiandi* known to our law as a possible subject-matter of grant or prescription, and "for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good" (quoted by Lord Selborne in *Dalton v. Angus & Co.* [1881] ²⁶). It is true that in some cases in the books the Courts have presumed trusts, but they have been cases where corporations holding the fee have been held to be trustees for some of their corporators or of the inhabitants to the exclusion of the others. *Goodman v. Saltash Corporation* ³ is a good illustration of this; but in that case Lord Selborne expressly negatives the application of such a principle to a case like the present. "The principle," he says, "on which I have arrived at this conclusion, would not, in my opinion, be applicable to such a case as *Rivers (Lord) v. Adams* [1878], ²⁷ in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title deeds, showing

that he held under conveyances made to him and his ancestors (in the usual way in which titles to land are established in this country), without any trust. Against such a title a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under these conveyances." Moreover, I adhere to the view that I expressed in *Att.-Gen. v. Simpson* [1901], ²⁸ that the gist of the principle on which presumptions are made is that the state of affairs is unexplained without such presumption. But the liberality with which landowners in this country have for years past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years to visitors to Stonehenge from all parts of the world. It would indeed be unfortunate if the Courts were to presume novel and unheard-of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property. Considering the unique character and great archaeological interest of Stonehenge and its position on downs where no harm was likely to be done to the land, it is most improbable that permission to visitors to inspect would have been ever refused; and, as the right of walking around and inspecting the stones is not one which could be the subject-matter of a grant, the owner may well have dispensed with requests for permission, relying on the fact that no right could grow thereout. I adopt Lord Bowen's language in *Blount v. Layard* [1888], ²⁹ which has been approved by Lord Macnaghten in *Simpson v. Att.-Gen.* ¹⁴: "nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood."

The next point is the alleged obstruction by the defendant of public ways.

(26) 50 L. J. Q.B. 689, 732; 6 App. Cas. 740, 795.

(27) 48 L. J. Ex. 47; 3 Ex. D. 361.

(28) 70 L. J. Ch. 828; [1901] 2 Ch. 671, 698.

(29) [1891] 2 Ch. 681a.

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Stonehenge is situated a short distance from a point where the road from Amesbury divides, one branch leading to Shrewton, and the other to Winterbourne Stoke. The outer ring of the *vallum* is within a few yards of the Shrewton road, and within about two hundred yards of the Winterbourne Stoke road. On the west of the stones, running north and south and crossing the Shrewton and the Winterbourne Stoke roads, there is a way, which is admittedly public, known as the Netheravon Way, which intersects the *vallum*, and passes within a few yards of the circle of stones. The plaintiff claims that, in addition to this, there is a public way which he calls the Well House Way, entering the circle from the Shrewton road, and then bifurcating, one branch going to the north and the other to the south of the stones, and the latter bifurcating again into a track leading into the Winterbourne Stoke road and a track leading into the Netheravon Way. He claims also another right of way from a point close to Stonehenge Bottom, running alongside the Shrewton road, and entering the *vallum* on the east side, and joining the other roads claimed by him within the *vallum*—a somewhat large amount of public carriage-ways to find within a circle whose diameter is about one hundred yards, and whose surface is, to a large extent, covered by these ancient stones.

The witnesses fall into two classes—namely, those who speak to tourist traffic to the stones and back, and those who speak to through traffic for business purposes. The evidence shews that for many years there has been a large concourse of sightseers to Stonehenge, who have arrived indifferently from all sides. They have usually driven to the stones, left their carriages there, and, after amusing or instructing themselves according to their several tastes, have driven away, usually by a route differing from that by which they have arrived. The track from Stonehenge Bottom has been used solely by sightseers, and only as a substitute for the adjacent high road, when the latter was freshly stoned or the like. It has been twice blocked during the last twenty years or so by the defendant's predecessors

in title; and on the facts alone (apart from other matters to which I will refer later) I hold that no public right of way over this road has in fact been proved. I find therefore, as a fact, that there has for many years past been a large amount of traffic to Stonehenge as the end and object of the journey; that the journeys have been made for the purpose of visiting the stones, and of staying there for such period as each visitor may find pleasant for the purposes of inspection, instruction, and general enjoyment. I find that there has been no through traffic by any of these pleasure-seekers—that is to say, they have not driven through Stonehenge on their way to other places, but their journey has been to Stonehenge, and the general object of their journey has been the sight of the stones. The great majority of the visitors to the stones have been pleasure-seekers; but some evidence has been called with a view to proving the existence of a public carriage-way from Durrington along the Packway, and turning off it across the downs by the Well House, and so up the avenue to the Shrewton road, and into the circle by the Friar's Heel. The defendant denies the existence of any such road; it crosses Countess Farm, part of his property, to the north of the Shrewton road, as well as his land by the stones.

Now the defendant succeeded to the estate in 1899 under the will of a predecessor who died in 1826, and during the seventy-three years that intervened the property has been in the possession of two successive life tenants. Now, it is well settled that a public way can be created only by Act of Parliament or by dedication by the owner, and dedication is a question of intention and of title. User by the public is some evidence of intention to dedicate, but the person said to have intended cannot dedicate more than he owns. Unless, therefore, the way in question was dedicated before 1826 there has been no dedication. The plaintiff put in evidence and relied on a plan made by Andrews and Drury in 1773; but, in my opinion, it is plain that no such track as the alleged Well House track is shewn upon it. The

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track actually shewn thereon corresponds more nearly with the Netheravon Way, and was, I think, afterwards displaced by it. Further, in 1823 an award was made under the Inclosure Acts, and a plan was duly deposited with the proper authority. This award deals with Durrington parish, and includes two fields over which the Well House track is said to run. It sets out the Netheravon track and shews no trace of the Well House track. Again, in 1847 the tithe map was made for the purpose of the Tithe Apportionment Act, and this again shows no trace of the Well House track. Unless, therefore, I can assume that this road was dedicated to the public between 1823 and 1826 there has been no one competent to dedicate a material part of it until 1899. I could make no such assumption even if the tithe map did not exist, but this map confirms my opinion that there was no such road in existence in 1847. Further, I find as a fact that there has been no user of the track by the public "openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were using it as of right," to use Mr. Justice Blackburn's words in *Greenwich Board of Works v. Maudslay*.⁹ It is material to remember that this is open down. The allotment road No. 2 left the Packway at or about the point where the alleged track commences. People driving over open downs were not, and are not, particular in keeping to the track. When they left the Packway some followed the allotment road No. 2; some—for example, Frank Toomer and C. S. Ruddle—kept more to the east and joined the Netheravon track further down. Others—such as the two Ferrises and Mr. Rendle, of Brigmerston—drove occasionally along the bottom by the Well House and up the avenue; but there was nothing like regular use or use as of right. Mr. J. Sandell, whose testimony I accept, never saw the same persons use the track more than once except Newton, the coalman, and after seeing him five or six times he stopped him.

It would serve no useful purpose, and would lengthen my judgment greatly, if

I examined all the evidence in detail. I have no doubt, and I find that the result is that there was occasional passage by light carts, not by waggons, but very infrequent. Many of the persons who drove that way were persons who were not likely to be stopped. There was no one on the spot to stop them in the great majority of cases, nor would it have been worth the tenant's while to run across from any distance to try and stop a light cart that did no damage and might contain a friend or neighbour. Many of the plaintiff's witnesses were untrustworthy in the sense that they were illiterate, obviously exaggerating, and inaccurate. As to the farm traffic, I do not believe the witnesses who spoke to driving waggons laden with wheat and drawn by eight horses, and threshing-machines, and the like in winter, by the Well House track and through the stones. Further, the defendant's witnesses are corroborated in their evidence that there never has been a track in fact by the Well House, and certainly no road used by heavy waggons, not only by the nature of the ground, but by two documents, both of which I think I am justified in accepting as admissible in evidence on this point. The first is the Ordnance map of 1874. Such maps are not evidence on questions of title or questions whether a road is public or private, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and set out every track visible on the face of the ground. The map of 1874 shews no trace of the alleged Well House track. The second documents are the plans deposited by the railway company in 1897. These were open to inspection, and were inspected by numbers of persons. They shew no trace of the alleged track, and the railway was intended to be carried on an embankment over it. There is no evidence that any one ever made any objection or suggested the existence of any such road on the enquiry. Further, the condition of the ground corroborates it. The avenue was the ancient approach to the stones from the *tumuli* to the east, and the *curvus* and *tumuli* to the west. There is no sug-

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gestion of any ancient approach from the north in the line of the alleged track. At the end of the avenue the ground shews signs of tracks to the east, where flints have been gotten, but these signs cease altogether at the bottom for some distance. Then some way up the north slope another track appears, which is apparently due to water-carts and the carriage of flints gotten there to the Durrington side.

Finally, dedication is a question of intention. It is almost inconceivable that any man in the position of the owner of the Amesbury estate would be guilty of such an act of vandalism as to dedicate a way for waggons and carts and all sorts of traffic through the midst of one of the most interesting relics of antiquity. Then it was urged that, even if the Well House track is not proved to exist, there are tracks from the Netheravon track through the circle to the Shrewton road, and that a right of way over such tracks exists for the purpose of passing to and from the Shrewton road, irrespective altogether of the stones. This is really equivalent to asking me to treat the stones as non-existent and to infer a right of simple passage from Netheravon track to Shrewton road. But the Netheravon track is a public road, and the plaintiffs' plan claims no less than four other ways, all converging into one, within a circle of less than a hundred yards diameter and joining the Shrewton road at a point about seventy yards from the place where the Netheravon track adjoins it. It is obvious that, apart from the stones, no such network of tracks over down land would be held to be public roads. Applying Sir George Mellish's judgment in *Wimbledon and Putney Commons Conservators v. Dixon* [1875],³⁰ I should say that the Netheravon track is the only one that could be allowed. Such a case would be somewhat similar to *Robinson v. Cowpen Local Board* [1893]³¹ where the Court of Appeal held that the mere fact that the public had, for thirty years and upwards, passed in all directions over a strip of land sixty-three feet by twenty-three feet

in a town surrounded on all sides by highways, was not conclusive evidence of intention to dedicate. But in fact I find that there are not and never have been any such tracks through the circle as figure on the plaintiff's plan. The plan put in by the defendant is correct, and shews that there are five tracks entering the circle, but that none of them cross. The visitors were not in the habit of crossing, but drove within the circle and left their carriages, which then turned off and waited, having attained the end and object of their journey. It is impossible to eliminate the stones. The whole object of the journeys was to see the stones; and, as there can be no legal right of visiting, walking about, and inspecting the stones in the public, these visits must be deemed to have been by the permission of the owner; and such permission must obviously be presumed to accord with the circumstances of the case and to be a permission to visit and inspect the stones, and for that purpose only, and, as necessarily incident thereto, to drive up and remain and drive away from the circle. No one would dream of driving across this barren triangle if the stones were not there. The inference is irresistible that the permission is not to drive simply, but to visit the stones, and for that purpose to drive there.

The proper inference to be drawn must depend on the circumstances of each case, and on such circumstances will depend whether the use of the way or the enjoyment of some view or object of interest is the real inducing cause, or whether both may be such. For instance, if a landowner allowed the public to drive into his park to a ruined tower or chapel, and to return by the same way, the inference would be plain that the ruins, not the drive, were the inducing cause, especially if the road were as bad as the tracks in the present case; but if he allowed the public to drive out at another gate, and this made a convenient passage between two villages, the inference to be drawn would be less clear. If, however, as in the present case, the inference is plain that the permission is to visit the stones, and for that purpose only to use the tracks,

(30) 45 L. J. Ch. 353; 1 Ch. D. 362.

(31) 63 L. J. Q.B. 235.

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then such permission is one and indivisible and no right of way can be established from user attributable to the permission to visit. If this were not so, the necessity of being churlish, deprecated by Lord Bowen in the passage already cited, would arise in every case where the object of interest did not abut on the high road, and the landowner in the case I have suggested could not venture to allow visitors to drive through his park to his ruins lest they should acquire a right to drive there after he had withdrawn his permission to visit the ruins.

Further, the tracks which lead into the circle cease there and do not cross, and the public have no *jus spatiandi* or *manendi* within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is *prima facie* a road that leads from one public place to another public place (per Lord Cranworth in *Campbell v. Lang* [1853]²² and *Young v. Cuthbertson*⁶); or, as Lord Justice Holmes suggests in the *Giant's Causeway Case*,² there cannot *prima facie* be a right for the public to go to a place where the public have no right to be. But the want of a *terminus ad quem* is not essential to the legal existence of a public road. It is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public, without more, been held sufficient. Cases of non-thoroughfares, such as Connaught Place or Stratford Place, might be regarded (as suggested in some of the earlier cases) as not of a true *cul de sac* at all. No law requires the wayfarer to take the shortest route, and there is nothing in law to prevent a man walking along Oxford Street from going round Stratford Place instead of using the crossing. But in all the cases in which a *cul de sac* has been held to be a public road there has been expenditure on it by the parish or local authority. In *Bourke v. Davis*¹³ Lord Justice Kay says: "But it is argued that a *cul de sac* may be a high-

(32) 1 Macq. 451, 453.

way. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. . . . But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended." Mr. Justice Swinfen Eady's decision in *Att.-Gen. v. Richmond Corporation*²⁴ accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says in *Young v. Cuthbertson*.⁶ But the landowner may, by express words or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a *cul de sac* to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by these means. This explains the *Giant's Causeway Case*,² for in that case the road in question had been "presented" by the grand jury in 1814, and had been repaired by the public authority. The law in Scotland is clear on the subject. In *Duncan v. Lees*,¹⁸ dealing with the Rock and Spindle, "a natural object of curiosity, and very much visited by people who are resident in St. Andrews and also by strangers who come there," the Lord President says, "But no amount of visitation of such a place by persons from mere curiosity will create a right of public way, unless the place to which they resort is in the proper sense of the term a public place." And the Court held that the Rock and Spindle was not a public place so as to form a terminus and establish a right of way, although the path claimed had been used for upwards of forty years by tourists, geologists, and members of the public generally. The law in Ireland is stated by Lord Justice Holmes, in delivering the judgment of the Court in *Abercromby v. Fermoy Town Commissioners*,¹² to the

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same effect, and at page 314, after stating that Barnane Walk was not used for the purpose of reaching any definite place, but as a place of recreation, to walk, to saunter, to lounge, to chat, to meet their friends, he says, "Dedication of a public right of way cannot I think be inferred from user of this kind." No case to the contrary has been cited. Mr. Justice Wills, in his summing-up in *Eyre v. New Forest Highway Board*,²⁵ asks: "What would be the meaning in a country place like that of a highway which ends in a *cul de sac*, and ends at a gate on to a common? Such things exist in large towns . . . but whoever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again?" These questions might be asked with great force in the present case. He then adds (and counsel for the plaintiffs relied on this): "I have known it successfully established in a beautiful walk leading to a cliff end or a place on the sea shore." But this may well have been so, if the circumstances were such as I have mentioned above. I hold, therefore, that the access to the circle was incident only to the permission to visit and inspect the stones, and was therefore permissive only; and, further, that the tracks to the circle are not thoroughfares, but lead only to the circle, where the public have no right without permission, and therefore are not public ways.

The action accordingly fails, and ought never to have been brought. It is plain that the vicinity of the camp and the consequent increase of visitors compelled the defendant to protect the stones if they were to be preserved; and he has done nothing more than is necessary for such protection. I desire to give the relators credit for wishing only to preserve this unique relic of a former age for the benefit of the public, but I fail to appreciate their method of attaining this. The first claim to dispossess the defendant of his property is simply extravagant; so much so that, although not technically abandoned, no serious argument was addressed to me in support of

it. The rest of the claim—for rights of way over the network of tracks shewn on the plaintiff's plan—if successful, would defeat the relators' object. If these ways were left unfenced, and heavy traffic passed through the circle, there would be great risk of injury; and even without such traffic there is great risk from the increased numbers of passers-by. As Sir Norman Lockyer (whose interesting application of the orientation theory to Stonehenge has recently appeared) says in one of his articles, "The real destructive agent has been man himself—savages could not have played more havoc with the monument than the English who have visited it at different times for different purposes." I feel no confidence that the majority of tourists have improved, nay, rather—"Aetas parentum pejor avis tulit nos nequiores." It is only fair to the defendant to say that he is not acting capriciously, but on expert advice for the preservation of the stones. If, on the other hand, the roads are all fenced off, the general appearance would be ruined, and no human being would be in any way the better. It is not immaterial to remark that this is not the action of the district or the county council to preserve rights of way, but is brought on the relation of strangers on the score of the public interest in Stonehenge. The action is dismissed with costs.

Solicitors—Horne & Birkett, for plaintiffs;
Farrer & Co., for defendant.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

KEKEWICH, J. { SCHOLEFIELD, *In re*;
1905. { SCHOLEFIELD v. ST. JOHN.
July 6, 14. { YOUNG, *In re*; SMITH v.
St. JOHN.

Conflict of Laws—General Power of Appointment—Personal Property—Exercise by Will—Foreign Domicil—Unattested Will—Validity—Wills Act, 1837 (1 Vict. c. 26), ss. 9, 10, and 27.

Such words as "all the property which comprises my estate in England as well as in France," contained in a foreign will, which is not attested in conformity with English law, is not such an indication that the will is to be construed with reference to English law as to import section 27 of the Wills Act so as to operate as an exercise of a general power of appointment.

D'Este Settlement Trust, In re; *Poulter v. D'Este* (72 L. J. Ch. 305; [1903] 1 Ch. 898), *followed*.

Price, In re; *Tomlin v. Latter* (69 L. J. Ch. 225; [1900] 1 Ch. 442), *explained and distinguished*.

C. having, under each of two English wills, a general power to appoint a fund by will, and being a domiciled Frenchwoman, made a will and codicils in French form, appointing her niece S. general and universal legatee of "all the property which comprises my estate in England as well as in France." The will and codicils were unattested, but valid according to French law, and were admitted to probate in England, together with other documents in the handwriting of the testatrix referring to the property and the power:—Held, that the will and codicils did not operate as an execution of the power.

Adjourned summonses.

The question raised was whether certain general testamentary powers of appointment vested in the late Isabella Deborah Comtesse De Damas D'Hautefort had been validly exercised by her, and it depended upon the question whether her testamentary dispositions ought to be construed according to English or French law.

The Comtesse was an English lady born of English parents named Young. She was twice married: first, to E. C.

Scholefield, who died in 1859; and secondly, to the Comte De Damas D'Hautefort, who died in 1887. The Comte was a French subject, domiciled in France, and by her marriage with him the Comtesse lost her English domicile and acquired her husband's French domicile, and retained such French domicile until her death, which took place in Paris on March 13, 1904.

By his will dated July 22, 1851, E. C. Scholefield, the first husband of the testatrix, who died on November 1, 1859, bequeathed his residuary personal estate to his two brothers as trustees of his said will upon trust as to one-third part thereof for such person or persons in such shares and proportions as his wife, Isabella Deborah Scholefield, should by her last will and testament in writing, notwithstanding any future coverture, direct or appoint, and in default of any such last-mentioned direction or appointment, and so far as the same should not extend, then upon trust for the testator's executors and trustees absolutely.

Under the will dated May 6, 1858, of her mother, Jane Young, who died on August 9, 1862, the testatrix also had a life interest and a general testamentary power of appointment in the ordinary form over a share in the estate of the said Jane Young, which consisted of personality, such share to go in default of appointment upon the trusts therein declared.

The property over which the testatrix thus had powers of appointment under the two wills consisted of 14,000*l.* and 1,200*l.*, or a total exceeding 15,000*l.*

By a will dated July 19, 1888, written in French by a notary and made at Pau, the testatrix appointed her brother, W. B. Young, her general and universal legatee and bequeathed to him "all the movable and immovable property which shall be found to belong to me on my death as well in France as in England," upon condition that he executed legacies amounting to 4,000*l.* in favour of two nieces of the testatrix; and in the event of her said brother predeceasing her, the testatrix appointed Millicent Mundy her universal legatee. This will was executed and attested by three witnesses, conform-

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ably with section 9 of the Wills Act, 1837.¹

By a holograph codicil to this will dated June 4, 1889, made in Paris, the testatrix appointed her niece, Millicent Mundy, her universal legatee, in case her brother refused the office. This codicil was not attested conformably with section 9.

By a holograph will, written in French, dated September 29, 1890, and made in Paris, the testatrix appointed her said brother, W. B. Young, her universal legatee—"wishing that he receive in full ownership all the property which comprises my estate in England as well as in France." This will was not attested.

By a codicil dated February 9, 1893, the testatrix, in the event of her brother not accepting, or in the event of his dying before her, appointed her niece Helen St. John her universal legatee; and by another codicil dated August 8, 1903, in case her niece Helen St. John should die before her, she appointed Agnes Peacock her universal legatee. Neither codicil was attested.

(1) Wills Act, 1837 (1 Vict. c. 26), s. 9: "No will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Section 10: "... no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner herein-before required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

Section 27: "... a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may

In a holograph letter dated May 2, 1900, the testatrix wrote as follows:

"Dearest Sissie,—In my will I have left everything I have to dear Walter with certain provisions which I felt sure he would faithfully carry out and in the event of my surviving him to you feeling sure that you would do the same. Of course if the expenses are more than I have calculated you will deduct from the sums left to others, but if there should be a surplus after having sold all my things, I should like it divided between Olivia, yourself and Sophy. (Signed) Isabella."

In another holograph letter dated July 17, 1902, she wrote:

"Dearest Sissie,—I am much troubled in mind about poor Mary. . . . I wish her to have together with the 500*l*. enough furniture for two rooms. . . . (Signed) Isabella."

In the same envelope with the above two letters, among other papers found in a desk of the testatrix, was an unsigned and undated memorandum in the handwriting of the testatrix, which stated as follows:

"On my death you ought to receive from Otterell and Claude Scholefield' (the trustees of the first husband's will) 'the sum of 15,000*l*., dear."

The testatrix died on March 13, 1904, having survived her brother, W. B. Young, but leaving her niece, the defendant Helen St. John, surviving her.

On April 9, 1904, the defendant Helen St. John was put in possession of her estate by the French Court.

On July 1, 1904, letters of administration, with translations of all the above-mentioned wills, codicils, and letters, all of which (excepting the unsigned memorandum) were admitted to probate in have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

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England as being valid and effectual testamentary dispositions according to the law of France, were granted to the defendant Helen St. John as the universal legatee.

The value of the estate of the testatrix in England was sworn at 62*l.* 3*s.* 11*d.* Her property in France consisted of furniture and personal effects of small value and about 1,400*l.* in cash, but she was heavily in debt on account of her late husband, the Comte De Damas D'Hautefort, who had predeceased her.

It was stated by the defendant Helen St. John, and not contradicted, that the testatrix's sole income had been derived from her life interest under the above-mentioned wills of her first husband and her mother, and that she was well aware that since the death of her second husband she could never have paid the legacies to her nieces, amounting to 4,000*l.*, out of her French property.

The plaintiffs, who were respectively the trustees of the two wills, desired the opinion of the Court upon the question whether the testamentary dispositions of the testatrix operated as an execution of the powers of appointment conferred upon her, having regard to the facts that she had not referred either to the powers or to the property comprised therein, and that section 27 of the Wills Act¹ did not apply, as her last will and codicils were not executed and attested in conformity with the provisions of sections 9 and 10.

The evidence of experts in French law was adduced, shewing that nothing corresponding to the English testamentary power of appointment was known to the French law, but that the creation of a universal legatee involved the passing of all property over which the testator had any power of disposition; also that by the law of France, differing in this respect from the law of England, the documents discovered after the death of the testatrix would be admissible as evidence of her intention.

T. T. Blyth, for the trustees of the will of the first husband.

Neville, K.C., and *A. L. Morris*, for the universal legatee.—A general power of appointment is a technicality unknown to

the French law; but according to the evidence of the French experts the words used by the testatrix would pass all property over which she had any power of disposition. In *Price, In re; Tomlin v. Latter* [1900],² *Stirling, J.*, thought that the English and not the French rules of construction ought to be applied. In *D'Este Settlement Trust, In re; Poulter v. D'Este* [1903],³ *Buckley, J.*, held that, to make a foreign will valid according to the law of England, the formalities—for example, attestation—required by sections 9 and 10 must be complied with; but it is difficult to see why for that reason the use of the words "testator" and "will" in section 27 of the Wills Act¹ should be limited to a will executed in the presence of two witnesses. In *D'Este Settlement Trust, In re*,³ there was no reference to England or English law in the will and no evidence as to the applicability of French law.

P. O. Lawrence, K.C., and *Leigh Clare*, for persons taking in default of appointment.—The testatrix made no valid exercise of her powers. This question must be determined according to English law. This will contains no reference to either the fund over which she had the power or the power itself, and so is unlike that in *Price, In re*,² where there were special words referring to "England the same as in France." This case is governed by *D'Este Settlement Trust, In re*.³ Under the Wills Act, 1837,¹ the benefits of section 27 cannot be claimed without compliance with sections 9 and 10. The expressions in the documents outside the will cannot be used here, where English and not French law applies; if the French Courts had to decide on this will, they would have to deal with the English law as a fact.

Stewart-Smith, K.C., and *Dauney*, for other persons taking in default of appointment.—Prior to the Wills Act, 1837,¹ a general power of appointment could not be exercised by a will unless there was a reference to the power or the property. Here sections 9 and 10 are not complied with, and section 27 does not apply to a foreign will. The decision in *Price, In re; Tomlin v. Latter*,² would have been the

(2) 69 L. J. Ch. 225; [1900] 1 Ch. 442.

(3) 72 L. J. Ch. 305; [1903] 1 Ch. 892.

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other way but for the words referring to "England as in France." The evidence of the experts is not to be relied on, as their province is only to state the law on the meaning of technical terms, and not to construe the provisions of the will—*Di Sora (Duchess) v. Phillips* [1863]⁴ and *Stearns Kaarsen Fabrick Gonda Co. v. Heintzmann* [1864].⁵ The extrinsic evidence of the documents outside the will is inadmissible, each Court being governed by the *lex fori*. The Court will not be affected by the fact that the testatrix had not enough property apart from the fund over which she had the power, as she might have got more between the dates of her will and her death.

Neville, K.C., in reply.—If the French rules of construction govern this case, there is competent evidence that the words used by the testatrix are sufficient. But if the English law is to apply, then the decision in *Price, In re; Tomlin v. Latter*,² governs this case. In *D'Este Settlement Trust, In re*,³ it was held that the French law must prevail, and that accordingly the canon of construction, being an English canon, contained in section 27 of the Wills Act, 1837,¹ could not be brought in. In *D'Huart v. Harkness* [1865]⁶ the will was not attested, and yet was held to be an effectual appointment. If Buckley, J., in *D'Este Settlement Trust, In re*,³ held that because of section 10 of the Wills Act, 1837, a foreign will cannot exercise a general power of appointment unless it is attested by two witnesses, he was deciding contrary to the decisions in *D'Huart v. Harkness*,⁶ *Price, In re*,² and *Harman, In re; Lloyd v. Tardy* [1894].⁷ The first will of the testatrix, dated July 19, 1888, was attested so as to satisfy section 9 of the Wills Act, 1837,¹ and it is arguable that that operated as an exercise of the powers.

On the second summons, *A. L. Ellis*, for the trustees of the will of Mrs. Young; *Neville, K.C.*, and *A. L. Morris*, for the universal legatee; and *P. S. Stokes*, for

persons interested in default of appointment, respectively repeated and adopted the foregoing arguments.

Cur. adv. vult.

KEKEWICH, J.—The main question arising on this summons can be concisely stated. A lady domiciled in France, on whom a power of appointment by will over personal property had been conferred by an English instrument, made a will constituting the defendant Miss St. John universal legatee, which referred neither to the property nor the power, and was admitted to probate here only because it complied with the law of the domicile. Did this will operate as an exercise of the testamentary power of appointment?

The precise question came before Mr. Justice Buckley in *D'Este Settlement Trust, In re*,³ and he decided that a like power was not exercised by a like will. I am not sure that I have thoroughly and correctly grasped the reasoning of the learned Judge; but his conclusion is perfectly plain, and I ought to follow it unless convinced that it is wrong. That conclusion is that a testamentary power can only be exercised by a will which conforms to English law, and that what is called the rule of construction, depending on section 27 of the Wills Act, 1837, has no application to any instrument other than an English will—that is, does not apply to a will not executed according to the provisions of English law, notwithstanding that by reason of its having been made according to the law of the testator's domicile, or otherwise, it is admissible to probate here. Perhaps the phrase "rule of construction" is not a particularly happy one. The effect of section 27 is to provide that as regards English wills—that is, wills executed and attested according to the law of England—there is no longer any occasion to refer to a testamentary power, or to the property affected by that power, provided the will contains a general devise, or bequest, such as would pass the property if it were the testator's own; and the question, to state it again in a slightly different form, is whether this provision is applicable to wills not executed and attested according

(4) 33 L. J. Ch. 129; 10 H.L. C. 624, 638.

(5) 17 C. B. (N.S.) 56.

(6) 34 L. J. Ch. 311; 34 Beav. 324.

(7) 63 L. J. Ch. 822; [1894] 3 Ch. 607.

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to English law. Mr. Justice Buckley decided that it is not applicable, and that decision governs the present case.

But it is said that there are other authorities deciding otherwise. First, reference is made to a case of *D'Huart v. Harkness*,⁶ which has been approved by the present Lord Justice Stirling in *Price, In re*.³ In that case Lord Romilly had to consider a power exercisable "by last will and testament in writing duly executed," and he held the power to have been exercised by a will of which, though unattested, probate had been granted in this country because made according to the law of the testator's domicile. But that will specifically gave the property in question, a sum of Consols, to the legatee claiming that the power had been exercised, and thus it appears that there was compliance with the English law, apart from the provisions of section 27 of the Wills Act, and that the question which I have to deal with did not arise. Again, it is said that the point was decided by myself in *Harman, In re*.⁷ There is nothing in the report to indicate that the question now under consideration was there raised. It is extremely unlikely that, if the facts allowed of its being raised, it would have escaped notice, and probably they did not allow it; but it is sufficient to say that the point was not raised in argument, or dealt with by the judgment.

The only other authority requiring notice is the decision of Mr. Justice Stirling in *Price, In re*.³ Needless to say the judgment is replete with learning, and those who seek instruction on this subject generally will find it there writ large; but he certainly did not decide, and as I read his judgment he did not express an opinion on, the particular point now under consideration. In the will before him the testatrix had directed that it should be considered "in England the same as in France," and the learned Judge accepted this as an indication upon the face of the will that she wrote it with reference to the law of England as well as the law of France, and that, therefore, he was entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms, including the rule of

construction introduced by section 27 of the Wills Act. His conclusion depends on this, and on this alone.

As regards text-writers, there is nothing to add to Mr. Justice Stirling's quotation from Mr. Dicey's *Conflict of Laws*, p. 684, that "Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid" in England. The profession is still waiting for a new edition of Mr. Westlake's book on *Private International Law*, and Mr. Foote in his valuable work on *Private International Jurisprudence* (3rd ed., at p. 273), the most recent on this subject, quotes Mr. Justice Buckley as having decided the particular point as he certainly did, but without comment.

Some reasons were urged why this lady's will should be accepted on special grounds as an exercise of the testamentary power. She disposes of all the movable and immovable property which should be found to belong to her "as well in France as in England," and it was urged that these words are equivalent to those which influenced Mr. Justice Stirling's decision in *Price, In re*.³ They seem to me essentially different. There is no indication of any reference to English law, and all the testatrix intends is that her will shall be construed largely so as to include property wherever situate, and especially property situate in England. Then it is said that, although the codicils were unattested, the will was executed in the presence of two witnesses, who attested it in a form sufficient to comply with the English law—section 9 of the Wills Act. It may be so, but the gift to the defendant Miss St. John is by an unattested codicil, and her title must depend on that. My attention was called to expert evidence intended to shew that the French Courts would place a construction on this testamentary disposition favourable to the defendant Miss St. John. Comments were made on this evidence, and objections were raised to the admissibility of some parts of it. I pass by both comments and objections alike, because it seems to me that the question for decision is one of English law; and I take it that, whatever else it might decide, the French Court would

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necessarily follow English authorities on a question of English law.

The short result is that, although the power was exercisable by will, and this lady's testamentary disposition, notwithstanding non-compliance with the provisions of the Wills Act, has been treated as a will and admitted to probate, yet it is not a will which can be construed according to the rule of section 27 of the Wills Act, and that, in default of application of that rule, it does not operate as an exercise of the testamentary power conferred on the testatrix.

Solicitors—Blyth, Dutton, Hartley & Blyth; Burton, Yeates & Hart; Fardell & Canning, agents for G. Fardell, Ryde; C. & S. Harrison & Co.

[Reported by Warwick H. Draper, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905. }
July 20, 21, 22. } BEHRENS v. RICHARDS.
Aug. 1. }

Trespass—Public Highway—Right not Established—User of Country Paths—Absence of Injury—Injunction Refused.

Where a defendant sets up, as a defence to an action for trespass, a public right of way which he fails to establish, and the public use of the way does no present injury to the landowner, who, moreover, disclaims any intention of stopping it so long as it does not conflict with the due enjoyment of his property, the Court will not interfere by injunction, but will make a declaration and impose nominal damages for the trespass.

From the public use of country paths by permission for the purpose of pleasure no dedication can be inferred.

Action for an injunction and damages.

The plaintiff was owner in fee of certain lands on the Cornish coast, and the defendants, some of whom were fishermen, had thereon broken down a wall and stone fence, filled up a trench dug by

the plaintiff across a road, removed two stone posts, broken down and displaced a bed of bulbs and a turf wall, and broken down and demolished a turf fence, all the property of the plaintiff.

The plaintiff claimed, besides damages, a perpetual injunction to restrain the defendants from entering and trespassing upon his said lands, and from committing the said acts, and from in any way committing any trespass to and upon the said lands, and from interfering with him in the quiet possession and enjoyment thereof.

The defence was to the effect that the said acts were done in the exercise and assertion of a public right of way over certain roads, paths, or tracks leading to the sea, and which had been wrongfully obstructed by the plaintiff.

Asbury, K.C., Garland, and T. H. Watson, for the plaintiff. — We have proved our title, and have shewn that there is no public right of way over these roads and tracks, but we do not wish to act harshly towards the defendants. We do not press for an injunction, for our purpose will be fully answered by a declaration that there is no public right of way.

J. G. Wood and J. R. Randolph, for the defendants. — The public have a right to reach the sea for the purpose of fishing or boating, and the shore is therefore a proper *terminus ad quem* for a highway. The tracks have become public highways by user—none the less, in the case of the one leading to Pixies' Cove, because the user has there been mainly for the purpose of visiting the caverns at that place. The acts in respect of which the action is brought were done for the purpose of asserting this right. Even if there be no public right of way, it is no injury to the plaintiff that the public should use the tracks as they have done for many years. The plaintiff, if successful, would prevent the fishermen from gaining their livelihood. He is acting from mere caprice, and the Court will not grant an injunction in such a case.

[BUCKLEY, J. — Suppose the paths have been used for a very long period—not so as to create a highway, but by the

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indulgence of the landlord. If he applies for an injunction to restrain you from doing what you have no right to do, but which causes him no injury, am I bound to grant it or no?

In *Rhymney Railway v. Glamorgan-shire Canal Co.* [1904]¹ the House of Lords refused an injunction against a railway company in respect of a bridge over a canal, which had sunk below the statutory level by the subsidence of the ground. The reason was that there was no present damage, the canal being out of working order from the same cause as affected the bridge. A declaration was made that the railway company was bound to maintain the bridge at its old level, and the canal company, on disclaiming any present intention of enforcing its rights, was given liberty to apply for an injunction if and when there should appear a prospect of restoring the navigation. We are willing to waive our rights of way if the plaintiff will disclaim any right he may have to stop our using these tracks as heretofore.

Asbury, K.C., in reply.—The proposed disclaimer might prejudice the plaintiff in the enjoyment of his land in case he wished hereafter to use it for building, unless words were added preserving his rights in such a case. We should be satisfied with a simple declaration, and would undertake not to enforce any order for costs that might be made in our favour. But the law is clear. This is a case of trespass, the continuance of which is threatened, and except in such a case as *Llandudno Urban Council v. Woods* [1899],² where the matter was thought too trivial for such a remedy, the right to an injunction is undoubted—*Bourke v. Davis* [1889],³ *Stocker v. Planet Building Society* [1879],⁴ *Goodson v. Richardson* [1874],⁵ *Colle v. Home and Colonial Stores* [1904],⁶ *Brinkman v. Matley* [1904],⁷ and

Imperial Gas Light and Coke Co. v. Broadbent [1859].⁸ Lord Kingsdown's language in the last case was quoted by your Lordship in *Cowper v. Laidler* [1903].⁹ *Cur. adv. vult.*

Aug. 1.—BUCKLEY, J., read the following judgment: The scene of the dispute in this case is land upon a beautiful rocky piece of the Cornish coast in the parish of St. Hilary, near Marazion. From the north-east to the south-west the following succeed one another: Channel Rush, King's Cove, Bessie's Cove, and Pixies' Cove. At some little height above the sea, on the rocky cliff above Channel Rush and King's Cove, stands Allen's cottage. South of the cottage, at a distance of a few yards, is a garden surrounded by stone walls erected upon the rising cliff. The length of this garden lies from north to south. Upon the eastern and western sides of the garden are the remains of old buildings, which in these proceedings have been called "fish cellars." Tradition has it that King's Cove was a notorious resort of smugglers, and it may well be that these so-called fish cellars were in fact smugglers' storehouses. At any rate, they are very ancient. At the date to which the evidence in this case carries me back these fish cellars were in ruins, but the foundations of their walls have been clearly traced, and I have no difficulty in saying where they once stood. Immediately to the west of the western cellar the rock rises again, and the western wall of the western cellar was, in fact, in part formed of the rock. Until recently there were two means of access from the foreshore at Channel Rush and King's Cove up to the road, such as it is, which is found immediately to the north-west of Allen's cottage. The one started from Channel Rush, or thereabouts, passed over the site, or to the east of the site, of the eastern cellar until it reached the north-east corner of the garden, and then, turning sharply to the left, went westward between Allen's cottage and his

(1) 91 L. T. 113.

(2) 68 L. J. Ch. 623; [1899] 2 Ch. 705.

(3) 44 Ch. D. 110, 121, 124.

(4) 27 W. R. 793.

(5) 43 L. J. Ch. 790, 792; L. R. 9 Ch. 221, 223, 227.

(6) 73 L. J. Ch. 484, 492; [1904] A.C. 179, 192.

(7) 73 L. J. Ch. 160; [1904] 2 Ch. 313.

(8) 29 L. J. Ch. 377, 379; 7 H.L. C. 600, 610, 612.

(9) 72 L. J. Ch. 578, 580; [1903] 2 Ch. 337, 340.

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garden. This I will call "the green way," merely because it is so coloured on the plan. It was used for carrying up fish from the shore when at particular states of the tide Channel Rush was the convenient landing place. It does not seem to have been more than a footway, although a hand-barrow, or possibly a donkey-cart, might, I dare say, have been got up and down it. The other started from King's Cove, ran a short distance to the south, then turned round sharply and went northwards, leaving a mound called Pennygrain at its western side, and so passed up the western side of Allen's garden until it met the green way at the north-west corner of the garden. From that point it continued northward by a road which runs up to a gate near the capstan, which is just below the coast-guard station. So much of the latter road as lies south of the point where the green way joins it I call "the purple way." I consider it to be established by the evidence that the purple way was widened and developed into such a road as it is now about the year 1870. It passes over the site of the old fish cellar on the west side of Allen's garden. Down to 1870 the old transverse walls of this fish cellar, running from east to west, were more or less still in existence. It was possible, I think, to get a cart past the ruins of these walls, and down to Pennygrain, if the driver was prepared to cross an irregular surface which was very far from level. But down to 1870 there was no cart road in any proper sense of the word. As far back as the evidence goes there was always, I think, the means of carrying fish up the cliff in baskets by this way and then putting them into carts at some point further to the north. Fishermen have landed their fish in King's Cove for a very long time, but for some years past—say ten to twenty years—the fishing has been indifferent, and much less has been done. Passing to Bessie's Cove, there is a slipway there, and the evidence is that of recent years Bessie's Cove has been more used than King's Cove for the purposes of the fishermen. In Pixies' Cove there are some beautiful natural caverns. There is a pathway there leading down the face

of the cliff, which is, and has been for many years, a well-defined track. It has sometimes, but seldom, been used for carrying up fish. In substance it has been the means of access to the shore with a view to exploring the natural beauties of Pixies' Cove and its caverns. Any one mounting that path finds himself at the cliff top confronted by a turf wall or hedge in which was a gap. Passing through that gap he would find himself on rough ground, on which for some part at least of the distance there was no well-defined track; but later a more defined track is reached, and ultimately he would find himself on what is called a "seaweed road," being a rough track over the moorland used by the farmers to draw seaweed for the purposes of manure. This pathway up the cliff at Pixies' Cove leading to the seaweed road I call "the red path." Lastly, to the north of Bessie's Cove, near Cliff Cottage, at a spot where a road which certainly exists at this point is but 7 ft. 3 in. wide, there is a small recess or bay which the defendants say has been used for years as a passing place for carts. The dispute in this case arises as to the green way, the purple way, the red path, and this passing place.

The defendants are fishermen and others of a like station in life, who have most of them been born in this district and have lived there all their lives. The plaintiff is a gentleman who from the year 1882 onwards has resorted to this beautiful piece of country from time to time, and who ultimately, some eighteen months ago, became the purchaser of several acres of land extending to the sea and including the sites of these disputed places. Unfortunately he has not made himself popular in the district. Being of opinion, whether rightly or wrongly, that he was within his rights, he took physical means to prevent the country people from using the disputed ways. He dug a trench across the road immediately to the north of the purple and green ways, so that no cart could go that way, and also built a wall. It is material to note that this obstruction of the existing way was not made in the course of the erection of new buildings or of any

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development of this part of the property for new purposes (although the plaintiff says that this is in fact what he has in contemplation), but was made by way of physical interference with the possibility of access. He also put a fence at the junction of the green way and the purple way. He filled up the turf bank at the gap leading to Pixies' Cove to a height of five feet, so that access could not be obtained to the cove by the old path, and he planted the passing place (if it be a passing place) with hyacinths. It is a matter of regret rather than surprise that the local inhabitants in these circumstances took forcible although not justifiable steps to assert rights which they conceived they possessed. They did so in a manner which is to be deprecated. They trampled on his hyacinths, they filled up his trench, they re-opened the gap to Pixies' Cove, and they demolished his fence. Local feeling has run high, and large and, I daresay, disorderly crowds of persons have assembled to assert what the local inhabitants conceive to be their rights. Under these circumstances this action is brought. The plaintiff asks an injunction to restrain the defendants from trespassing on the disputed ways. The defendants plead that all the ways in question are common public highways.

First, as regards the passing place, the matter is to my mind too insignificant to require any intervention by this Court. That a passing place was a convenience at the spot in question I have no doubt, and it was no inconvenience or injury to the plaintiff. There was no reason why he should plant it with hyacinths. I pass by this petty contest without further mention. It is matter for the application of reason, common sense, and ordinary forbearance, not for an injunction. As regards the three ways—the green way, the purple way, and the red path—the action is not so constituted as that I can in this proceeding determine, so as to bind the public, whether there be public rights over those ways or not. The Attorney-General is not a party. I have only to decide whether the defendants have as matter of defence made out that they have such a public right of way as they allege so that the plaintiff was not

entitled to exclude them. In my opinion, the evidence falls short of establishing the defence that these ways are common and public highways. To those who are conversant with the Cornish coast or with many other parts of the coast in this country it will be familiar that there are frequently to be found rough tracks or paths which have in fact been used without objection made by the landowner for very many years. From this fact alone it is difficult, in surroundings such as there are in this case, to infer an intention to dedicate. I cite again, as I did in *Brinckman v. Matley*,⁷ Lord Bowen's words in *Blount v. Layard* [1888],¹⁰ that "nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood," and "that, however continuous, however lengthy, the indulgence may have been, a jury ought to be warned against extracting out of it an inference unfavourable to the person who has granted the indulgence." In permitting persons to stray along the cliff edge, or wander down the cliff face, or stroll along the foreshore, the owner of the land was permitting that which was no injury to him and whose refusal would have been a churlish and unreasonable act on his part. From such a user nothing, I think, is to be inferred. If it were otherwise, a landowner would be compelled to prohibit such a user as this lest at some future time, when perhaps the cliffs now practically deserted may become the site of a place like Bude, Cromer, or Bournemouth, he should be told that he could not lay out his estate as he was minded because rights of highway existed which precluded him from so doing. No part of the disputed ways has ever become repairable by the parish. The parish roads (as is common in many parts of Cornwall) are in this neighbourhood joined by rough cart-tracks coming up from the irregular contour of the broken coast line, which serve to give access to

(10) [1891] 2 Ch. 681n, 691n.

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the foreshore or the lands adjoining the foreshore; and these rough cart-tracks in turn degenerate into mere rough foot-tracks crossing the moorland and ending sometimes in the roughest of paths by which the adventurous may scramble down the face of the cliff to the sea. From the mere fact that the landowner has never raised objection to any one who was so minded making use of tracks such as these no inference of dedication can, I think, be drawn. There may no doubt exist, and there does in my opinion in this case exist, another question—that is, whether a public right may in some such case have been acquired for the purpose of access to the foreshore as the means of reaching the highway of the sea and there exercising the public right of fishing. That arises in the present case as regards King's Cove. In *Blundell v. Caterall* [1821]¹¹ Mr. Justice Holroyd speaks of public common-law rights, with respect to the sea, of obtaining access thereto “by and from such places only as necessity or usage have appropriated to those purposes.” I am pronouncing no final opinion, but only an opinion as between the parties to these proceedings, when I say that I think these defendants have failed in making out a public right over the green and purple ways for the purpose of access to King's Cove for fishing. There is some evidence of an access from the north which has been destroyed by erosion of the sea, and of an access round Battery Point from the west which is possible, though inconvenient. As regards dedication, the purple way, as I have said, as such has existed, I think, only from 1870, and substantially the user of the purple and green ways has been by tenants of the estate. Moreover, as regards about the last fifty years, the circumstances have been such, as regards settlements and tenancies, as that dedication binding the owner of the inheritance is not to be presumed. On the whole, therefore, I have arrived at the conclusion that the defendants have not established the public rights of way which they assert. The order will therefore contain an expression of the opinion of the Court to that effect. At the same

(11) 5 B. & Ald. 268, at p. 302.

time I think it right to add that if the plaintiff is minded, as I understand he is, to build at King's Cove in such manner as that, for the reasonable enjoyment of his property, he will have to interrupt the purple way and the green way, I think he will be well advised, both in his own interest and as a neighbourly act to his poorer neighbours, to see that some way is substituted or preserved for the benefit of the fishermen whose fish are landed at Channel Rush and King's Cove.

From the fact, however, that I arrive at the conclusion that the defendants have not established the common public rights which they claim, it does not, in my opinion, follow that the plaintiff is entitled to the formidable weapon of an injunction of this Court. He asks the Court by injunction to forbid the continued user of ways which have in fact for many years past been enjoyed, and whose enjoyment is no injury to the owner of the land unless and until, under altered circumstances, the reasonable enjoyment of his property is affected by its continuance. No doubt it is the law that upon the foreshore of this country and the rough cliff paths which exist in many places along the coast the public have not a right of way recognised by the law, [and no doubt it is true that rights of property are as a general proposition entitled to protection by, if necessary, an injunction of this Court. But it does not follow that if the owner of the foreshore—say at some well-known seaside resort—came to this Court for an injunction to restrain the nurserymaids from wheeling their perambulators on the sand or the children from playing on the rocks, this Court is bound to make, or in the absence of good reason would make, such an order. In *Llandudno Urban Council v. Woods*² Lord Justice Cozens-Hardy, then a Judge of first instance, refused it. The existing security of the tenure of land in this country is largely maintained by the fact that the owners of the land behave reasonably in the matter of its enjoyment. It would, in my judgment, be a disastrous thing, not for the public only, but for the landowners also, if this Court at the caprice of the landowner—

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not because circumstances have altered, but merely because he was minded that it should be so—entertained every trivial application to restrain persons by injunction from using paths which, though not public highways, have in fact been used by the permission of the owners for many generations, and whose user is no injury to the owner of the land. The landowner, if he be wise, will rather erect upon the road or path a notice expressive of permission, or even of invitation, to persons who make use of the way in an orderly and reasonable manner. I am glad to say that the plaintiff in this case, by his answers to myself in the box, disclaimed any intention of acting thus capriciously, and that he has by his counsel offered to make a disclaimer in terms which I will read presently in the exact words in which counsel offered it, and which will form part of the order of the Court. The people must understand that in availing themselves under this disclaimer of the user which the plaintiff concedes they must conduct themselves in an orderly and reasonable manner. If effect be really given by the plaintiff to that disclaimer and the people act temperately and with good feeling in availing themselves of it, and if, by mutual concession as regards the purple and green ways, the plaintiff's intended building at King's Cove is rendered harmless by such a substitution or preservation of a way to the foreshore at that place as I have suggested, no further difficulty ought, I think, to arise in this case. The plaintiff must bear in mind that in proceedings properly instituted he might have great difficulty in maintaining that there is not at some one of the places here in dispute a public right of access to the foreshore for fishing, and that, as between Bessie's Cove and King's Cove, there is no obvious reason why the access should be by the former and not by the latter. As to this, however, I need say no more. I have only to consider whether, the defendants having failed, as I think, to make out that the ways are public, the plaintiff is entitled to an injunction. For the reasons which I have given, I think not. It is enough, in my judgment, that I should mark the

opinion of the Court that the acts of the defendants were wrongful by giving nominal damages.

As regards the costs of the action, I think that both parties are to blame, and that neither the plaintiff who fails to obtain an injunction, nor the defendants who fail to establish the public rights which they claim, ought to receive costs. In dealing with the costs I have also borne in mind that the plaintiff makes a disclaimer which I am about to read. I wish to add, as matter to the plaintiff's credit, that he offered an undertaking not to enforce an order for costs if he obtained one.

The judgment which I pronounce is this: The Court being of opinion that the defendants have failed to establish any right of public cart-way or public foot-way over the purple way, the green way, and the red path, or any of them, as public highways, and the plaintiff voluntarily disclaiming any intention of preventing the fishermen in the district from reasonably exercising their calling, or of refusing to permit the defendants or any member of the public to exercise reasonable passage to or from such portions of the foreshore abutting on the plaintiff's property for the purpose of fishing or enjoying the beauties of the locality as may not from time to time interfere with his own or his tenants' user and enjoyment of his property, the Court doth not think fit to make any order except that the defendants do pay to the plaintiff 40s. damages. There will be liberty to apply.

Solicitors—Collyer-Bristow & Co., agents for J. J. Hill, Penzance, for plaintiff; Cooze, Kingdon & Cotton, agents for Edward Boase, Penzance, for defendants.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

FARWELL, J.
1905. } HIGGINS v. BETTS.
May 23, 24, 25, 26. }

Light—Obstruction—Nuisance—Test of Nuisance—Injunction—Damages.

The decision of the HOUSE OF LORDS in Colls v. Home and Colonial Stores (73 L. J. Ch. 484; [1904] A.C. 179) has left the obstruction of ancient lights still, as it always has been, a question of nuisance or no nuisance, but has readjusted the law in respect to the test of nuisance; and the test now is, not how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?—but, how much light is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?

There is nothing in this decision of the HOUSE OF LORDS that overrules the decision in Shelfer v. City of London Electric Lighting Co. (64 L. J. Ch. 216; [1895] 1 Ch. 287).

Witness action.

The plaintiff Higgins was tenant in possession of licensed premises called the Red Lion in Cowcross Street for a term of years, of which thirty and a-half years were unexpired, granted by his co-plaintiffs, Messrs. Barclay & Perkins, Lim., who held the premises under a superior lease for a term of which thirty-one and a-half years were unexpired.

The premises in question were corner premises, and had an exceptionally good light to the west. They faced over a large open space in front of the Farringdon Street Station of the Metropolitan Railway, and had a frontage of 17 feet to Cowcross Street on the west, and a frontage on the north to Benjamin Street, which was a narrow street of only some 13 feet in width. The ground floor of the premises was used for the purposes of the business, the first and upper floors being used by the plaintiff Higgins and his family for residential purposes.

On the ground floor were the public bar, the private bar and the saloon bar, all looking into and being lighted from Benjamin Street. On the first floor were

a sitting-room and dining-room, each with two windows looking into Benjamin Street. All these lights were ancient lights.

On the opposite side of Benjamin Street, and facing the plaintiffs' house, were the defendant's premises. Originally, these consisted of an old building, of which the part that was near the Cowcross Street end and opposite to the plaintiffs' public and private bar, was about 31 feet in height, but opposite to the plaintiffs' saloon bar and dining-room there was a gap of considerable size, commencing about 11 feet from the ground, and being about 11 feet in width. The gap broadened out as the wall of the old building rose again to a height of about 31 feet. The greatest width of the gap was about 20 feet, and through this gap the light used to come to the plaintiffs' windows.

The defendant had recently pulled down this old building and commenced to build another one on its site. The wall of the proposed new building was to be 38 feet in height throughout the whole of its length in Benjamin Street, with the result that the old gap would be entirely filled up, and the access of light to the plaintiffs' premises greatly obstructed.

The plaintiffs thereupon commenced this action, and upon motion for an interim injunction on April 7, the defendant's wall being then about 11 feet high, the defendant assented to an interim injunction in the form suggested by Lord Macnaghten in *Colls v. Home and Colonial Stores* [1904].¹ The defendant, however, continued building in due course until the new wall in Benjamin Street attained to a uniform height of 32 feet, in reliance upon the advice of his surveyors that, even if the plaintiffs were eventually successful, they would, according to the decision of the House of Lords in *Colls v. Home and Colonial Stores*,¹ be entitled to reasonable damages only and not to an injunction.

In his defence the defendant alleged that any diminution in light caused by the filling up of the gap in Benjamin Street would be fully compensated for by

(1) 73 L. J. Ch. 484; [1904] A.C. 179.

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the rounding off of the south-west corner of his new building, whereby additional light would be admitted to all the plaintiffs' windows in that street.

Jenkins, K.C., Sebastian, and C. Noad, for the plaintiffs.—The evidence shews that the private bar, and especially the saloon bar, have been injuriously affected by depriving them of the light which formerly came through the gap; that the dining-room also has now only thirty-two degrees of light instead of seventy-nine degrees as formerly; and that the rounding off of the south-west corner will not compensate for the light so cut off. The plaintiffs have consequently suffered material damage amounting to more than 1,000*l.* The plaintiffs' premises are in a sensible degree less fit for the purposes of business or occupation within the rule contained in *Back v. Stacey* [1826]² and *Parker v. Smith* [1832]³ and adopted by the House of Lords in *Colls v. Home and Colonial Stores*.¹ It is not denied that the defendant continued his building in good faith, but nevertheless the plaintiffs are entitled to an injunction or at any rate to substantial damages.

Upjohn, K.C., and J. Tanner, for the defendant.—The filling in of the gap has no doubt deprived the plaintiffs of a certain amount of light, but not to such an extent as seriously to affect the comfortable user of their premises. Any deprivation of light in this respect has been made good by the rounding off of the corner of the new building, whereby additional light has obtained access to the plaintiffs' premises, and the Court will take such additional light into consideration—*Colls v. Home and Colonial Stores*,¹ which has not altered the law, but only the practice of the Courts.

[FARWELL, J.—I have come to the conclusion that the rounding off of the corner has not benefited the saloon bar and dining-room.]

In the circumstances, the plaintiffs are only entitled to damages. In *Kine v. Jolly* [1904]⁴ the Court of Appeal directed an enquiry as to damages, and the Court

will give damages rather than grant an injunction where the defendant has acted in good faith, as he has done here—*per* Lord Macnaghten in *Colls v. Home and Colonial Stores*.¹

[FARWELL, J.—Does not the principle of *Shelfer v. City of London Electric Lighting Co.* [1894]⁵ apply?]

It is not consistent with the ruling in *Colls v. Home and Colonial Stores*¹ and *Kine v. Jolly*.⁴ If the Court is of opinion that the damage exceeds 400*l.*, the defendant would prefer to submit to an injunction in the form suggested by Lord Macnaghten in *Colls v. Home and Colonial Stores*,¹ with the additional words "so as to be a nuisance."

FARWELL, J.—Inasmuch as this is the first case I have tried dealing with ancient lights since *Colls v. Home and Colonial Stores*¹ was decided in the House of Lords, I will say a few words about my understanding of that case. To my mind it is plain that this action would never have been defended had it not been for that decision in the House of Lords. I think that there is a general impression that *Colls v. Home and Colonial Stores*¹ has disturbed the rules of this Court with regard to ancient lights to a very much greater extent than it really has done. I have carefully studied the speeches in that case, and also the exposition of it by the Court of Appeal in *Kine v. Jolly*,⁴ and also Mr. Justice Bray's recent decision in *Ambler v. Gordon* [1905].⁶ The result to which I have come I have set down in writing, without referring in detail to the various speeches upon which it is founded, and I will now read it.

Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act. When he has so acquired it, he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house according to the usages of ordinary persons in that locality is actionable as a

(2) 2 Car. & P. 465.

(3) 5 Car. & P. 438.

(4) *Ante*, p. 174; [1904] 1 Ch. 480.

(5) 64 L. J. Ch. 216; [1895] 1 Ch. 287.

(6) 74 L. J. K.B. 185; [1905] 1 K.B. 417.

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nuisance at common law. His neighbour's brick-burning, or fried-fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise, and in like manner his neighbour's new building may be a nuisance in respect of interference with light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced—the two latter are *ab initio* incident to the right of property. But the wrong done is in both cases the same—namely, the disturbance of the owner in his enjoyment of the house. Inasmuch as the acquisition of the easement was a necessary condition precedent to the right to sue, the Courts appear in many cases to have addressed themselves rather to the extent of the easement acquired and the amount of such easement taken away by the defendant, than to the sufficiency for ordinary purposes of the amount of light left, so much so that many expressions can be found that lend support to the argument that the right to light was a right of property for which trespass would lie. The dominant owner was never entitled either by prescription or under the Act to all the light that came through his windows. It was not enough to shew that some light had been taken; but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from the light acquired, and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirements. If a man had a house with unusually excellent lights, it was treated as a nuisance if he was deprived of a substantial part of it, even although a fair amount for ordinary purposes was left. It is in this respect that *Colls v. Home and Colonial Stores*¹ has to my mind readjusted the law. It is still, as it always has been, a question of nuisance or no nuisance; but the test of nuisance is not, how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner had pre-

viously had?—but, how much is left, and is that enough for the comfortable use and enjoyment of the house, according to the ordinary requirements of mankind? This latter is the direction in *Back v. Stacey*,² quoted in *Colls v. Home and Colonial Stores*¹: “Best, C.J., told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as beneficially as he had formerly done. His Lordship added, that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises.”

This puts the case of nuisance by interference with light on the same footing as other cases of nuisance—for example, noise; for, apart from the question of locality, which is always important in considering the question of nuisance or no nuisance, the fact that the owner of a house had enjoyed exceptional quiet gave him no right to more than the ordinary freedom from extraordinary noises. The practical difference arises from the necessary limitation of the plaintiff's rights by the extent of his ancient lights, for the right to immunity from unreasonable noise is an incident of property; but the right to light, having to be acquired, is limited by the extent of the enjoyment, and if the windows be small and few the question propounded by Lord Robertson may arise: “Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from

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building a house which would have done no harm to the light if there had been five windows?"

That, to my mind, is the alteration which the decision of the House of Lords in *Colls v. Home and Colonial Stores*¹ has made. There are various other suggestions thrown out by the noble and learned Lords which, of course, are entitled to careful consideration when they may arise. For instance, the question concerning the greater freedom of the Court with regard to exercising a judicial discretion in granting an injunction or not. But, according to my understanding, the mere opinions of the noble Lords, apart from decision, do not overrule the decisions of the Court of Appeal, which, at any rate so far as the Judges of first instance are concerned, must remain binding upon them until they are in fact overruled. I refer more particularly to the case of *Shelfer v. City of London Electric Lighting Co.*⁵ I cannot say that I can read anything in *Colls v. Home and Colonial Stores*¹ as overruling that decision.

I am relieved from considering the question of injunction or no injunction in this case, because the damages, as I have intimated, are so substantial that counsel for the defendant prefers not to argue that question, but prefers to submit to an injunction. [His Lordship then reviewed the evidence in detail, and came to the conclusion that the defendant's new building had materially injured the saloon bar and the dining-room, and that the business of the plaintiff Higgins had been thereby undoubtedly seriously affected and prejudiced, and continued:] The result is that I find as a fact that there has been a substantial deprivation of light sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff Higgins from carrying on his accustomed business (that of a licensed victualler) on the premises as beneficially as he had done before.

The injunction will be in the *Yates v. Jack* [1866]⁷ form, with the additional words "so as to be a nuisance," suggested by Lord Macnaghten in *Colls v. Home and Colonial Stores*,¹ with liberty to apply

(7) 35 L. J. Ch. 539; L. R. 1 Ch. 295.

for a mandatory order. I understand, however, that the parties, who appear to be reasonable men, may come to some arrangement which will render it unnecessary for the Court on a subsequent application to specify with exactitude the amount which the defendant has to pull down.

Solicitors—Marson, Son & Haigh, for plaintiffs;
Letts Brothers, for defendant.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

KEKEWICH, J. }
1905. } CHURCH ARMY, *In re*.
July 18. }

Charity—Registration under Companies Acts—Land Registry—Restriction—"Endowment"—Disposition of Property—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), ss. 62 and 66.

Under its memorandum of association a charitable society incorporated under the Companies Acts, 1862 to 1890, had full power to purchase, lease, and acquire real or personal property, erect and maintain buildings, and sell, exchange, or deal with all its property. Appeals were from time to time made for donations to special objects of the charity, including one for the completion of new headquarters of the society. A large sum was obtained, and leasehold premises acquired. Upon an application to register the society as proprietor of these leaseholds under the Land Transfer Acts, 1875 and 1897,—Held, that there was no such "endowment" within the meaning of the Charitable Trusts Act, 1853, s. 66, as rendered the society amenable to the jurisdiction of the Charity Commissioners. The subscribers to the headquarters must be taken to have known that their contributions, although primarily applicable to this particular object, were given for the general purposes of the society, and there was no intention to take the money out of the control of the managing body. The society could therefore deal with its

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property within the powers of the memorandum of association, and it was entitled to be registered in respect of the leaseholds without any restriction to the effect that no disposition of the land was to be registered without the consent of the Charity Commissioners.

Decision of the COURT OF APPEAL in Clergy Orphan Corporation, In re (64 L. J. Ch. 66; [1894] 3 Ch. 145), as to the definition of "endowment," adopted, but held inapplicable.

This was a motion on behalf of the Church Army that the Registrar under the Land Transfer Acts, 1875 and 1897, might be directed to register the Church Army as proprietors of the leasehold land known as 12, 14, and 16 Edgware Road, in the county of London, held under a lease dated April 18, 1904, and made between Viscount Portman of the one part, and the Church Army of the other part, for a term of seventy-six years from March 25, 1903, without entering a restriction on the register to the effect that no disposition of the said leasehold land was to be registered without the consent of the Charity Commissioners.

The Church Army was incorporated on September 14, 1892, under the Companies Acts, 1862 to 1890, as an association limited by guarantee, for the purpose of promoting the objects mentioned in the memorandum of association; and by a licence of the Board of Trade dated the same day it was directed to be registered with limited liability without the addition of the word "limited" to its title. By the memorandum of association the objects for which the society was established were, *inter alia*:

"(d) Subject to the provisions of section 21 of the Companies Act, 1867, to purchase, take on lease, hire, or otherwise acquire any real or personal property, and any rights and privileges necessary or convenient for the purposes of the Society."

"(e) To erect, maintain, and alter any buildings upon any land held by or belonging to the Society for any estate or interest, and to provide the same with all proper and necessary fixtures, furniture, apparatus, appliances, conveniences, and accommodation."

"(g) To borrow or raise money at interest on the issue of or upon bonds, debentures, debenture stock, bills of exchange, promissory notes, or other obligations or securities of the Society, or upon mortgage or charge of the property of the Society, or otherwise in such manner as may seem expedient."

"(k) To sell, improve, manage, develop, lease, mortgage, exchange, dispose of, turn to account, or otherwise deal with all or any part of the property and rights for the time being of the Society."

The income of the Church Army was derived from three sources—voluntary contributions, rents and income of property, and earnings of the workers in the various homes. The Church Army constantly appealed for donations and subscriptions for general purposes and for special objects, the proportion required for any particular object being specified. In 1903, in order to carry on this work more efficiently it became necessary to acquire (*inter alia*) Nos. 12, 14, and 16 Edgware Road, as a site for new training homes and headquarters, and subscriptions for this object were specially invited. In response a sum of 26,888*l.* 17*s.* was subscribed, to which a further sum of 7,000*l.*, subscribed for the general purposes of the society, was added, and more was required. The leasehold premises in question were secured. No deed or declaration of trust of these premises, or of any of the sums collected had ever been executed by the Church Army.

Part of the premises in question had been sub-demised by the Church Army, and the rents payable by the tenants were paid into the general account.

On February 24, 1904, the Church Army applied to be registered as proprietors of these leasehold lands in Edgware Road.

The Registrar considered that the Church Army was a charity within the meaning of the Charitable Trusts Acts, 1853 and 1855, and that it was a difficult matter to determine whether it was within the exceptions allowed by section 62 of the Charitable Trusts Act, 1853,¹ and whether or not the consent of

(1) The Charitable Trusts Act, 1853, by section 62, provides that the Act shall not extend

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the Charity Commissioners was necessary to sales and other dealings with this property. The Registrar accordingly referred the matter to the decision of the Court.

P. O. Lawrence, K.C., and Tindal-Robertson, for the Church Army.—This society, which is admittedly a charity, having been incorporated as a company under the Companies Acts, is outside the jurisdiction of the Charity Commissioners altogether. It has never been suggested before in the case of similar charities that this is not so. There is no trust, and no *cestuis que trust*, except the society itself. The assets of the company may be required in the event of a winding-up, and would have to be realised and applied by the liquidator without any interference from the Charity Commissioners. But if that is not so, the society comes within the exemption in section 62 of the Charitable Trusts Act, 1863.¹ The subscriptions to the headquarters were required really for the general purposes of the society and to carry on its business. There has been no "endowment" in the sense laid down in the cases—*Corporation of the Sons of the Clergy v. Sutton* [1860],² *Charity for Poor Widows &c. and Skinner*,

to "any institution, establishment, or society for religious or other charitable purposes . . . wholly maintained by voluntary contributions . . . ; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or controul of the said board, or the powers or provisions of this Act. . . ."

Section 66: ". . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, . . . which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof. . . ."

(2) 29 L. J. Ch. 593; *sub nom. Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. Sutton*, 27 Beav. 651.

In re [1892],³ and *St. Hilda's Incorporated College, Cheltenham, In re* [1901].⁴ The applicants are therefore entitled to be registered without any restriction.

E. Beaumont (The Attorney-General (Sir R. B. Finlay, K.C.) with him), for the Charity Commissioners.—The case does come within the exemptions in section 62 of the Charitable Trusts Act.¹ There has been an "endowment" within the meaning of that term, as defined in *Clergy Orphan Corporation, In re* [1894],⁵ which overruled the ground upon which Lord Romilly proceeded in *Corporation of the Sons of the Clergy v. Sutton*,² and also the decision of North, J., in *Charity for Poor Widows &c. and Skinner, In re*.³ In the present case money was asked for and subscribed for these central headquarters, and the society cannot sell without the consent of the Charity Commissioners. There is a permanent endowment here of the headquarters, and the money subscribed for it could not have been applied to anything else.

The general proposition that this society is outside the jurisdiction of the Charity Commissioners cannot be supported.

[His Lordship intimated that he did not intend to go into that.]

KEKEWICH, J.—In my opinion the applicant is in the right and is entitled to registration without any restriction. I was asked to come to that conclusion on some general grounds which may be sound, but which are certainly startling. There are numerous companies incorporated under the Act of 1862 for purposes other than gain, and therefore entitled under the Act to be registered without the addition of the word "Limited," and it must be that many of those companies are established for the purpose of charity. Some certainly are not, and I also know some, quite apart from the Church Army, which have been established for charitable purposes.

The Church Army is of the latter class. It is admitted; and it could not be denied, that it is, in one word, a charity. It is argued that any com-

(3) 62 L. J. Ch. 148; [1893] 1 Ch. 178.

(4) 70 L. J. Ch. 266; [1901] 1 Ch. 556.

(5) 64 L. J. Ch. 66; [1894] 3 Ch. 145.

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pany of that kind is, by virtue of the provisions of the Companies Acts, and possibly of its own memorandum of association, exempt from the jurisdiction of the Charity Commissioners. I am not convinced by the argument. I am not deciding against it. It is a very broad proposition, which may on a proper occasion require judicial consideration. I propose to pass it by. My decision in favour of the applicant will proceed on an entirely different ground. No doubt the decision in the case of *Charity for Poor Widows &c. and Skinner, In re*,³ following a decision of Lord Romilly, which up to that time had been accepted, does go on the proposition that you cannot have an endowment within the meaning of section 62 of the Charitable Trusts Act, 1853, unless there is some specific trust—something apart from the general purposes of the institution. It is clear from the case of *Clergy Orphan Corporation, In re*,⁵ that the Court of Appeal took a view entirely different from that of Mr. Justice North and Lord Romilly, and that, so far, both those decisions must be considered as overruled. It does not follow that they were not perfectly right; and indeed Lord Davey, in giving the judgment of the Court of Appeal, says, "Although in the result Lord Romilly's conclusion may not differ much from that which we have endeavoured to express, we cannot agree with him in the reasons which he gave for his judgment." But as regards that particular view, we must, I think, treat the Court of Appeal as differing from Lord Romilly and Mr. Justice North. There are several passages in the judgment of the Court of Appeal which shew what they think was the meaning of the word "endowment." More than one passage, I think, explains it perfectly clearly. Early in the judgment Lord Davey, delivering the judgment of the Court, says, after quoting section 62 of the Act, "The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will." Then further down he says: "We can see no

sufficient reason for limiting or restricting the meaning of these words, or for confining the words to property held upon some special purpose or trust in connection with a charity as distinguished from the general purposes of the charity. On the contrary, the words 'in trust for any charity or for all or any of the objects or purposes thereof,' seem to us to preclude any such limited construction. We conclude, therefore, that the words mean what they say, and that all property of every description belonging to or held in trust for a charity, and whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income, is an endowment within the meaning of the Act." There are other passages which I might read to illustrate their views, but it is perfectly clear what their Lordships meant.

Then it is argued that on that footing this must be an "endowment." The facts, about which there is no dispute, are exceedingly simple. The Church Army appeals for subscriptions, not only for their everyday work, but also for special work which comes in hand from time to time. Like all other charitable institutions, they have from time to time some special object in view which attracts the sympathy of the public, and they avail themselves of that attraction. Among other things they thought it necessary to have headquarters—that is to say, a building apparently of some extent where the general business of the charity can be carried on, and it was required of course to be fitted up so as to be applicable in that way. They made an appeal for that purpose, and an appeal which apparently was repeated from time to time, and elicited a very generous response. I have one of those appeals before me, and I suppose they are all more or less in the same form. As has been pointed out in argument, they invite persons to respond to the appeal by signing a document in this form: "I gladly promise you during 1902 or 1903, the sum of £ towards the completion of the Central Halls." Those are really the new headquarters

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and training homes of the Church Army. Money was given, as I say, largely and generously to that.

Now, it is said that is not a voluntary contribution, but comes within an "endowment," as described by the judgment of the Court of Appeal in *Clergy Orphan Corporation, In re.*⁵ In one sense, no doubt, it does. The money was no doubt devoted to that specific purpose at the time. The reason which actuated the subscribers in finding the money was that they were in sympathy with the Church Army and its general purposes, and saw that it was desirable, in order to promote those, to have these new headquarters and training homes, and they meant the money to be expended in that way, and it would have been extremely wrong of the managing body of the Church Army to have applied the money which they received for that purpose in any other way. I have no doubt, so far, it partakes of the character of an endowment; but the subscription was to the Church Army, to be applied to that particular purpose at the time, but not, as I understand it, so as to take the money subscribed out of the control of the managing body. On the contrary, every person who subscribes to a charity of this kind must be taken to know the constitution of the charity, and that the particular object to which he is subscribing is only part of the whole wider object containing many constituent parts, and he must be taken to have devoted his money to the promotion of the general objects of the charity. Now this is, as we know, an incorporated company with a memorandum of association, and the constitution of the company is contained in that memorandum of association. I need not read it all. Perhaps the objects are not described with quite as great prolixity as one finds in a modern company of the ordinary character, but still there is a good deal of it. The objects are described under different heads, and among other things under (e) "To erect, maintain, and alter any buildings upon any land held by or belonging to the Society, for any estate or interest, and to provide the same with all proper and necessary fixtures, furniture, apparatus, appliances, conveniences, and accommoda-

tion." That is just what this appeal was for. It was to provide a building to be fitted up and to be used as headquarters and as a training home. It is one of the objects there generally described. Then under (g) they are "To borrow or raise money at interest on the issue of or upon bonds, debentures, debenture stock, bills of exchange, promissory notes, or other obligations or securities of the Society, or upon mortgage or charge of the property of the Society or otherwise, in such manner as may seem expedient." Now, can it be said that because a gentleman had subscribed to the purchase and fitting up of these headquarters, therefore the society was not at liberty to raise money by charge on that property? To say that it could not is to add a term to his subscription, which seems to me not by any means necessarily implied, and which, of course, was not expressed. But there is more than that. Under (k) there is power "To sell, improve, manage, develop, lease, mortgage, exchange, dispose of, turn to account, or otherwise deal with all or any part of the property and rights for the time being of the Society." Again, can it be said with any propriety that because some part of this money, or even the whole, has been subscribed for the particular purpose of purchasing, acquiring, and fitting up these houses, therefore the society is paralysed and cannot sell? I will pass over the words which follow, "improve, manage," &c. Surely every subscriber must be taken to know that his money was going in the first instance into this particular property, but that it was to be part of the general property of the company which might be sold, mortgaged, or exchanged as desirable. Now, according to the argument on behalf of the Charity Commissioners, if the society were minded to cross to the opposite side of the street or to a different part of London, and they could effect that by exchange, they could not possibly do it without the assent of the Charity Commissioners; that their powers given them by their memorandum of association are paralyzed by the mere fact that a certain number of persons have subscribed money to purchase and fit up this particular property. It seems to me that

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that would be reducing this within limits within which it ought not to be reduced. I hold that the subscriber, whoever he was, not subscribing of course as he might have done upon certain terms, but subscribing under such a promise as this to pay certain money towards the completion of the central homes—in other words, subscribing a certain sum for the acquisition, completion, and fitting up of the new headquarters—must be taken to have done that with the knowledge and with the intention that, though the managing body hoped and intended to use it as headquarters, it was, after all, only property of the company, to be dealt with under their powers, and that he had no right to intervene to say that, so long as they acted within the power conferred on them by their memorandum, they could not dispose of the property because he had devoted his money to a specific trust. If that is the right view of the constitution of the company, the result is that, far from going away from the decision of the Court of Appeal in the case of *Clergy Orphan Corporation, In re*,⁵ I adopt it to the full, only I apply it to an entirely different set of circumstances from what they had there. In my judgment, there is nothing here to prevent the society selling or disposing of their property so long as they sell within the powers of the memorandum of association, and therefore, having that power, they are not amenable to the jurisdiction of the Charity Commissioners, and no restriction ought to be entered on the register.

Solicitors—Mackrell & Ward, for Church Army;
Solicitor to Treasury, for Charity Commissioners.

[Reported by G. Macan, Esq.,
Barrister-at-Law.

[IN THE HOUSE OF LORDS.]

1905.
March 27, 28, 30. { WESTMINSTER COR-
July 24. { PORATION v. LONDON
AND NORTH-WESTERN
RAILWAY.*

Metropolis—Local Authority—Sanitary Conveniences—Statutory Powers—Trespass—Mandatory Injunction—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44.

A public body invested with statutory powers must take care not to exceed or abuse those powers, and must act in good faith within the limits of its authority.

Where a corporation under the Public Health (London) Act, 1891, constructs public conveniences, the mere provision in connection with such a convenience of a subway capable of being used as a thoroughfare under a crowded street is not evidence of bad faith or excess of authority. To establish such a case it would have to be shewn that the corporation constructed the subway as a means of crossing the street under colour of providing public conveniences.

The HOUSE (LORD JAMES OF HEREFORD dissenting) reversed the decision of the COURT OF APPEAL (73 L. J. Ch. 386; [1904] 1 Ch. 759), and restored that of JOYCE, J. (71 L. J. Ch. 34; [1902] 1 Ch. 269).

Appeal from a decision of the Court of Appeal (Vaughan Williams, L.J., Stirling, L.J., and Cozens-Hardy, L.J.), which discharged a judgment of Joyce, J., in an action in which the respondents were plaintiffs and the appellants defendants. The question was whether the appellants had exceeded their statutory powers in the construction of certain lavatories and conveniences for the use of the public at the southern end of Parliament Street.

The facts are sufficiently stated in the judgments of Lord Macnaghten and Lord James of Hereford.

Haldane, K.C. (Hughes, K.C., and D. Pollock with him), for the appellants.

Younger, K.C., and Shearman, K.C. (Eustace Hills with them), for the respon-

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, Lord James of Hereford and Lord Lindley.

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 dents, relied on *Birkenhead Corporation v. London and North-Western Railway* [1885],¹ *Tunbridge Wells Corporation v. Baird* [1896],² and *Sydney Municipal Council v. Young* [1898].³
Haldane, K.C., replied.

The House took time for consideration.

THE LORD CHANCELLOR (EARL OF HALSBURY).—It seems to me that the power of the local authority to erect certain public conveniences cannot be disputed. The shape, site, and extent of them are left to the discretion of the authority in question, and as to the things themselves, which, under this discretion, have been erected, I do not understand that any objection can be made. The objections, so far as they assume the force of legal objections, refer to the access to them, and to the supposed motives of the local authority in the selection of the site.

Assuming the thing done to be within the discretion of the local authority, no Court has power to interfere with the mode in which it has exercised it. When the Legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any Court to contest that discretion. Of course, this assumes that the thing done is the thing which the Legislature has authorised—see *London, Brighton, and South Coast Railway v. Truman* [1885].⁴

It appears to me impossible to contend that these conveniences are not the things authorised by the Legislature. It seems to me that the provision of the statute itself contemplates that such conveniences should be made beneath public roads, and if beneath public roads some access underneath the road level must be provided; and if some access must be provided, it must be a question simply of greater or less convenience, when the street is a wide one, whether an access should be provided at only one or at both sides of the street. That if the access is provided at both sides of the street it is possible that people who have no desire or necessity to

use the convenience will nevertheless pass through it to avoid the dangers of crossing the carriage-way seems to me to form no objection to the provision itself; and I decline altogether to sit in judgment upon the discretion of the local authorities upon such materials as are before us.

I quite agree that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for the other, but I have endeavoured to shew that the Legislature did contemplate making subterranean works under the roadway, and also access to them. Under these circumstances, I think it is a question of degree; and if there be the express provision, as I think there is, to make a tunnel under the street for the purpose of these conveniences, then I think the question of its extent or cost is a matter with which neither a Court of law nor equity has any concern, since the thing contemplated by the statute has been done, and done in the way which the statute contemplated it might be done. That the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose.

I think the judgment of Mr. Justice Joyce should be restored. With respect to the costs of this litigation, I cannot look over the fact that the local authority made a blunder and interfered with the footway. That has now been put right, but in the first instance it led to the litigation. Then I think the negotiation and correspondence was not as candid as it should have been, and I think therefore that neither side in this controversy should have any costs.

LORD MACNAGHTEN.—At the southern or lower end of Parliament Street, just before you come to Bridge Street, where in consequence of recent improvements there is a distance of about a hundred feet between the opposite buildings, the appellants, as the sanitary authority of the City of Westminster, have constructed public lavatories and other conveniences for the use of persons of both sexes. These conveniences are placed under the ground in the middle of the street, as far removed

(1) 55 L. J. Q.B. 48; 15 Q.B. D. 572.

(2) 65 L. J. Q.B. 461; [1896] A.C. 434.

(3) 67 L. J. P.C. 40; [1898] A.C. 457.

(4) 55 L. J. Ch. 354; 11 App. Cas. 45.

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as possible from the buildings on either side. The plan of the construction is this: On each side of the roadway there is an entrance, five feet nine inches wide, protected by railings and leading by a staircase of the same width to a passage or subway ten feet wide and eight feet high, which runs the whole way across on a level with the underground conveniences. Out of this subway there are openings—two for men and one for women—into spacious chambers, where the usual accommodation (politely described as lavatories and cloak-rooms) is provided on a large and liberal scale. All the arrangements seem to have been designed and carried out with due regard to decency, and with every possible consideration for the comfort of wayfarers in need of such accommodation. The London and North-Western Railway Co. are the owners of a large and valuable block of buildings on the east side of Parliament Street, having a frontage to Parliament Street and a frontage to Bridge Street, with vaults under the pavement in Parliament Street, and a claim, for what it is worth, to the soil beneath the roadway up to the mid-line of the street. They took objection to the sanitary works constructed by the corporation and sought to have them removed. They put their case alternatively as a case of trespass or of obstruction to the highway causing special damage. The corporation relied on their statutory powers under the Public Health (London) Act, 1891, which authorises them to construct such public sanitary conveniences, and vests in them for the purpose the subsoil of the road, exclusive of the footway.

When the parties came to trial it was found that owing to some mistake or inadvertence the works of the corporation had encroached on the footway. Mr. Justice Joyce, before whom the case was tried, ordered the corporation to remove the encroachment, but made no order as to costs. On appeal by the plaintiffs, the Court ordered the corporation to "pull down and remove the whole of the staircase, railings, and other works placed by the defendants upon the lands of the plaintiffs other than the conveniences in the pleadings mentioned, and such

further portion of the construction as the Court 'might,' upon application, sanction as a proper approach to the said conveniences." The order was to be suspended pending an appeal to this House, and the corporation were to pay the costs of the action and of the appeal. The corporation have acquiesced in the order of Mr. Justice Joyce. Their only contention now is that the order of the Court of Appeal is wrong.

There can be no question as to the law applicable to the case. It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first. But in the present case I think it will be convenient to take it separately.

Now, looking merely at what has been done—at the work as designed and actually constructed—it seems to me that, apart from the encroachment on the footway, it is impossible to contend that the work is in excess of what was authorised by the Act of 1891. The conveniences themselves, extensive as the accommodation is, have not been condemned by the Court of Appeal, or even attacked in the evidence. Then the entrance from the roadway is only five feet nine inches wide; so is the staircase. It is in evidence that a width of four feet six inches is "necessary" in order to enable two persons to pass on the staircase. The witness who gave that evidence was pressed to say that "under ordinary circumstances four feet six inches to five feet would be a wide entrance for a thing of this sort." "No," he replied, "not ample. You want to give a minimum of five feet, if you can, and more than that. You would give six feet if you had got plenty of space." So the entrance actually provided which has been condemned by the Court of Appeal, and as I think without evidence, is just nine inches wider than the minimum width which the only witness examined on the point says ought to be provided, and three inches narrower than what he thinks should be

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allowed if space permits. It seems rather a strong measure to invoke the powers of the Court in so trifling a matter, especially considering that the excess, if excess there be, cannot make the slightest practical difference to the respondents. Then I come to the subway, which has not been opened to the public as yet. Now, there is not a scrap of evidence tending to shew that there is anything improper or suspicious about the subway. One witness was asked if he had "ever known an approach to a convenience which was 10 feet wide except this." He said he had not, and there the matter dropped. But then no instance could be given—at any rate no instance was given—of a convenience so large placed in the centre of a street so wide, and approached from either side. If it is permissible to construct a convenience approachable from either side of a wide street, you cannot prevent the public from using the subway as a thoroughfare. I should think it most unlikely that it would be largely used, if used at all, by persons not desirous of availing themselves of the convenience, but it is possible; Lord Justice Vaughan Williams thinks it more than possible. He has "no doubt apart from the conveniences the subway at the present moment is a considerable convenience to pedestrians." There seems to be no experience to guide one on the point. And so the corporation were, I think, not to be blamed for making provision in order to obviate crushing and jostling in a place where crowding is (to say the least) not convenient. I have not forgotten that there are two passages in the evidence which one of the learned Lords Justices quoted at length, and on which all the members of the Court appeared to rely. It seems that the chairman of the works admitted that this tunnel (as it has been called), ten feet wide and eight feet high, was "both an approach and a subway." That seems to have been thought a very damaging admission. Of course it was a subway. It was a subway capable of being used as a thoroughfare. It would have been a subway if there had been no thoroughfare. For my part, I do not quite understand all this play upon words. Then there was another passage in the evidence supposed

to be more damaging still, in which a witness said that he did "not see any necessity for 10 feet." It would, he admitted, be "a waste of space and a waste of money." But if you look at the context it is perfectly clear that the learned Lord Justice was under a misapprehension. The witness was not referring to the subway, which was ten feet wide. He was not thinking of the subway. The questions put to him both by the learned counsel and by the Judge were addressed to the entrance and staircase, to which very different considerations apply. It was not suggested that there was any notice, or any intention of putting up a notice, directing the public to this subway as a means of crossing. The entrance, which was of the usual limited dimensions, did not of itself offer any invitation to the public to enter for the purpose of crossing the roadway.

Then I come to the question of want of good faith. That is a very serious charge. It is not enough to shew that the corporation contemplated that the public might use the subway as a means of crossing the street. That was an obvious possibility. It cannot be otherwise if you have an entrance on each side and the communication is not interrupted by a wall or a barrier of some sort. In order to make out a case of bad faith it must be shewn that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place. That was the view of their conduct taken by the Court of Appeal. "In my judgment," says Lord Justice Vaughan Williams, "it is not true that the defendant corporation have taken this land with the object of using it for the purposes authorised by the Legislature." "You are acting *mala fide*," he added, "if you are seeking to acquire land for a purpose not authorised by the Act." So you are; there can be no doubt of that. The other learned Lords Justices seem to take the same view of the conduct of the corporation. Now this, as I said, is a very serious charge. A gross breach of public duty, and all for a mere fad! The learned Judge who tried the case had

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before him the chairman of the works committee. That gentleman declared that his committee considered with very great care for a couple of years or more the question of these conveniences in Parliament Street. He asserted on oath that "the primary object of the committee was to provide these conveniences." Why is this gentleman not to be believed? The learned Judge who saw and heard him believed his statement. The learned Judges of the Court of Appeal have discredited his testimony, mainly, if not entirely, on the ground of two letters about which he was not asked a single question—one written by the surveyor of the parishes of St. Margaret and St. John under the city engineer of Westminster, the other by a person acting for the acting town clerk. The letter of the surveyor was a foolish letter, which the writer seems to have thought clever. The letter of the temporary representative of the acting town clerk, if you compare the two letters, seems to have derived its inspiration from the same source. I cannot conceive why the solemn statement of the chairman of the committee should be discredited on such a ground. I do not think there is anything in the minutes tending to disprove his testimony. I agree with Mr. Justice Joyce that the primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom.

I have felt more difficulty with regard to the question whether the corporation have acted altogether reasonably—"with judgment and discretion"—as Lord Justice Turner puts it in a well-known case. It seems to me that when a public body is exercising statutory powers conferred upon it for the benefit of the public, it is bound to have some regard to the interest of those who may suffer for the good of the community. I do not think it is right—I am sure it is not wise—for such a body to keep its plans secret and carry them into execution without fair and frank communication with those whose interests may possibly be prejudiced or affected. I cannot help thinking that if the engineer of the corporation and the engineer of the railway company had

been put into communication, some modification of plan might have been suggested which would have obviated all this litigation and expense, and all the litigation and expense yet to come if the Court of Appeal is to take upon itself, as it proposes to do, the functions of a sanitary authority and determine the precise dimensions of approaches to such a place as this. The surveyor thought it politic, and not unworthy of his position as an officer of a great public body, to try and throw dust in the eyes of his correspondent. I do not suppose that the officials of the railway company were put off their guard by the answer which he sent. I have no doubt they knew perfectly well what the corporation proposed to do. But still, the mode in which they were met prevented anything like a free interchange of ideas between these two bodies for their mutual advantage.

The result of these considerations to my mind is that if, at the trial, the respondents had suggested any practical mode of altering or amending the plans that would have obviated the inconvenience which the works as executed must cause to them, I should, speaking for myself, have been disposed to think that an injunction ought to have been granted to secure that object. Unfortunately, the respondents chose to stand aloof, and have given no assistance to the Court. Under these circumstances I think there is no alternative but to allow the appeal, and to restore the judgment of Mr. Justice Joyce. But I think there ought to be no costs either here or in the Court of Appeal.

LORD JAMES OF HEREFORD.—In this suit the London and North-Western Railway Co. seek by injunction to restrain the defendants, the present appellants, from maintaining a certain tunnel, staircase, and railings, and other works upon land in Parliament Street, Westminster.

The facts upon which the questions in issue depend may, I think, be summarised as follows. In March, 1898, the then Vestry of St. Margaret's, Westminster, had under consideration the desirability of constructing an underground convenience

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in the neighbourhood of the Houses of Parliament. On March 23 the vestry resolved: "That it be referred to the Works and General Purposes Committee to consider and report upon the question of constructing an underground convenience with accommodation for men and for women in or near Victoria Street." During the month of July, 1898, a proposition for the making of a subway as well as the underground convenience was considered by the vestry, but under the date of January 11, 1899, the following minute appears: "In reference to the proposal for the construction of a convenience and subways at the south end of Parliament Street, and to the representations made on the matter to the First Commissioner of Works by direction of the vestry, of July 27th last, it has now been reported by the surveyor that the department does not intend to take any steps to provide the suggested subways, and has expressed the opinion that the construction of the convenience should not be commenced until after the coming session of Parliament. The committee are proposing to view the locality at an early date, and will report further in due course." On February 8, 1899, the vestry resolved, "That the action of the committee in inquiring from the Office of Works whether the vestry might be permitted to construct the proposed convenience under the Peel Memorial be approved and adopted." On June 1 a minute shews that the site (whereon the works have been carried out) "for a convenience" was determined upon. But the matter seems to have been reconsidered. The surveyor of the vestry furnished particulars of plans and reports for the construction of a subway at the point selected, being the junction of Parliament Street, Great George Street, and Bridge Street. From a perusal of the minute of January 24, 1900, it will be seen that the vestry was treating the subway, if not as an independent scheme, certainly as an important and necessary means of transit for the public, apart from any use of the underground convenience. There can be no doubt but that the vestry, and its successor, the borough council, sought to provide for the public the means

of crossing in safety by the subway instead of being subjected to the dangers arising from crossing at a spot much used for the purposes of vehicular traffic. It is true that persons who desired to use the convenience would approach it by the subway, but equally those who made no use of the convenience would cross through the subway from one side of Parliament Street to the other. The convenience and the subway seem to have been treated as distinct subjects. In the constructing contract of August 28, 1900, it is stated that tenders had been obtained "for the construction of a subway and underground convenience, &c.," and the contractors undertook "to execute all the works, &c., in constructing a subway and convenience, &c." When information had to be given to the railway company of the action of the vestry, Mr. Wheeler, their surveyor, wrote on September 20, 1900, "I am constructing, on behalf of the Westminster Vestry, and in accordance with their directions, a subway from one side of Parliament Street, &c." In this letter no reference is made to the construction of the convenience. Further detail of the proceedings of the vestry and of the borough council may be avoided by accepting the statements made by the acting town clerk of Westminster in a letter dated December 6, 1900, wherein he says: "I was directed to explain that the intention is the construction of a subway to facilitate pedestrians crossing from one side to the other of a thoroughfare of great width and very considerable traffic, an object with which this committee consider your company will be in the fullest accord. . . . Admission to the conveniences, which will be accessible from the subways, could otherwise have been provided from refuges above them." Additional light is thrown upon the nature and object of the works constructed by the oral evidence given at the hearing of the cause before Mr. Justice Joyce. Mr. Weaver, an expert witness called on behalf of the appellants, was questioned in respect of the necessary width of the approach to the convenience and replied as follows: "(Mr. YOUNGER): That under ordinary conditions 4 feet 8 inches to 5 feet would be a wide entrance for a thing of

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this sort if that was the only purpose for which it was used?—No, not ample. You want to give a minimum of 5 feet and more than that. You would give 6 feet if you had got plenty of space. (Q.) It would be quite unnecessary to have it as wide as 10 feet?—Yes, I do not see any necessity for 10 feet." Mr. Smith, who had been chairman of the works committee of the vestry, admitted that the so-called tunnel would be both a subway and an approach.

Now upon these facts it seems to me to be clear that the intention of the local authority was to construct two distinct objects—a convenience with an approach and a subway. It is true that a portion of the subway would be used as the approach to the convenience, but the subway would also be used by those who did not intend to visit the convenience, but only desired to cross free of danger from one side of Parliament Street to the other. It is also clear that in consequence of this double user the subway was made of four feet greater breadth than would have been necessary if only an approach to the convenience had been constructed. Such being a summary of the facts before your Lordships, it is necessary to consider with what legal powers the appellants and their predecessors were invested so as to authorise the construction of the works in question.

Inasmuch as the soil of the respondents has been taken without their sanction for the purposes of the works, the appellants must shew legal authority for such an act, and no assertion of good faith can confer legal powers upon a body which does not possess them. By section 44 of the Public Health (London) Act, 1891, power was conferred upon the sanitary authorities to provide and maintain public conveniences; and in order to carry out the exercise of the power, the subsoil of any road (required for the purpose) was vested in the sanitary authority. This is the only legislative authority under which a justification for the act done is alleged. It will be noted that there is no legislative power given to local authorities to construct subways. Now I agree in the view that has been taken that the powers to construct a convenience under the Act

of 1891 of necessity include a power to construct an approach thereto. And so the question to be solved seems to be thus formulated: Was the so-called tunnel an approach to the convenience only, or was it something more? First, was it a subway distinct from the approach? or secondly, was it a subway in combination with the approach used for two distinct purposes? In my judgment, the construction in question comes within one or other of the two latter alternatives. Possibly within the first, certainly within the second.

If this finding on the facts be correct, the works, so far as they constitute the subway, are constructed without legal authority. The Legislature has not thought it right to confer on local bodies the power to compulsorily take land or impose rates for the purpose of constructing subways. In this case some land has been taken which would not have been required if the approach had not been enlarged into a subway, and an unauthorised burthen has been imposed upon the ratepayers in consequence of this enlargement. Thus it is, in my opinion, that the appellants have acted beyond their powers and without justification. I have only to add that the reasons for their judgment given by the Lords Justices in the Court of Appeal appear to me to be unanswerable, and I therefore think that those judgments ought to be affirmed, and this appeal dismissed.

LORD LINDLEY (whose judgment was read by Lord Macnaghten).—By the Public Health (London) Act, 1891, s. 44, the appellants were authorised to provide and make and maintain public lavatories and sanitary conveniences in situations where they might deem the same to be required, and they were authorised to defray the expense of providing the same, and of any damage occasioned to any person by the erection and construction thereof as if such expense was an expense of sewerage. Further, for the purpose of such provision the subsoil of any road exclusive of the footway adjoining any building was vested in the appellants.

I cannot doubt that under this authority the appellants could lawfully construct

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lavatories and sanitary conveniences in, on, or under any road in their district provided they did not interfere with any footway adjoining any building, or with the soil under any such footway. No particular size or form of convenience or mode of access to an underground convenience is prescribed, and I see no reason why a convenience should not be made under a road with an underground access to it on each side of the road. The size and position of the convenience and of the access are left to the discretion of the appellants, and in the exercise of that discretion the locality, the amount of traffic, and the class of people likely to use the conveniences would naturally have to be considered. The cost is left to the good sense of the appellants, and I am not aware of any authority to shew that the High Court can properly grant an injunction to restrain a public body authorised to make a particular work for some public purpose from exercising its authority on the ground that, in the opinion of the Court, the work being made is larger or handsomer and more costly than it need have been. Still less can a mandatory injunction be properly granted in such a case. Matters of detail, of taste, and of expense in executing works authorised by statute are left to the constructing authority, and their decision on such matters is not open to review in an action for an injunction unless the Court is of opinion that the statutory authority is a mere cloak to screen a really unauthorised work. The case before us is not one of that description. Whether an expense unnecessarily incurred in constructing an authorised work could be disallowed by an auditor or be thrown in some other way on the persons who incurred it, is a matter which we have not to consider on the present occasion, and I say no more about it. But the foregoing observations, favourable as they are to the appellants, do not exhaust this case. Other matters have also to be considered.

Where a person is authorised by statute or by the common law to do what apart from such authority would be unlawful—for example, to commit a trespass—and the authority is conferred for some distinct

and definite purpose, and is abused by being used for some other and different purpose, the person abusing it is treated as a wrongdoer from the first, and not only as a wrongdoer in respect of what can be proved to have been an excess of his authority. It is presumed against him that the abuse of his authority shews an intention from the first to commit an unlawful act under colour of a lawful authority. This general principle was established in the well-known case known as the *Six Carpenters' Case* [1610],⁵ on which there is an instructive comment in 1 *Smith's Leading Cases* (10th ed.), p. 127. Counsel for the respondents urged that this principle was applicable to the present case, and deprived the borough council of any defence which they might have had if they had not exceeded their authority. In one respect the appellants did clearly exceed their authority, for they interfered with the pavement and the land under it, which they had no right to do. This, however, was put right by the injunction granted by Mr. Justice Joyce.

The argument of counsel for the respondents had the charm of novelty, but he cited no authority for applying the principle of the *Six Carpenters' Case*⁵ to such a case as this. I never heard of, and I cannot find, any instance of an injunction being granted to restrain the completion of works authorised by statute simply because the authority authorising them has been exceeded, if the excess is abandoned and satisfaction for the injury caused by it has been made either by payment of money or by restoration in fact. In the absence of any such authority I cannot accede to the argument of the learned counsel. The consequences would be most unjust and contrary to settled principles of equity. Still less would it, in my opinion, be in accordance with the principles on which mandatory injunctions are granted to compel the corporation to undo work done which, apart from the excess, can be shewn to be within their statutory authority.

The respondents naturally rely very strongly on the minutes of the proceedings of the constructing authority, and on

(5) 8 Co. Rep 146a.

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the letters written by their officials, and on the evidence given by Mr. Weaver at the close of his cross-examination. They contended that the sanitary conveniences were constructed in order to make a subway, which without them could not be lawfully made. But I do not think that the minutes and letters are sufficient to prove that the subway as constructed was in fact unauthorised by statute. On this part of the case I do not think it necessary to say more than that I concur with the observations of Lord Macnaghten. Having regard to those minutes and letters, I also am of opinion that the costs should be dealt with as proposed by him. Although the appellants succeed in their appeal, they have only themselves to thank for the litigation which they provoked.

Appeal allowed.

Solicitors—Percy Gates, for appellants;
C. de J. Andrewes, for respondents.

[Reported by J. Eyre Thompson, Esq.,
Barrister-at-Law.

[IN THE HOUSE OF LORDS.]

1905. }
Feb. 23. } CROSFIELD & SONS, LIM., AND
April 3, 6. } OTHERS v. MANCHESTER
July 14. } SHIP CANAL.*

Arbitration — Jurisdiction — Private Acts—Statutory Agreement—Corporation—Traders—Manchester Ship Canal Act, 1885 (48 & 49 Vict. c. clxxxviii.), ss. 88, 202—Manchester Ship Canal Act, 1896 (59 & 60 Vict. c. clxxxii.), s. 43.

Held (affirming the decision of the COURT OF APPEAL, 73 L. J. Ch. 345; [1904] 2 Ch. 123), that the Corporation of Warrington were not, under the Manchester Ship Canal Acts, 1885 and 1896, entitled to bring an action against the Manchester Ship Canal, but were compelled to resort to arbitration as provided by the Acts for the adjustment of differences between the corporation and the canal company.

Held also (reversing the decision of the COURT OF APPEAL), that the traders referred

* *Coram*, The Lord Chancellor (Earl of Halsbury), Lord Macnaghten, and Lord James of Hereford.

to in the Acts were not by the Acts excluded from access to the Courts.

Appeal from a judgment (reported 73 L. J. Ch. 345; [1904] 2 Ch. 123) of the Court of Appeal (Vaughan Williams, L.J., and Stirling, L.J.; Cozens-Hardy, L.J., dissenting), dated March 15, 1904, reversing a judgment of Byrne, J., dated April 7, 1903, in an action wherein the appellants were plaintiffs and the respondents were defendants.

The appellants, Crosfield & Sons, Fairclough & Sons, and Monks Hall & Co., were traders and manufacturers carrying on business at or near Warrington, and were suing on behalf of themselves and all others the traders, manufacturers, and others carrying on business at or near Warrington, and also in their own respective rights. The other appellants were the mayor, aldermen, and burgesses of the borough of Warrington.

The respondent company was incorporated by the Manchester Ship Canal Act, 1885, for the purpose of constructing a canal between Manchester and Liverpool.

The only question argued was whether the appeal was competent, the respondents' contention being that all differences between the plaintiffs and the company were, under the various statutory enactments, to be finally adjusted by arbitration.

The corporation and the traders, apprehending that the construction of the canal would have the effect of lowering the level of the water in the Mersey and causing silting in the portion of the river near Warrington, to the injury of the corporation and the traders and manufacturers of Warrington, petitioned against the bill of the company, and procured the insertion in the bill of certain provisions for their protection. These provisions were agreed between the company on the one hand and the corporation, with the assent of the traders, on the other hand, and were embodied in section 88 of the Act, which provided as follows:

"For the protection of the Corporation of Warrington (in this section referred to as 'the Corporation') and of traders manufacturers and others carrying on business at or near Warrington the

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following provisions unless otherwise agreed on between the Corporation and the Company shall have effect (that is to say):—"

Amongst the provisions were the following:

"14. The Company shall before the canal be opened for traffic at their own cost dredge the bed and banks of the River Mersey and for ever after maintain the same dredged so that at all times there shall be a depth of 8 feet of water at low water of spring tides between the western boundary of the works of Monks Hall & Co at or near Bank Quay and the eastern boundary of the Borough of Warrington near the commencement of the Latchford Canal."

"22. If any difference shall arise between the Company and the Corporation as to the true intent and meaning of this section or as to anything to be done or not to be done thereunder such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the Company or the Corporation by the Board of Trade whose decision shall be final and binding on both parties and the costs of the reference shall be borne as he shall direct."

In Part 10 of the Act, headed "Miscellaneous," was contained the following section:

Section 202: "If any question arise between the Company and any person touching anything to be done or not to be done or any money to be paid under the provisions of this Act then unless by this Act otherwise expressly provided such question shall be determined by arbitration in manner provided by the Railways Clauses Consolidation Act 1845."

The dredging required to be executed by the company under section 88 of the Act of 1885 was commenced and in part executed, but could not be completed upon the opening of the canal, and accordingly, in consideration of the corporation's consenting not to oppose the opening of the canal on January 1, 1894, the company, by an agreement dated December 12, 1893, and made between the company and the corporation, bound themselves to execute and complete at their own cost

the dredging required by section 88, sub-section 14 of the Act, on or before July 1, 1894, and for every day for which the company should be in default in completing the dredging the company undertook to pay to the corporation the sum of 50*l.* per day as and by way of liquidated damages; and save as aforesaid all powers, rights and privileges of the corporation and the manufacturers and traders of Warrington under the Acts relating to the company or otherwise were reserved, and it was also agreed that during the period that should elapse until the completion of the dredging the corporation and certain traders and manufacturers carrying on business at Warrington should have the right to carry goods and materials free of toll along a certain portion of the canal.

Disputes subsequently arose between the corporation and the company with regard to the extent of the dredging to be executed under the provisions of the Act of 1885.

By an agreement made on April 9, 1896, between the corporation and the company, after recitals to the effect already stated, and that disputes and differences had arisen between the corporation and the company in connection with the aforesaid dredging, and that for the purpose of settling such disputes and differences the corporation and the company had agreed to enter into and execute the agreement now being stated, and also reciting that the traders and manufacturers and other persons then or thereafter carrying on business at or near Warrington were entitled to use portions of the canal and river Mersey and the lock and works at Walton on the terms and conditions therein referred to, and that the corporation and the company had agreed to alter those terms and conditions as thereafter mentioned, it was provided, amongst other things, as follows:

Clause 1: "Sub-section 14 of section 88 shall for the purposes of this Agreement be read and have effect as if the same were in the words following (that is to say) (a) The Company shall forthwith at their own cost dredge the bed and banks of the River Mersey (meaning thereby a channel in and along the River

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Mersey having a minimum width of 50 feet at the bottom) and for ever after maintain the same dredged so that at all times there shall be a depth of 8 feet of water at low water of spring tides in the said channel between the western boundary of the works of Monks Hall and Company Limited at or near Bank Quay and Howley Lock. The portion of the old bed of the River Mersey between the westerly end of the river diversion and Walton Lock (which portion of the River Mersey is shown on the plan hereunto annexed and therein coloured blue) is admitted and agreed to be a portion of the River Mersey within the limits aforesaid." (b) and (c) contained other provisions which need not be stated.

Clause 4: "The Company bind themselves effectually to execute and complete at their own cost the several dredging and other works prescribed by this Agreement.

Clause 5: "All penalties (if any) incurred by the Company to the Corporation under or by virtue of the said Agreement of the 12th day of December 1893 are hereby absolutely waived and released.

Clause 6: "If and whenever the Company shall fail to maintain the channel referred to in the first clause of these presents and navigation is thereby obstructed then and in each such case the traders and manufacturers carrying on business at Warrington shall have the right of navigation in respect of vessels passing through the Walton Lock of the portion of the Manchester Ship Canal extending from Eastham to the Walton Lock and of the portion of the River Mersey within the limits described in Clause 1 (a) of this Agreement free of all tolls and dues until the aforesaid channel shall have been made and completed to the reasonable satisfaction of the surveyor for the time being of the Corporation. Provided always that no such trader or manufacturer as aforesaid shall be entitled to the right of navigation referred to in this clause if the Company immediately on the receipt of a written notice from the surveyor for the time being of the Corporation certifying the fact of such obstruction and its position and extent commence to dredge

and continue to dredge the aforesaid channel to the reasonable satisfaction of the surveyor for the time being of the Corporation.

Clause 7: "Notwithstanding anything hereinbefore contained it is hereby declared and agreed that if the Company fail to fulfil any of the provisions of this agreement and shall not within six months after receiving notice in writing from the Corporation comply with such notice and fulfil the provisions of this agreement then upon any such event the rights powers and privileges of the Corporation and of the said traders and manufacturers under the Act of 1885 (except Sub-section 6 of Section 88) shall thereupon revive and have full force and effect notwithstanding this Agreement or the said Agreement of the 12th day of December 1893 and as if such Agreements had never been executed.

Clause 8: "If and whenever the Company shall neglect or fail to maintain the channel referred to in the first clause of these presents and the Corporation shall give to the Company a written notice specifying the obstruction to such channel and its nature and extent then and in any such case and so often as the same shall happen upon the expiration of six calendar months after the time of giving such notice the Corporation may if they think fit remove such obstruction and the Company shall thereupon pay to the Corporation the costs reasonably incurred by them in effecting the removal of such obstruction: Provided always that if and whenever the Corporation elect to avail themselves of the power hereby conferred upon them the operation of Clause 7 of this Agreement shall for the time being and from time to time as often as the Corporation shall avail themselves of such power be suspended and shall not operate or take effect until notice (in addition to the notice required by Clause 7) has been served upon the Company by the Corporation that they have not availed and do not intend to avail themselves of the power hereby conferred upon them.

Clause 9: "Save as hereinbefore expressly mentioned nothing in this Agreement contained shall affect lessen or take away any rights powers and privileges

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enjoyed by or conferred upon the Corporation and the manufacturers and traders of Warrington under or by virtue of any Acts relating to the Company or otherwise and save as aforesaid such rights powers and privileges are hereby reserved accordingly.

Clause 10: "If any difference shall arise between the Company and the Corporation as to the true intent and meaning of this Agreement or as to anything to be done or not to be done thereunder such difference shall be determined by an engineer to be appointed (unless otherwise agreed on) on the application of the Company or the Corporation by the President for the time being of the Institution of Civil Engineers whose decision shall be final and binding on both parties and the cost of the reference shall be borne as he shall direct."

Clause 12: "The Corporation shall have all rights and privileges under and shall be deemed to be traders within the meaning of this Agreement."

The agreement of April 9, 1896, was embodied in the schedule to the Manchester Ship Canal Act, 1896.

The company, it was alleged, made default in making and maintaining the channel of the River Mersey between the points referred to in clause 1 of the agreement of 1896 for the minimum width and depth therein provided, and the navigation of the river had been always since the date of the agreement obstructed.

From time to time the surveyor of the corporation served written notices on the company certifying that the channel was obstructed, but the company did not dredge or continue to dredge the channel to the reasonable satisfaction of the corporation's surveyor.

The traders under these circumstances claimed the right of free navigation conferred upon them by clause 6 of the agreement of 1896, and accordingly navigated their vessels through the portion of the canal mentioned in that clause, and claimed to be entitled to do so free of all tolls and dues. The company, however, alleged that the traders and manufacturers were not entitled to free navigation under that clause, and claimed tolls from

the traders and manufacturers in respect of such navigation, and they were accordingly obliged to pay such tolls, and paid the same to the company under protest.

Moreover, it was stated that in consequence of the failure on the part of the company to make and maintain a proper channel in the River Mersey within the limits referred to in the agreement, barges belonging to the appellants Joseph Crosfield & Sons, Lim., James Fairclough & Sons, Lim., and Monks Hall & Co., Lim., grounded in the channel, and the appellants sustained considerable loss and damage.

The traders and the corporation accordingly brought the action claiming a declaration that the company had failed in its statutory obligation and an injunction to restrain further breaches of the agreement of 1896, and the traders claimed repayment of the tolls under the 6th clause of the agreement of 1896. At the trial before Byrne, J., the company raised the preliminary objection that by the various provisions for arbitration the jurisdiction of the Court had been ousted. Byrne, J., held that the objection had been waived and that it was too late to raise the objection for the first time at the trial. In the Court of Appeal Vaughan Williams, L.J., and Stirling, L.J., held that the jurisdiction had been excluded both in respect of the corporation and of the traders. Cozens-Hardy, L.J., held that the corporation was and the traders were not precluded from enforcing their rights by litigation before the ordinary tribunals.

The arguments are fully stated in the report in the Court below, but as their Lordships proceeded entirely on the construction of the sections of the Acts of Parliament it is unnecessary to repeat them.

Neville, K.C., and Bousfield, K.C. (Hughes, K.C., and F. Thompson with them), for the appellants.

Moulton, K.C., and Cripps, K.C. (Leigh Clare with them), for the respondents.

The House took time for consideration.

THE LORD CHANCELLOR (EARL OF HALSBURY) expressed his concurrence with

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the judgment of Lord Justice Cozens-Hardy.

LORD MACNAGHTEN.—It is no wonder, I think, that the preliminary question as to competency, which was argued fully before your Lordships, led to much difference of opinion in the Courts below. The provisions in the Manchester Ship Canal Acts, 1885 and 1896, as to arbitration are so various and inconsistent that it is impossible to arrive at a conclusion which can be regarded as satisfactory from every point of view.

The question was raised for the first time when the parties went to trial. It does not seem to have been argued very seriously before Mr. Justice Byrne, who tried the case. His opinion was that the provision contained in sub-section 22 of section 88 of the Act of 1885 would have been enough to oust the jurisdiction of the Court if it had not been for the introductory words of the section, which declare that the provisions that follow shall have effect "unless otherwise agreed on between the Corporation and the Company." He thought that the parties might waive a provision which they were authorised to alter by agreement. I think there is a good deal to be said in favour of that view. But I am not satisfied that mere omission to insist on a statutory provision is equivalent to an agreement that the provision shall not have effect. The enactment at the commencement of section 88 seems to require something more than tacit abandonment.

Upon appeal, the decision of Mr. Justice Byrne as to competency was reversed by a majority of the Court. The action so far as it was brought by the corporation was dismissed; so far as it was brought by the traders it was stayed till further order. For some reason which I do not quite understand, Lord Justice Vaughan Williams held that the provision in sub-section 22 of section 88 in the Act of 1885 was not one of the provisions which the corporation and the company were competent to deal with by agreement. He thought that the jurisdiction of the Court as between the corporation and the company was ousted by sub-section 22. Without expressing a decided

opinion as to whether the traders had independent rights which they could enforce, he came to the conclusion that such rights, if they existed, could not be enforced unless and until the default of the company had been established in an arbitration between the company and the corporation. He did not think it necessary to consider section 202 of the Act of 1885, which enacts that if any question should "arise between the Company and any person touching anything to be done or not to be done or any money to be paid," under the provisions of the Act, then, unless by the Act otherwise expressly provided, such question should be "determined by arbitration in manner provided by the Railways Clauses Consolidation Act 1845." Lord Justice Stirling agreed with Lord Justice Vaughan Williams in his view of sub-section 22 and in the general result of his opinion, though he thought the traders were entitled to enforce the provisions in their favour contained in section 88. But he relied mainly, if not entirely, on section 202, which Lord Justice Vaughan Williams left out of consideration. On the other hand, Lord Justice Cozens-Hardy, while agreeing that the jurisdiction of the Court was ousted as between the corporation and the company, held that the traders had statutory rights which they could enforce independently of the corporation, and that they were not compelled to resort to arbitration or to await the result of arbitration between the corporation and the company. His view was that section 202 did not apply to a refund such as that which the traders claimed. It may have been intended, he said, to apply only to cases specified in the earlier parts of the Act, which provide for arbitration without designating the arbitrator or prescribing the mode of arbitration. At any rate, he thought that section 202 was not so expressed as to exclude the jurisdiction of the Court.

On the whole, I am disposed to agree with Lord Justice Cozens-Hardy. I have no doubt that the Manchester Ship Canal Acts do confer upon the traders independent rights which they are entitled to enforce. I do not find in either of those Acts anything which compels the traders

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to resort to arbitration for the purpose of enforcing their rights unless section 202 of the Act of 1885 be held to have that effect, and on this point I agree with Lord Justice Cozens-Hardy. It is an unfortunate result, as Lord Justice Vaughan Williams observes, that cases relating to the same alleged obligations of the company should not be disposed of by one and the same tribunal, but I am by no means sure that the result would be more satisfactory if the questions between the company and the corporation under the Act of 1885 were referred to an arbitrator appointed by the Board of Trade, and those under the statutory agreement confirmed by the Act of 1896 to an arbitrator appointed by the President of the Institution of Civil Engineers, while the very same questions arising between the company and the traders were referred to arbitration in manner provided by the Railways Clauses Consolidation Act, 1845.

It seems to me that the corporation should be struck out as co-plaintiffs with the traders, but that the action should proceed as between the traders and the company, and that the company should pay the traders their costs both here and below, except so far as such costs have been increased by making the corporation co-plaintiffs.

LORD JAMES OF HEREFORD.—In this case the Corporation of Warrington and certain traders are co-plaintiffs and the Manchester Ship Canal Co. are the defendants. The action is brought principally to recover certain tolls paid to the canal company on the ground that certain dredging operations imposed by statute on that company had not been fulfilled.

Upon the hearing of the cause before Mr. Justice Byrne it was submitted that the arbitration provisions contained in the original Ship Canal Act of 1885, and in an agreement affirmed in a subsequent Act, so completely ousted the jurisdiction of the Court that even the assent of the parties could not give power to the Court to hear and determine the matters in dispute, and this preliminary objection has now been dealt with. After considerable

hesitation I have come to the conclusion that the judgment given by Lord Justice Cozens-Hardy is correct and that it ought to be followed. I agree with the view entertained by the Court of Appeal as between the Corporation of Warrington and the Ship Canal Co. The provisions of the Act of 1885 and the agreement of 1896 (confirmed by the Act of that year) being duly considered, the result is that the provisions of sub-section 22 of section 88 of the Act of 1885 amount to an ouster of the jurisdiction of the ordinary Courts, and that the tribunal created by that sub-section alone can determine the matters now in difference between the corporation and the canal company.

But I agree with Lord Justice Cozens-Hardy in holding that the case of the traders individually stands upon a different ground. The traders are not mentioned in the provisions I have referred to. But it is argued that section 202 of the Act of 1885 places them in the same position as the Corporation of Warrington, and that therefore, equally in respect to the traders, the jurisdiction of the Court is ousted. For the reasons given by the Lord Justice I do not accept this view; and although I think that the corporation may for some purposes represent the traders, I cannot agree that, because the corporation must proceed by arbitration, therefore the traders must do so also. Each of these traders may have an independent claim for damages, yet would not be entitled to appear upon an arbitration between the corporation and the canal company.

I therefore think that the traders are entitled to proceed in the action, and that so far the appeal should succeed, and I agree with Lord Macnaghten's view as to costs.

Appeal of the traders allowed.

Appeal of the corporation dismissed.

Solicitors—Burton, Yeates & Hart, agents for Alexander Wilson & Cowie, Liverpool, for appellants; Grundy, Kershaw, Samson & Co., for respondents.

[Reported by J. Eyre Thompson, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.

STIRLING, L.J.

COZENS-HARDY, L.J.

1905.

June 21, 22, 23, 24.

Aug. 5.

W. TASKER &
 SONS, LIM., *In*
re; HOARE *v.*
 W. TASKER &
 SONS, LIM.

Company — Debenture — Security for Loan—Return to Company on Repayment of Loan—Transfer to Fresh Holder—Rights of Holder against other Debenture-holders.

A company issued a series of debentures to rank pari passu as a first charge, the company not to be at liberty to create any mortgage or charge on the security in priority to or pari passu with those debentures. Certain of the debentures having been issued as security for loans were, on repayment of the loans, returned to the company with blank transfers. These debentures were subsequently assigned to fresh holders for value by completing the transfers:—Held, that on payment off of the loans for which they were issued as security the debentures were paid off, and that the holders of these debentures could not rank pari passu with the other debenture-holders.

Decision of KEKEWICH, J. (ante, p. 141; [1905] 1 Ch. 283), affirmed.

Appeal against the decision of Kekewich, J., upon the further consideration of a debenture-holder's action.

In 1899 the defendant company, being in want of money, borrowed temporary loans of 1,000*l.* and 700*l.* from two persons named Ashby and Herbert, and issued to the lenders debentures to twice the amount of their respective loans—that is, 2,000*l.* and 1,400*l.* respectively—and it was stipulated that the company should be at liberty to pay off the advances in sums of not less than 100*l.*, and that on each such payment the lender should give up to the company debentures to the nominal amount of twice the sum paid off. The debentures so issued were registered in the names of Ashby and Herbert. The company availed itself of the right of repayment so reserved, and upon each occasion received back from the lender debentures of twice the value of the

money so paid, and also, by request of the company, a transfer of those debentures executed by the lender in blank except as to his own name.

From time to time the company received new applications for debentures. Whenever such an application was received, the company, on payment of the amount secured by the debentures, handed to the applicants debentures originally issued to Ashby and Herbert which had been returned as above stated, together with the transfers in respect thereof, with the blanks filled in by the company, and the names of the transferees were placed on the register of debentures. In other cases the company deposited such debentures as security with persons who had made advances, but without the transfers. All the holders of these debentures were set out in the Second Schedule, parts 1, 2, 3, and 4, of the Master's certificate, and their claim to rank *pari passu* with the other debenture-holders (who were set out in the First Schedule), was adjourned into Court.

By the articles of association of the company the directors had extensive powers to borrow money not exceeding the nominal amount of the capital, and to secure the repayment of the same by the issue of debentures charged upon the property of the company, and any debentures might be issued to or deposited with any person lending money to the company by way of security, collateral or otherwise.

The material articles were as follows: Article 49: "Every debenture or other security created by the Company may be so framed that the same shall be assignable free from any equities between the Company and the original or any intermediate holders."

Article 112 (k): "The directors shall have power to borrow or raise any sum or sums of money on such security and upon such terms as to interest or otherwise as they may deem fit, and for the purpose of securing the same and interest or for any other purpose, create, issue, make and give respectively any perpetual or redeemable debentures or debenture stock or any mortgage or charge on the undertaking or the whole or any part of the property (present or future) or uncalled capital of

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the Company, and any debentures or debenture stock may be issued to or deposited with any person lending money to the company by way of security collateral or otherwise."

Under these powers the company in 1896 had issued this series of first mortgage debentures. Each debenture contained covenants on the part of the company that the company would, on April 1, 1946, or on such earlier date as the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon, pay to the person named in the debenture, or other registered holder thereof, the sum named therein, and would in the meantime pay interest on such sum at the rate of 5 per cent. per annum by equal half-yearly payments on April 1 and October 1 in each year. The material conditions indorsed on each debenture were—

(1) "This debenture is one of a series of debentures of 20*l.*, 50*l.*, and 100*l.* each, issued or about to be issued by the Company for an aggregate amount of 35,000*l.* and the said debentures are all intended to be in the same form."

(2) "The debentures of this series shall rank *pari passu* as a first charge upon the premises within charged without any preference or priority one over another and shall until the moneys hereby secured shall become payable be a floating charge upon such premises but so that the Company is not to be at liberty to create any mortgage or charge thereon in priority to or *pari passu* with the said debentures."

(3) By this condition the company was empowered (but was not under any obligation) at any time after July 1, 1906, to redeem the debenture upon payment of the principal and interest secured upon giving the registered holder six months' notice of its intention so to do.

(4) "A register of the debentures will be kept at the Company's registered office wherein there will be entered the names addresses and descriptions of the registered holders and particulars of the debentures held by them respectively."

(5) "The registered holder of this debenture will be regarded as exclusively entitled to the benefit thereof and the Company shall not be bound to enter in

the register notice of any trust affecting this debenture or to recognise any right therein."

(6) "Every transfer of this debenture must be in writing under the hand of the registered holder hereof or his legal personal representative."

(9) "The principal moneys and interest hereby secured will be paid without regard to any equities between the Company and the original and any intermediate holder hereof and the receipt of the registered holder for such principal moneys and interest shall be a good discharge to the Company."

Kekewich, J., came to the conclusion that when the repayment was made by the company to Ashby and Herbert the debentures issued as security for the debt were spent, and that when the company borrowed further money, whether by depositing the debentures as collateral securities or by issuing them in the ordinary way, they really issued new debentures. There was no distinction for this purpose between the different classes of persons mentioned in the Second Schedule. Consequently the only persons entitled to rank as holders of the issue of debentures for 35,000*l.* were those mentioned in the First Schedule.

Some of the persons mentioned in the Second Schedule appealed.

Younger, K.C., and *A. F. Peterson*, for the appellants.—The company had power to issue the debentures for double the amount of their loans to Ashby and Herbert by way of collateral security—*Regent's Canal Ironworks Co., In re* [1876].¹

[*STIRLING, L.J.*, referred to *Anglo-Danubian Steam Navigation and Colliery Co., In re* [1875].²]

When and as the loans were paid off it may be inferred from the surrounding circumstances that the company intended to keep the returned debentures alive—*Adams v. Angell* [1877].³ The debentures themselves were not paid off, but only the loan for which they were given as security. The actual moneys secured by the debentures themselves were not then payable.

(1) 45 L. J. Ch. 360, 620; 3 Ch. D. 43.

(2) 44 L. J. Ch. 502; L. R. 20 Eq. 339.

(3) 46 L. J. Ch. 352; 5 Ch. D. 634.

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The only restriction upon the right of a mortgagor to keep a charge alive for his own benefit is that he cannot set it up against his own creditor—*Thorne v. Cann* [1894]⁴ and *Liquidation Estates Purchase Co. v. Willoughby* [1898].⁵

[COZENS-HARDY, L.J., referred to *Watts v. Symes* [1851].⁶]

[STIRLING, L.J., referred to *Johnston v. Webster* [1854],⁷ *Otter v. Vaux* (Lord) [1856],⁸ and *Frazer v. Jones* [1848].⁹]

By subsequently assigning the debentures for value and registering the transfer the company is effectually estopped from denying that the debentures were kept alive. Then, the debentures having being so kept alive and transferred for value, condition 9 comes into operation, and the other debenture-holders have no equity to prevent the bargain being carried into effect—*Palmer's Company Precedents* (8th ed. 1900), vol. iii. ("Debentures"), p. 20. The case of *George Routledge & Sons, Lim., In re; Hummell v. George Routledge & Sons, Lim.* [1904],¹⁰ by which Kekewich, J., was really influenced, is entirely distinguishable, as the debentures there had been assigned to the company and the company had been registered as owner, while in the present case the company never became registered holder or transferee of the debentures.

P. O. Lawrence, K.C., and *Ashton Cross*, for the plaintiff in the action.—These debentures were issued at the date of the advance by Ashby and Herbert, and it makes no difference that they were issued by way of collateral security. When they were once paid off by repayment of the loan they became spent, and there was no power to re-issue them, and a prohibition to do so is contained in conditions 1 and 2. The judgment of Buckley, J., in *George Routledge & Sons, Lim., In re*,¹⁰ shows that these debentures were spent, and as against the other debenture-holders the holders of these

debentures are merely in the position of transferees of debentures which have been paid off. The assignee of debentures of a company is in no better position than the company itself. No authority is wanted for that proposition. If it were desired to establish the contrary, authority should be produced, and there has been none. There is a *dictum* in *Otter v. Vaux* (Lord)⁸ to the effect that a mortgagor can keep alive a security for his own benefit after payment; but the mere fact that a man says that property which has lapsed to himself is not to merge, or that he takes it back in the name of trustees, does not prevent merger in equity. Something more is wanted—*Thorne v. Cann*.⁴

Sheldon, for other debenture-holders in the First Schedule.—A man cannot at the same time be his own debtor and creditor. That is self-evident. It is the ground on which an executor is allowed to retain his own debt. Assigning the debt to a trustee only gets rid of the technical difficulty that a man cannot both sue and be sued in respect of the same debt.

The principal debtor cannot keep alive an incumbrance created by himself as against other incumbrances of his own making. *Mowatt v. Castle Steel and Iron Works Co.* [1886]¹¹ and *Robinson v. Montgomeryshire Brewery Co.* [1896].¹² He can keep it alive as against incumbrances on the property not created by him. *Thorne v. Cann*⁴ was a case of that kind. In the present case the debentures were paid off with the money of the principal debtor, and they cannot be kept alive as against other incumbrances created by the debtor.

Younger, K.C., in reply.—The holders of these debentures had no notice of any irregularity, and in their hands the debentures are a valid charge—*Strand Music Hall Co., In re* [1865].¹³

[He also cited in addition Conveyancing and Law of Property Act, 1881, s. 15, and *Platt v. Mendel* [1884].¹⁴]

Cur. adv. vult.

(4) 64 L. J. Ch. 1; [1895] A.C. 11.

(5) 67 L. J. Ch. 251; [1898] A.C. 321.

(6) 21 L. J. Ch. 713; 1 De G. M. & G. 240.

(7) 24 L. J. Ch. 300, 304; 4 De G. M. & G. 474, 488.

(8) 26 L. J. Ch. 128, 129; 6 De G. M. & G. 638, 643.

(9) 17 L. J. Ch. 353; 5 Hare, 475, 481.

(10) 73 L. J. Ch. 843; [1904] 2 Ch. 474.

(11) 34 Ch. D. 58.

(12) 65 L. J. Ch. 915, 918; [1896] 2 Ch. 841, 849.

(13) 3 De G. J. & S. 147.

(14) 54 L. J. Ch. 1145; 27 Ch. D. 246.

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Aug. 5.—VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of Mr. Justice Kekewich in this case ought to be affirmed. The same point appears to have been already decided by Mr. Justice Buckley in *George Routledge & Sons, Lim., In re*.¹⁰ I have had the opportunity of reading the judgments of Lord Justice Stirling and Lord Justice Cozens-Hardy in the present case, and it is sufficient for me to say that the conclusion at which I have arrived is fortified by the reasoning contained in those judgments.

STIRLING, L.J., read the following judgment: The question on this appeal is whether the holders of certain debentures forming part of an issue by the company of first mortgage debentures to the nominal amount of 35,000*l.* are entitled to the benefit of such debentures as against the holders of the other debentures. [His Lordship referred to the facts, and continued:] It was not disputed that if no repayment had been made to Ashby and Herbert, and the debentures had remained in their hands, they would have been entitled to prove in the action and to receive dividends on the full amount of the debentures in their hands *pari passu* with the other debenture-holders until they received in full the principal and interest due to them. This right was established by the Court of Appeal in *Regent's Canal Ironworks Co., In re*.¹ It was there decided that a company may issue or deposit debentures by way of collateral security for money lent, and that the holders of other debentures of the same issue have no equity to prevent such a bargain from being carried into effect. That case, however, does not govern the present, because there the holders of the debentures were in substance (though not formally) the original holders for value, standing in the position of Ashby and Herbert in the present case, and not in the position of the transferees from them.

It is settled law that a mortgagor who pays off an incumbrance created by himself on real estate cannot set it up against a subsequent incumbrancer—*Otter v. Vaux* (Lord).⁸ Dealing with the

case just cited, Lord Cranworth, L.C., states the rule thus: "The case is therefore to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer paying it and getting a transfer; but that transfer is something which upon general principle he cannot set up as against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off: he pays it off for the benefit of the inheritance; and all persons who are entitled to any portion of the inheritance under him are also entitled to the benefit of his having liquidated a demand prior to their title." Lord Cranworth speaks of a creditor claiming by title subsequent to that of the person whose charge is paid off; but, on principle, I can see no distinction between the position of such a creditor and that of one who ranks *pari passu* with the incumbrances paid off. This being so, it seems to me that, even if the company could keep alive the debentures handed over by Ashby and Herbert when they were paid off, and has effectually done so—points which are of considerable, but perhaps not of insuperable, difficulty—still the company could not set up those debentures against the holders of the other debentures. Further, I think that the transferees who dealt with the company and not with Ashby or Herbert are in no better position.

In the first place, it seems to me that, in the circumstances of this case, the transfers could only confer a legal title by way of assignment, under the provisions of section 25, sub-section 6 of the Judicature Act, 1873; and that title would be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," and consequently subject to the equities of the other debenture-holders. It may be that the holders acquired a title by estoppel against the company; but this estoppel would not bind the other debenture-holders—see *Mowatt v. Castle Steel and Iron Works Co.*¹¹ Again, condition 9, which provides that "the principal moneys and interest hereby secured will be paid without regard to any equities between the company and any intermediate holder," does not appear to meet

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the present case. That clause is indeed sufficient to prevent the company from availing itself of any equity to which it was entitled against an intermediate holder—see *Blakely Ordnance Co., In re; New Zealand Banking Co., ex parte* [1867]¹⁵; but the equity here set up is not that of the company, but of the other debenture-holders, who, in my opinion, could only be excluded from setting up their equity by clear language, as, for example, by words expressly authorising the company to re-issue debentures which had been paid off.

I was at one time impressed with the distinction sought to be drawn in argument between redemption under the conditions of the debentures and payment off by virtue of the stipulation contained in a collateral contract; but the rule stated in *Otter v. Faux (Lord)*⁸ appears to me to be independent of any such considerations. It would apply, for example, when the payment off was the result of a bargain voluntarily entered into between mortgagor and mortgagee before the time for redemption of the mortgage had arrived. For these reasons I feel constrained to come to the conclusion that the appeal fails. I much regret the result, for it is not suggested that there has been any want of good faith in the transactions which have given rise to the question; and the present holders (who, as I understand, were ignorant of the facts) may well be excused if they failed to detect the possible infirmity of the title which they accepted.

COZENS-HARDY, L.J., read the following judgment: In the course of the arguments on this appeal many important and difficult questions have been raised. But in the view which I take it is not necessary for our decision that a positive answer should be given to all of these questions. I propose, therefore, to deal very briefly with several of them. It has been argued that a company which has once issued debentures to the full authorised amount may nevertheless re-issue debentures which have been paid off, although there is no express power reserved so to do. As at present advised,

(15) 37 L. J. Ch. 418; L. R. 3 Ch. 154.

I think a company cannot under such circumstances re-issue. The re-issue is in substance the creation of a fresh charge. The extinguishment of the old charge must enure to the benefit of the persons entitled to *pari passu* charges—*Frazer v. Jones*.⁹ But it suffices in the present case to say that the company did not profess to re-issue, and that the appellants must succeed or fail as transferees of issued debentures. I will only add that in any case in which a company re-issues debentures the claims of the Revenue authorities will demand consideration.

Again, it was argued that a company, by registering a transfer of a debenture, is estopped from denying its existence and validity. But this will not suffice for the appellants, for assuming, without deciding, that they have a good title by estoppel against the company, the respondents, who are registered holders of the admittedly valid debentures, are in no way estopped from disputing the validity of the debentures registered in the names of the appellants. *Mowatt v. Castle Steel and Iron Works Co.*¹¹ is a clear authority against any such contention.

It is necessary, therefore, to consider whether, as against the respondents, the appellants can establish a right to rank as transferees and holders of debentures of the first issue. Now, it has not been, and it cannot be, disputed that the debentures in respect of which the appellants claim were issued to Herbert and Ashby, who were registered as holders, and for this purpose it is not material that they were issued as so-called "collateral security" for loans of lesser amount than the face value of the debentures. The debentures thus issued were redeemed by the company when the loans were paid off. The debentures themselves were handed back to the company together with transfers in blank. From that time Herbert and Ashby had nothing to do with, and had no interest in, the debentures. The appellants did not contract with Herbert or with Ashby. They entered into direct relation with the company, and after a considerable interval paid to the company the face value of the debentures. The blank transfers were filled up, and the appellants were entered

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on the register as holders. It seems to me that the redemption of the debentures by payment off of the loans must involve precisely the same consequences as if the debentures had been redeemed by payment off of the amount due on the debentures themselves. In either case the debentures were spent; nothing was due under or in respect of them. But it is argued that they were kept alive, though in a state of suspended animation, and were capable of transfer at the dates when they were transferred to the appellants. It is well established that, if a limited owner, such as a tenant for life, pays off a charge on the inheritance, there is a presumption that he does not make a present of it to the owners of the inheritance. So long as he lives, he is the person whose duty it is to keep down and whose right it is to receive the interest. But on his death his executors are entitled to a charge on the inheritance, with interest from his death. The charge extends beyond the life estate, and no question of merger or extinguishment arises. Lord Cranworth, in *Morley v. Morley* [1855],¹⁶ states the principle very clearly thus: "The result of the long series of authorities, proceeding upon a very intelligible principle, I take to be this, that when an incumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to show a contrary intention, the presumption is, that he meant to do that which in law and equity he might have done, namely, to keep it alive for his own interest, and that the omission was a mere oversight; in such a case the Court will supply that omission, by giving him or by causing the proper parties to give him, if necessary, an assignment or an instrument which shall put him in the same position as if he had obtained it for himself. The presumption is different where the party paying off the incumbrance is entitled to the inheritance,—where he is absolutely entitled to the fee simple." The presumption in favour of extinguishment where the incumbrance is paid off by the owner of the inheritance does not

arise, or may be rebutted under certain circumstances. In *Thorne v. Cann*⁴ Lord Macnaghten says: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The same principle is again laid down in *Liquidation Estates Purchase Co. v. Willoughby*.⁵ It will be observed that Lord Macnaghten carefully limits the doctrine of keeping alive to an owner who is not personally liable to pay; and, so far as I am aware, there is no authority for extending it to an owner who is simply paying off his own debt. It is not easy to see how it can be to his interest to keep alive his own debt, which he cannot set up against his own subsequent or *pari passu* incumbrancers. Nor is it easy to follow the argument that a debtor who has paid off his debt and thus satisfied his legal obligation can keep it, or the security for it, alive for his own purposes. The language of Lord Cranworth in *Otter v. Vaux* (Lord)⁶ seems to me to indicate that in his view this cannot be done. He says, "The case is therefore to all intents and purposes that of a mortgagor liable to pay a sum of money to his first incumbrancer paying it and getting a transfer; but that transfer is something which upon general principle he cannot set up against a creditor claiming by a title subsequent to that of the person whose charge he has so paid off." This, too, was the view of Mr. Justice Buckley in the recent case of *George Routledge & Sons, In re, Lim.*,¹⁰ though possibly his observations may be regarded only as *dicta*. If, therefore, it were necessary for the decision of the present case, I should be prepared to hold that the company could not keep alive their debt when once paid off.

But assuming, contrary to my present view, that it is possible for an owner in

(16) 25 L. J. Ch. 1, 3; 5 De G. M. & G. 610, 620.

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fee to keep alive his own debt, I think it is clear that his intention must be unequivocally manifested at the time when the debt is paid off, and that the presumption of extinguishment cannot be rebutted by subsequent acts. In the present case there is no expressed intention at the time, and there is nothing which can be referred to as indicating intention at the time, unless it be the taking transfers in blank. But, in my opinion, that is not sufficient. An act of doubtful and equivocal import cannot rebut the legal presumption. Even a cotemporaneous transfer of the charge to a trustee is not conclusive evidence against the presumption. The intention to keep alive must, in the language of Lord Langdale, not be "left as matter of implication and inference," but must be "clearly and unequivocally expressed"—*Hood v. Phillips* [1841].¹⁷ Nor can it be said that the company had any interest in keeping alive the debt and the security, for they could not in any way use it against their own incumbrancers. I think the debentures when redeemed must be considered as dead and gone for all purposes, and as incapable of transfer. They were no longer part of the series, they were merely pieces of paper; and, that being so, condition 9, upon which so much reliance was placed by counsel for the appellants, has no application. The result is that, the instant the debentures were redeemed by the company, the redemption enured for the benefit of all persons entitled to the *pari passu* charge. The appellants cannot be in any better position than the company through whom they claim. Their title is subsequent in date to that of the respondents, and, there being no question of legal estate, priority of date is the governing element.

For these reasons I think the judgment of Mr. Justice Kekewich was correct, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors—Mackrell, Maton, Godlee & Quincey, agents for P. E. J. Talbot, Andover; Wood & Wootton; E. Bevir.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

(17) 3 Beav. 513, 519.

SWINFEN EADY, J. { TUNNICLIFFE &
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June 3, 8, 24. { | WEST LEIGH
COLLIERY CO.

Damages—Damage to Mill Caused by Subsidence Due to Past Mining Operations — Discontinuance of Operations—Principle of Estimating Damage—Future Apprehended Injury.

In assessing the damages for injury caused to premises by subsidence due to past mining operations, the official referee is not entitled to include an allowance for risk of future injury from apprehended further subsidence, or for present depreciation caused by the risk of future injury.

Cross-motions.

The plaintiffs were the owners of certain lands at West Leigh, in the county of Lancaster, known as the Firs Estate, and of certain cotton mills known as the Firs Mills, and were also occupiers of the mills.

The action was brought to recover damages for injury by subsidence, owing to the removal of minerals.

The defendants by their defence admitted that by their past working of the mines they had caused some injury to the Firs Mills, but pleaded that for some time past they had ceased to work under or near the mills, and that their present or projected workings could not further injure the mills, and on April 21, 1904, they paid 300*l.* into Court in satisfaction of the plaintiffs' claim for damages up to that date.

The plaintiffs declined to accept this sum as sufficient.

Damage occurred after that date.

On August 2, 1904, judgment was taken by consent directing an enquiry as to what damages the plaintiffs were entitled to by reason of the acts of the defendants. The judgment directed the damages caused down to April 21, 1904, to be assessed separately from damages caused between that date and the date of the judgment, but the parties agreed afterwards to waive these being separately distinguished. The judgment also directed a

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further enquiry or further enquiries to be made as to the damages (if any) to which the plaintiffs were entitled by reason of the acts of the defendants subsequent to the date of the judgment.

It was agreed by the parties, upon the hearing of the motions, that the judgment was intended to refer to and include any damage occurring after the date of the judgment from acts of the defendants done previously, and, that such damage, if and when it occurred, was intended to be the subject of further enquiries from time to time, to be made under and in pursuance of the directions contained in the judgment.

On December 20, 1904, an order was made in the action that the enquiry as to the damages directed by the judgment should be referred to an official referee for enquiry and report pursuant to section 13 of the Arbitration Act, 1889.

The official referee made his report on April 5, 1905, and assessed the damages down to the date of the judgment.

With regard to damages claimed in respect of the injury to the engine of the plaintiffs and the loss consequent thereon, he found that the defendants were not liable. As to the cost of the repairs of the premises, he assessed the damages at the sum of 1,300*l.*, including all repairs to the premises, the cottages, engines, and all other repairs of every description. And he assessed the damages for depreciation of the premises and otherwise at the sum of 13,200*l.* It was this last item alone which was now the subject of dispute.

Cross-notice of motion were given by the plaintiffs and the defendants respectively. The motion on behalf of the plaintiffs was that the report of the official referee dated April 5, 1905, might be adopted, and that the defendants might be ordered to pay the plaintiffs 1,300*l.* and 13,200*l.*, making together 14,500*l.*, and certain costs. The motion on behalf of the defendants impeached the finding of the official referee as to the 13,200*l.* on various grounds, and asked to have the report varied or set aside and remitted to the same or some other official referee. The two motions were heard together.

There was no dispute as to the item of 1,300*l.*

Pickford, K.C., A. H. Jessel, and Leslie Scott, for the defendants.—The principle adopted by the official referee of assessing the damages was wrong. He based his report on the anticipation of future damage occurring from future subsidence, and held that the plaintiffs were entitled to the whole of the damages arising from such subsidence as if they were putting their mills upon the market. He ought to have taken into consideration the fact that, as the workings had been discontinued, the subsidence was decreasing and would probably come to a rest at the end of ten years.

No evidence was given by the plaintiffs of their intention to put the property upon the market, and they were not therefore entitled to damages for immediate diminution of its saleable value—*Bathishill v. Reed* [1856].¹

[SWINFEN EADY, J.—You must take the difference between what the property was worth before the depreciation and what it is now worth, and in so doing you must take into consideration the fact that the depreciation may cease as time goes on.]

The estimate of the damages is on the face of it excessive. If the report of the official referee stands, and the property comes to a rest in ten years, the plaintiffs will have the property in its improved state as well as 13,000*l.* for damages.

Further, the official referee took into consideration in assessing the damages the fact that a hypothetical purchaser would be influenced by the probability of the occurrence of future injury. Future apprehended injury cannot be taken into consideration—*Rust v. Victoria Graving Dock Co.* [1887]² and *Pennington v. Brinsop Hall Coal Co.* [1877].³

If future subsidence takes place the plaintiffs have their remedy by action, as the cause of action arises when the subsidence takes place, and not at the time of the workings which cause it—*Darley Main Colliery Co. v. Mitchell* [1886],⁴ overruling *Lamb v. Walker* [1878].⁵

(1) 25 L. J. C.P. 290; 18 C. B. 696.

(2) 36 Ch. D. 113.

(3) 46 L. J. Ch. 773; 5 Ch. D. 769.

(4) 55 L. J. Q.B. 529; 11 App. Cas. 117; affirming s.o., *sub nom. Mitchell v. Darley Main Colliery Co.* [1884], 53 L. J. Q.B. 471; 14 Q.B. D. 125.

(5) 47 L. J. Q.B. 451; 3 Q.B. D. 389.

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Langdon, K.C., O. Leigh Clare, and F. L. Wright, for the plaintiffs.—The official referee had a view of the premises and saw the damage occasioned to the structure of the mill. The conclusions at which he arrived were that there was a present depreciation in the value of the mill; that that depreciation was enhanced by the fact that it was caused by subsidence; and that an intending purchaser would be influenced by the latter fact and by the prospect that there might be a further subsidence. The question whether there is an intention on the part of the plaintiffs to sell is immaterial. They are entitled to recover not merely what they are obliged to lay out in actual repair, but also the difference in the value of the premises before and after the subsidence—*Bonomi v. Backhouse* [1858].⁶

[SWINFEN EADY, J.—Ought there to be any difference between the case of a mill damaged by subsidence and that of a mill damaged by an explosion—for example, of dynamite?]

Yes, because in the former case there is the risk of further subsidence.

In determining the amount of depreciation all the facts affecting such depreciation must be taken into account, including the apprehension of future depreciation as it would affect the mind of an intending purchaser. *Rust v. Victoria Graving Dock Co.*² does not touch the facts of this case.

Cases as to nuisances do not apply, as a nuisance can be abated at any time.

As regards the *quantum* of damages, the Court will not interfere with the discretion of the official referee unless it is satisfied that he has proceeded on a wrong principle.

Pickford, K.C., replied.

Cur. adv. vult.

June 24.—SWINFEN EADY, J., read the following judgment, in which, after stating the facts as above set out, he continued: The main objection urged against the item of 13,200*l.* by the defendants is that the official referee has proceeded on a wrong principle, and has

included an allowance for risk of future damage, and that, as the defendants will also be liable for any future damage if and when it occurs, they will thus have to pay twice over for the same loss. The defendants also object that the damages are excessive, that the official referee in calculating the amount at 15 per cent. on 88,000*l.* was under a misapprehension as to the evidence given by defendants' witnesses, and that depreciation ought not to have been allowed in respect of the reservoir which had not been injured. It was further contended by the defendants that the official referee was wrong in having regard to the value of the property for the purposes of sale in estimating damage, and that he should have paid regard to the value of the property only as a going concern.

The evidence produced before the official referee shewed that the mills had been very seriously injured by the defendants' mining operations. Not only had the cracks been very numerous, but in one mill the floor of the spinning shed had parted from the wall, in the other mill the joists carrying the floor had been pulled out of the wall, and had to be supported by angle-irons built into the wall; some of the walls were much out of plumb; indeed, both mills had been much shaken and damaged. Even after the expenditure of the amount allowed by the official referee for repairs, the appearance and condition of both mills will be very different from what they were before the subsidence.

I now proceed to consider whether the official referee did in fact take into account, and allow for, the risk of future damage, and whether he was right in so doing.

A consideration of the evidence given on both sides and of the observations made from time to time by the official referee makes it clear that, in arriving at the actual damage already sustained by the plaintiffs—namely, the difference between the saleable value before and the saleable value after the subsidence—there was taken into account the risk of future subsidence as a factor reducing the present value to purchasers. Thus Mr. Rushton, in giving evidence for the

(6) 27 L. J. Q.B. 378; E. B. & E. 622.

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plaintiffs, said the mill had been reduced in value from 15s. 9d. per spindle to about 10s. 6d. per spindle, taking the number of spindles at 112,000, or from about 88,200l. to about 58,800l., and in justifying these figures pointed to the fact that very little further disturbance would make the machinery useless even to sell for removal; that if any further subsidence took place it would pull the mills out of gear, it would fasten all the spindles in the spindle-boxes, and the machines would only be worth scrap price. Then, in cross-examination, he was pressed as to how he could justify a reduction from 15s. 9d. to 10s. 6d. per spindle if the mill continued to be worked and the same profit made as before; and he answered this by saying, it is depreciated in market value, that the plaintiff company have shareholders and debenture-holders, and an intending purchaser of shares or debentures would find out that the mill was cracked, "that it might possibly in a short time go worse, and the result would be that the whole thing would go."

The defendants' witnesses also took the future risk into account. Thus Mr. Turner estimated "the value would be reduced 10 per cent. on 26,000l. to a hypothetical purchaser after the existing damages had been repaired and for future risk." And that the official referee dealt with it on that basis appears from the shorthand notes of the proceedings before him. At the close of Mr. Walker's evidence, the official referee, referring to Mr. Rushton's evidence, said: "I think all Mr. Rushton did was this. He was speaking about a present purchaser, and said that purchaser would have his mind influenced by possible, or the expectation of possible, further damage being done. Mr. Rushton did not take it into account beyond that. It seems to me a matter which I must take into account in some way. I do not mean to say that I must necessarily assume there will be damage. That is not a matter which anybody can tell very accurately or exactly. The only question is whether it is one of those circumstances which would influence the mind of a possible purchaser." And again, further on, the official referee said: "I can

only repeat what I have said before, that it seems to me I must take into consideration that a purchaser of these mills, or a tenant of these mills, might have his mind affected as regards the price that he would pay by the fact of the possibility of further disturbance to these mills. I cannot say more than that. It does not seem to me, even according to the evidence of your (the defendants') witnesses, that that is a matter that can be excluded, because they put it at ten per cent., and that includes the possibility, as I understand, of future further damage." Indeed, the plaintiffs did not seriously contest that the official referee had taken this view, but insisted that he was right in so doing, and that it was a question of fact, which had to be considered in arriving at the amount of depreciation—namely, that every possible purchaser would take into account the risk of future subsidence and that the measure of damages would not be the same if the mill had been injured by some accidental explosion—by dynamite, for instance—as in the case of injury from subsidence, since with the latter there is the risk of its recurrence. Counsel for the plaintiffs urged in terms that if the risk of future subsidence prejudicially affects the actual present selling value of the property in the mind of an intending purchaser, who will give less money for the property on that account than he would otherwise have given, this is present, not future, depreciation, and can be recovered in this action, although if in future a further subsidence occasioning damage should occur the defendants would be liable to pay further compensation.

It was settled by the decision of the House of Lords in *Darley Main Colliery Co. v. Mitchell*⁴ that in the case of a second or further subsidence from colliery working the cause of action does not arise until the further subsidence occurs. Previous to this case there were conflicting decisions, as it had been held that on damage arising from the removal of support the damages were to be assessed once for all, including as well future damage as existing damage. But *Lamb v. Walker*⁵ was definitely overruled by the decision of the House of Lords just referred to.

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The law is that in the case of colliery working, where the mine owner is lawfully working his own minerals, damages cannot be recovered for future apprehended injury, whether there is or is not any existing actual damage. It follows, in my opinion, that the surface owner cannot recover any depreciation or diminution in the present selling value of his property caused by the apprehension of future damage. If he is not entitled to recover any sum for the risk of future damage, why should the amount be recoverable because a purchaser will only give so much less for the property on that account? Present depreciation caused by the risk of future injury is not, in my judgment, recoverable in cases like the present, any more than the future damage itself.

As the official referee has included this in his award, the matter must go back to him for reconsideration. It was contended by the plaintiffs that before the official referee the defendants had accepted the basis of an allowance for risk of future damage as part of the present depreciation, and were not entitled now to raise any objection to it; but this proposition cannot be maintained, if regard is had to the whole course of the argument before the official referee, although certain passages in the proceedings do afford some colour for it. I am satisfied, however, that the defendants are not precluded from raising the objection before me by any acquiescence of their counsel before the official referee. The objection was taken and insisted upon before the official referee that for any future damage the plaintiffs would have their remedy, whereas if allowed for it now, and the damage never occurred, the defendants would be paying for something which they ought not to pay for, and would have no remedy.

For the guidance of the official referee I may also point out, with reference to the 15 per cent. basis which he adopted, that the percentage spoken of by the defendants' witnesses was only on some of the items included in the plaintiffs' estimate, and that the reservoir does not appear to have been damaged at all. The sum of 13,200*l.* is certainly excessive, but

probably the greater part of it represents future damage.

On the other hand, I cannot accede to the contention of the defendants that the official referee ought not to have regard to the selling value of the property, but only to its value as a going concern and with reference to its profit-earning capacity. A mill which has been much cracked and injured, and with walls bulging and out of plumb, although repaired, is manifestly not of the same selling value as before it was injured; the repairs are very far from entirely reinstating it, and the loss to the plaintiffs is the same whether the mill be sold and the loss realised, or whether the mill be retained by the plaintiffs, its value being reduced. Whether the plaintiffs have the reduced price or the reduced value, the liability of the defendants is not affected. The plaintiffs are, in my opinion, entitled to recover the difference in value between the mill before it was injured and the mill after it has been repaired as far as possible, eliminating, however, anything whatever in respect of depreciation in value for future apprehended damage or the risk of future injury from subsidence. As to the costs, the plaintiffs are entitled to the costs so far as they relate to the 1,300*l.* upon which they succeeded before the official referee, and must pay the costs relating to their claim for injury to the engine, upon which they failed, and there must be a set-off.

The rest of the costs I reserve until after the official referee shall have made his further award.

Solicitors—Fowler & Co., agents for Grundy, Lamb & Grundy, Manchester, for defendants; Patersons, Snow, Bloxam & Kinder, agents for Wilson, Wright & Wilsons, Manchester, for plaintiffs.

[Reported by W. Iremey Cook, Esq.,
Barrister-at-Law.]

KEKEWICH, J. }
 1905. } COURTENAY, *In re*;
 Aug. 3. } PEARCE v. FOXWELL.

*Will—Construction—Class to Take—
 Gift to Children at Twenty-one—Period
 for Ascertaining Class—Advancement
 Clause—Power to Advance out of Vested
 Share.*

Where there is a gift to children at twenty-one the general rule is that the class is fixed when the eldest child attains twenty-one, and no child born afterwards can take. But if maintenance or advancement is continued beyond the time when the eldest child attains twenty-one—if, for instance, advancement is directed out of vested shares—all children will be let in.

Iredell v. Iredell (25 Beav. 485) followed.

Originating summons.

By his will dated May 7, 1886, J. D. Courtenay, after giving the income of the trust moneys to his sisters for life, directed his trustees to hold the said trust moneys, after the death of his sisters, "In trust for all the children or any the child of my nephews the said H. J. White and F. White and of my niece Eleanor Foxwell who being sons or a son shall attain the age of 21 years or being daughters or a daughter shall attain that age or marry and if more than one in equal shares Provided always that the said trustees or trustee may after the death of my said sisters raise any part or parts not exceeding one half part of the then expectant presumptive or vested share or fortune of any child under the trusts hereinbefore declared and apply the same for his or her advancement or benefit."

Testator died on August 21, 1894.

The surviving sister of the testator died on June 12, 1904, leaving the plaintiff sole surviving trustee.

The question raised by the summons was whether the residuary estate of the testator was divisible among all the children of the testator's nephews and niece already born or thereafter to be born who being a son or sons attained the age of twenty-one years, or being a daughter or daughters attained that age or married,

or only among such children as were born prior to the death of the survivor of the testator's sisters, and being a son or sons attained or should attain the age of twenty-one years, or being a daughter or daughters had attained or should attain that age or had married or should marry.

The defendants, who were the children of the testator's niece and had attained the age of twenty-one years, contended that the date of distribution was the date of the death of the last tenant for life on June 12, 1904, and that at that date the class must be ascertained to the exclusion of any child born subsequently.

A. F. Peterson, for the plaintiff.—The rule that the class is to be determined and the fund is to be distributable on the first child attaining the age of twenty-one does not apply where there is a power in the will to advance a child who has attained a vested interest—*Iredell v. Iredell* [1858]¹ and *Bateman v. Gray* [1868].² These two cases have never been questioned except for some reflections of Vice-Chancellor Malins in *Gimblett v. Perton* [1871].³

T. L. Wilkinson, for the defendants.—The general rule fixing the class to take on the first child attaining twenty-one applies to the present case. Here the will is not the same as in the two cases cited. There there was both an advancement and a maintenance clause, but here there is no maintenance clause. The rule is stated in *Theobald on Wills* (6th ed.), p. 302. The combination of the two clauses was the basis of the decision in *Iredell v. Iredell*¹ and *Bateman v. Gray*.² Those cases were very exceptional, and ought not to be followed except where the will is exactly the same.

KEKEWICH, J.—This is one of the many cases on the construction of wills which come before the Courts. In the present case the gift is to children who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or marry, in equal shares. Taking that alone, there is no difficulty. The rule is that where there is a gift to children at

(1) 25 Beav. 485.

(2) 37 L. J. Ch. 592; 1. R. 6 Eq. 215.

(3) 40 L. J. Ch. 556; 1. R. 12 Eq. 427.

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twenty-one, the class is fixed on the eldest child attaining twenty-one, and no child born afterwards can take. That has again and again been followed as a rule of convenience, and is settled law. If the will stopped there it is clear that the children born when the eldest child attained twenty-one would take, to the exclusion of those born afterwards. The only reason for excluding that rule in the present case is that the will contains a power to make advancements out of vested shares, and in support of that proposition two cases have been cited. But it is said by counsel for the defendants that in the present case there is no maintenance clause, and therefore those cases are not applicable. When, however, you come to deal with those cases, it is clear that nothing was further from the mind of the Court than to distinguish between advancement and maintenance. The precise point came before Lord Romilly in *Iredell v. Iredell*,¹ and the learned Judge thought that the case was taken out of the general rule by the advancement and maintenance clauses. He said: "The advancement and maintenance clauses would be wholly unmeaning if they applied only to a child who was entitled to dispose of his share of the capital itself. It is clear, therefore, that until after the possibility of children has ceased, the maintenance clause is to have effect, whether a grandchild has attained twenty-one or married or not, and notwithstanding the liability of a 'subsequent addition to the class entitled.' Therefore, unless I strike out the clause for maintenance and advancement, I cannot hold that the class and the number are to be ascertained on the first attaining twenty-one; but the plaintiff is entitled, in the meantime, to the interest of her presumptive share." Now, applying that to the present case, the advancement clause would apply to a child attaining twenty-one. If the general rule applied, the child attaining twenty-one would be entitled to be paid his share, and there would be no reason for advancing out of vested shares. The reason why the advancement clause was put in was that the testator did not intend the class to be fixed on the eldest child attaining twenty-one. It seems to me that the

reasoning of Lord Romilly applies here. The case of *Bateman v. Gray*² is to the same effect, but it is only a decision, and no reasons are given in the judgment. The only other case is *Gimblett v. Purton*,³ where Vice-Chancellor Malins found fault with the latter decision. He said, "Even if there were a clause for advancement similar to that which is found in *Bateman v. Gray*² I should have declined to follow the decision of the Master of the Rolls in that case, as it tends to throw a doubt upon a rule which is as well settled as any rule of interpretation in the Courts." If I were at liberty to do so, I should be inclined to follow the decision of Vice-Chancellor Malins; but it is impossible for me now to do so. The two first-named cases were decided as long ago as 1858 and 1868, and it is too late now to question them. The rule is established, as stated in *Theobald on Wills* (6th ed.), p. 302, that "if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in." I must therefore follow the decision of Lord Romilly. There will be a declaration that the residuary estate is divisible among all the children of the testator's nephews and niece already born or hereafter to be born, who being sons attain the age of twenty-one, or being daughters attain that age or marry.

Solicitors—Taylor, Hoare & Pilcher, agents for Wilson & Sons, Salisbury, for plaintiff; Long & Gardiner, agents for A. Whitehead, Salisbury, for defendants.

[Reported by S. E. Williams, Esq.
Barrister-at-Law.]

SWINFEN EADY, J. }
 1905. } MATHEWS, *In re*;
 July 29. } OATES v. MOONEY.

Practice—Co-plaintiffs—Compromise of Action by One of Co-plaintiffs—Application by Defendants to Strike Out his Name as Co-plaintiff—Discretion of Court.

A co-plaintiff who has compromised an action is not entitled as a matter of course to have his name struck out as a co-plaintiff.

Where two of three defendants in an action applied to have the name of one of three co-plaintiffs struck out on the ground that they had entered into a binding agreement with such co-plaintiff for the compromise of the action so far as she was concerned, the Court refused to make the order.

Adjourned summons.

Sarah Mathews, by her will dated June 27, 1874, bequeathed to her trustees a sum of 1,500*l.* upon trust to invest the same as therein mentioned, and to pay the income arising from such investments to her daughter Julia Isabella Mumford for life, and after her death, as to both principal and income, to hold the same upon trust for the testatrix's grandson J. W. Mumford, her granddaughter Adelaide Victoria Mumford, and her grandson H. R. Mumford, in equal shares. And the testatrix appointed the defendant Andrew Mooney and the plaintiff Mrs. A. E. Oates trustees and executor and executrix of her will.

The testatrix made a codicil to her will dated September 6, 1876, whereby she directed the income of the 1,500*l.* to be paid to the plaintiff Mrs. Oates for life, and from and after her decease she directed that the principal sum should go as directed by her will, and she revoked the appointment of Mrs. Oates as executrix and trustee, and appointed Alfred Holland in her place.

The testatrix died on October 26, 1876, and her will was proved on December 15, 1876, by the defendants Mooney and Holland.

By an indenture dated October 20, 1873, the defendant Lickorish was appointed a trustee of the will and codicil in the place of Holland, who had remained

out of the United Kingdom for many years.

By an indenture dated September 13, 1890, H. R. Mumford sold his interest under the will to the City Assets Co.

On January 8, 1904, in consideration of 350*l.* the City Assets Co. gave to the plaintiff H. J. Simpson a charge on H. R. Mumford's share.

By an indenture dated June 26, 1903, Mrs. Oates mortgaged her life interest in the fund to the City Assets Co. to secure the repayment of the sum of 480*l.* The deed expressly empowered the company "to take any proceedings they may think proper in and about the estate of the hereinafter named testatrix referred to in the schedule hereto for the protection of the estate and if necessary to use the name of the mortgagor for that purpose."

On January 27, 1904, the City Assets Co. executed in favour of the plaintiff Simpson a sub-mortgage in the following terms: "In consideration of 900*l.* advanced by you to the City Assets Co. the said company as beneficial owners charge the premises set out in the schedule to secure the repayment of the said sum of 900*l.* and authorise you to take proceedings and give discharges in their name in reference thereto." The schedule included the mortgage from Mrs. Oates.

J. W. Mumford assigned his interest under the will to the City Assets Co., who gave a charge thereon to the plaintiff Isabel Bateman.

On July 28, 1904, the present action was commenced by the plaintiffs Mrs. Oates, Bateman, and Simpson, against the defendants Mooney, Lickorish, and Bellord, asking for a declaration that the defendants were jointly and severally liable to replace the 1,500*l.* and make good the arrears of income.

The plaintiffs by their statement of claim alleged that the defendants Lickorish and Bellord acted as solicitors for the trustees, that the estate of the testatrix was got in and administered, and that the sum of 1,500*l.* was appropriated to meet the bequest; that this sum was allowed by the defendant Mooney to remain in the hands of the defendants Lickorish and Bellord without being in-

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vested, but that they had from time to time paid to Mrs. Oates moneys represented to be income of the trust fund.

The defendant Lickorish did not appear, but defences were put in by the defendants Mooney and Bellord.

This was a summons taken out by the defendants Mooney and Bellord asking that all proceedings in the action as between the plaintiff Mrs. Oates and the said defendants might be stayed, or in the alternative that the name of the said plaintiff might be struck out of the record upon the ground that she had compromised the matters in dispute in the action and had revoked the authority of the solicitors on the record for the plaintiffs to prosecute the same.

In support of the summons the defendant Bellord filed an affidavit in which he deposed that in March, 1905, he settled the claim of Mrs. Oates with her personally, and that she thereupon undertook to stay any proceedings in the action as far as she was concerned; and that she subsequently informed him that she had written on more than one occasion to the plaintiff's solicitors instructing them to do nothing more in the action, and informing them that she had settled with him.

The plaintiff Mrs. Oates also filed an affidavit in which she deposed that she agreed terms of settlement with the defendant Bellord; that such terms were that she was to be paid by him during her life an annuity of 30*l.*; that this annuity was to be taken by her in settlement of any claim against the defendants Bellord and Mooney; and that immediately on agreeing these terms she wrote to the plaintiffs' solicitors informing them that she had settled the action and requesting them to do nothing further in the action in her name.

The defendant Mrs. Oates had also signed a document settling the action.

Nepean, for the summons.—The applicants are entitled to the order they ask. It is undisputed on the evidence that the action has been compromised as between Mrs. Oates and the applicants. The other plaintiffs only stand in the shoes of the City Assets Co.

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The law is that, if an action is brought or continued without the authority of the plaintiff, he can apply to stay proceedings. Similarly, if an action is brought or continued after a binding compromise, the plaintiff can apply to stay proceedings. In such a case one co-plaintiff may apply, and that right extends to a defendant—*Doe d. Baker v. Roe* [1835]¹ and *Hubbart v. Phillips* [1845].²

[SWINFEN EADY, J.—Those cases seem very far from the present. Mrs. Oates is one of several co-plaintiffs.]

There is no authority that a person by becoming a co-plaintiff renders himself incapable of discontinuing the action so far as he is concerned.

An agreement to compromise an action may be enforced by a summons or motion to stay—*Eden v. Naish* [1878].³ No doubt that was a case of a single plaintiff, but the rule applies in the case of a co-plaintiff.

[SWINFEN EADY, J.—The rule laid down in *Daniell's Chancery Practice* (7th ed.), vol. i. p. 224, is that "An order to strike out a name of a co-plaintiff will not be made as a matter of course, even on the terms of giving security for costs."]

The plaintiffs may make Mrs. Oates a defendant.

W. Baker, for the plaintiffs.—The present application is a novel one, and cannot succeed. The plaintiffs are indivisible, and cannot be severed.

Further, the mortgage by Mrs. Oates to the City Assets Co. gives the company power to use her name, and the charge given to the plaintiff Simpson by the company gives him authority to use the company's name. Mrs. Oates is a necessary party to the action.

The defendants Lickorish and Bellord must make good the 1,500*l.* which came to their hands.

SWINFEN EADY, J.—This is a summons by two out of three defendants asking that all proceedings in the action may be stayed as between one out of three co-plaintiffs and the applicants, or in the alternative that the name of the said

(1) 3 Dowl. 496.

(2) 14 L. J. Ex. 103; 13 M. & W. 702.

(3) 47 L. J. Ch. 325; 7 Ch. D. 781.

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plaintiff may be struck out of the record on the ground that she has compromised the matters in dispute in the action and has revoked the authority of her solicitors to prosecute the action. The solicitors for that plaintiff, who were retained by her jointly with her co-plaintiffs, are still on the record, and counsel appear before me on their instructions and oppose the application on behalf of all the co-plaintiffs. In my opinion, the application is unprecedented and must fail. [His Lordship stated the facts of the case, and continued :] The case of the applicant Bellord is that he, being a solicitor, went to Mrs. Oates behind the back of her solicitor and her mortgagee, promised her an annuity of 30% a year for her life if she would settle the action, and paid her 30% down. That was a very serious transaction, which will have to be closely investigated at the trial.

The plaintiffs oppose the application, and say that, even if Mrs. Oates wishes to stay proceedings, they have a right to use her name under the powers given them by the mortgage deed and sub-mortgage. That is not a point which can properly be decided on a summons, but it ought to be reserved to the hearing. I certainly should not stay proceedings summarily in favour of a solicitor who had obtained such a document as this, but I should leave him to plead the compromise in his defence.

It has been pointed out in several cases that it is not matter of course to allow a co-plaintiff to withdraw and have his name struck out at any time. The general rule is that where co-plaintiffs disagree the name of one is struck out as plaintiff and added as defendant. But it is stated in *Daniel's Chancery Practice* (7th ed.), vol. i. p. 224, that "An order to strike out a name of a co-plaintiff will not be made as a matter of course even on the terms of giving security for costs." In *Att.-Gen. v. Cooper* [1837]⁴ an information was filed at the instance of several relators, and on their application an order of course was obtained for amending the information, and it was amended by striking out the names of all the relators except one. The Six-Clerk, con-

(4) 3 Myl. & Cr. 258.

ceiving such amendment to be irregular, refused to enter it, and a special application was made to the Vice-Chancellor for an order to amend by striking out the names of all the relators but one, upon an undertaking to give security for the defendants' costs to the time of the application. The Vice-Chancellor refused this application, and in 1837 the matter came before the Lord Chancellor. After dealing with a question whether the bill should be taken off the file because of the irregular amendment, he then discussed the question whether there was any ground for the application that the names of some of the relators should be struck out. He said that the relators must shew "that justice will not be done, or that the suit cannot be so conveniently prosecuted unless the alteration is made." He then examined the circumstances and refused the application. Another case to the same effect is *Brown v. Sauer* [1841],⁵ which shews that where there are two co-plaintiffs one cannot sever as of right. There the two co-plaintiffs had duly authorised the institution of the suit; one of them by a written notice to his solicitor withdrew from the suit and forbade him taking any further steps therein. The other co-plaintiff moved for liberty to amend by striking out the name of the co-plaintiff who had revoked his authority as plaintiff, and adding it as defendant. That was objected to. The Master of the Rolls said: "I think I must make the order . . . the plaintiff, who had, in this case, given written instructions to his solicitor, afterwards revokes the authority, and prevents the other plaintiff going on with the suit. The case is within the words of the case of the *Att.-Gen. v. Cooper*,⁴ the suit cannot be prosecuted unless the alteration is made, and therefore 'justice will not be done unless the alteration is made.'" The Master of the Rolls made the order asked for on the terms of security being given for the original defendant's costs.

That is the practice which would be followed in a proper case. But this summons is irregular and fails on the merits. I cannot stay proceedings in this way where, as is the case here, the

(5) 10 L. J. Ch. 210; 3 Beav. 598.

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plaintiff is a necessary party to the action. I dismiss the summons with costs, but the applicant may have leave to amend his defence by pleading the compromise.

Solicitors—Bellord & Coveney, for applicants;
Bowkers, for respondents.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.

FARWELL, J. } CORBETT v. SOUTH-EASTERN
1905. } AND CHATHAM RAILWAY.
May 11. }

Railway—Construction of Private Act—Statutory Bargain for Protection of Private Individual—Subsequent Agreement by Company with Third Party Inconsistent with Statutory Obligation—Impossibility of Performance—Ultra Vires—Specific Performance—Damages.

A private Act of Parliament authorising the construction of a railway contained a clause whereby "for the protection of" an adjoining owner, his heirs and assigns, it was provided, "unless otherwise agreed" between him and the railway company, that the company should (*inter alia*) construct and maintain a station at a particular point on the proposed line. Some years afterwards the company's successors, through oversight and in good faith, entered into an agreement with the proprietor of a building estate traversed by the line in question to remove the station, which had been built in pursuance of the statutory provision above mentioned, to a spot more advantageous for the development of his estate; but subsequently, on discovering their mistake, they refused to carry out this latter agreement. In an action by the proprietor for specific performance or damages,—Held, that the provision in the Act was a private statutory bargain between the company and a private individual who could waive or release performance thereof; that it was not *ultra vires* of the defendants to enter into the later agreement while the earlier was still

effective; and that the defendants were liable in damages for breach of the agreement.

Action for the specific performance by the defendants of an agreement dated October 13, 1900, and made between the plaintiff of the one part and the defendants of the other part; or, alternatively, for 50,000*l.* as damages in lieu of specific performance.

The plaintiff was the owner of a large building estate in Eltham Park, situate near the Well Hall and Welling stations on the South-Eastern Railway, between London, Bexley Heath, and Erith, the line crossing a road called Westmount Road, which ran through almost the centre of the Eltham Park estate.

By the agreement in question, after reciting (*inter alia*) that the plaintiff had requested the defendants to remove their present Well Hall station to a position nearer the Welling station for the convenience and accommodation of the building estate, and that the defendants had consented to do so upon and subject to the terms and provisions thereafter contained, it was mutually covenanted and agreed by and between the parties thereto that the defendants would, as soon as conveniently might be, discontinue the use of their present Well Hall station, and in lieu thereof would erect a new station nearer Welling station and adjoining Westmount Road. The agreement also contained further covenants and stipulations not material to this report. The defendants—the South-Eastern and Chatham Railway Companies' Managing Committee incorporated by the South-Eastern and London, Chatham, and Dover Railway Companies Act, 1889 (62 & 63 Vict. c. clxviii.)—were the successors in title of the Bexley Heath Railway Co., and subsequently to the execution of the above-mentioned agreement it was discovered that the Bexley Heath Railway Act, 1887 (50 & 51 Vict. c. lxxx.), under which the line in question had been constructed, provided as follows—section 19: "For the protection of Sir Henry Page Turner Barron Baronet his heirs and assigns (hereinafter referred to as and included

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in the expression "the owner") the following provisions shall unless otherwise agreed between the Company and the owner have effect (that is to say):—

"(1) No part of the garden or curtilage of Well Hall shall be entered upon taken or used by the Company.

"(2) No spoil banks shall be made by the Company on any land forming part of the estate of the owner.

"(3) The Company shall construct and maintain a station with all proper and sufficient works and accommodation and access to and from the estate of the owner either on the boundary between the said estate and the adjoining estate of the Earl of St. Germans or within 100 yards on either side of such boundary but no part of the goods portion of the station shall be placed upon any part of the estate of the owner.

"(4) The Company shall construct and maintain a station for both passengers and goods with all proper and sufficient works and accommodation and access to and from the estate of the owner at the point of junction of the railway authorised by this Act with Railway No. 1 authorised by the Act of 1883 or as near thereto as the levels and other circumstances will permit.

"(5) No more land forming part of the estate of the owner shall be entered upon taken or used by the Company than absolutely required for the purposes of the railway by this Act authorised and the stations approaches roads and works connected therewith.

"(6) The owner may at any time hereafter make any roads sewers drains and bridges across the railway by this Act authorised in addition to those to be constructed by the Company and such roads sewers drains and bridges shall be made in all respects to the reasonable satisfaction of the surveyor or engineer for the time being of the Company."

The Bexley Heath Railway Co. had duly constructed the railway authorised by the above-mentioned Act, and in performance of the obligation contained in section 19, sub-section 4, above set out, had constructed a station for both passengers and goods as thereby required, which was the Well Hall station in ques-

tion in this action. Upon discovering their oversight, the defendants refused to carry out their agreement with the plaintiff, who thereupon commenced the present action, claiming specific performance or damages as above mentioned.

In their defence the defendants contended that, by reason of the statutory provisions applicable to their undertaking, and in particular of section 19, sub-section 4 of the Bexley Heath Railway Act, 1887, above set out, it was not lawful for them to remove their present Well Hall station to the position specified in the agreement with the plaintiff, and to discontinue the use of their present station, and that consequently the said agreement was *ultra vires* of the defendants, and illegal and absolutely void.

It was not denied by the plaintiff that the defendants had entered into the agreement with the plaintiff in good faith and in ignorance of the provisions of section 19, sub-section 4 of the Act of 1887.

Haldane, K.C., and *Courthope-Munroe*, for the plaintiff.—The Bexley Heath Railway Act, 1887, authorises the making of this railway. On the face of the Act this contract to make and maintain a station was a mere Parliamentary bargain between the company and a private individual, and the company can get a release. Lord Justice Fry's judgment in *Goldemid v. Great Eastern Railway* [1883]¹ contains the neatest statement of the law. This is in effect a private contract between the parties concerned and one in which the public are not interested, and it can be rescinded by the consent of both parties—*Savin v. Hoylake Railway* [1865],² *Roths (Countess) v. Kirkcaldy and Dysart Waterworks Commissioners* [1882],³ per Lord Watson in *Davis & Sons v. Taff Vale Railway* [1895]⁴ and *Hampstead Borough Council v. Midland Railway* [1905]⁵; and the defendants were acting quite within their powers in entering into the later

(1) 53 L. J. Ch. 371; 25 Ch. D. 511. On app.: 54 L. J. Ch. 162; 9 App. Cas. 927.

(2) 35 L. J. Ex. 52; L. R. 1 Ex. 9.

(3) 7 App. Cas. 694.

(4) 64 L. J. Q.B. 488, 492; [1895] A.C. 542, 552.

(5) 73 L. J. K.B. 896; 74 L. J. K.B. 431; [1904] 2 K.B. 802; [1905] 1 K.B. 538.

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agreement with the plaintiff. The only question is whether there should be specific performance or damages; if specific performance is not possible, then the plaintiff is entitled to damages.

Neville, K.C., and *A. Adams*, for the defendants.—The question really is whether the agreement with the plaintiff was *ultra vires* of the defendants. The cases cited do not prove the plaintiff's case, because they are cases where it has been considered whether the parties to statutory provisions in an Act of Parliament can waive them at all or are bound by them for all time. This agreement has been legislatively confirmed and is statutorily binding on both parties—*Caledonian Railway v. Greenock and Wemyss Bay Railway* [1874].⁶ The question of power to waive was considered in *Crosfield v. Manchester Ship Canal Co.* [1904],⁷ which is now before the House of Lords on appeal.⁸ This case comes within Lord Watson's observations in *Davis & Sons v. Taff Vale Railway*,⁴ referring to the interest of the third parties in statutory contracts. Here the public is interested in the maintenance of the station, and it is not now in the power of the contracting parties to release each other. But, even if that is not so, it is *ultra vires* of the defendants so long as they are under this statutory obligation to contract to pull the station down; and the plaintiff, moreover, knew that they were under such obligation. That it was *ultra vires* appears from the various judgments in *Crosfield v. Manchester Ship Canal Co.*,⁷ *Roths (Countess) v. Kirkcaldy and Dysart Waterworks Commissioners*,³ *Ashbury Railway Carriage and Iron Co. v. Riche* [1875],⁹ *Royal British Bank v. Turquand* [1856],¹⁰ *Att.-Gen. v. Great Eastern Railway* [1879],¹¹ and *Wright v. Ingle* [1885].¹² *Haldane, K.C.*, replied.

FARWELL, J.—The plaintiff, having bought a building estate at Eltham, was minded to develop it, and accordingly

entered into a contract with the defendants, the Joint Committee of the South-Eastern and Chatham Railway Companies, that they would move Well Hall station from its present position and build another station in consideration of certain payments to be made by the plaintiff. On the face of it, that was apparently a perfectly possible and proper contract on the part of all parties. Afterwards, when the railway company came to look into the matter, they found that in one of their private Acts there was the section in question in this action—namely, section 19 of the Bexley Heath Railway Company Act of 1887, that being the Act of one of the predecessors in title of the South-Eastern Railway Co., which is now represented by this committee, which is a corporation. The section commences as follows: "For the protection of Sir Henry Page Turner Barron Baronet his heirs and assigns (hereinafter referred to as and included in the expression 'the owner') the following provisions shall unless otherwise agreed between the Company and the owner have effect (that is to say)." I pause there to say that the Act of Parliament has said in terms that it is for the protection of Sir Henry Barron his heirs and assigns, and the provisions are to apply unless otherwise agreed upon between the company and the owner—that is, Sir Henry Barron, his heirs and assigns. Down to that point I should have thought that the case was too plain to admit of argument, that this was a private statutory bargain between Sir Henry Barron and the railway company. Then six sub-sections are appended to the section; the first is: "No part of the garden or curtilage of Well Hall shall be entered upon taken or used by the Company." That is obviously an agreement which simply concerns Sir Henry. The second is: "No spoil banks shall be made by the Company on any land forming part of the estate of the owner." Again that concerns Sir Henry alone. Then the third sub-section relates to the construction and maintenance of a station—"with all proper and sufficient works and accommodation and access to and from the estate of the owner"—at certain

(6) L. R. 2 H.L. (Sc.) 347.

(7) 73 L. J. Ch. 345; [1904] 2 Ch. 123.

(8) See 74 L. J. Ch. 637.

(9) 44 L. J. Ex. 185; L. R. 7 H.L. 653.

(10) 25 L. J. Q.B. 317; 6 E. & B. 327.

(11) 43 L. J. Ch. 428; 11 Ch. D. 449.

(12) 55 L. J. M.C. 17; 16 Q.B. D. 379.

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places—"but no part of the goods portion of the station shall be placed upon any part of the estate of the owner." The latter part of that is obviously for the benefit of Sir Henry Barron alone, whatever the first part may be. I do not stop to comment on that sub-section, because the next one is in similar terms, and is the one in question in this case: "(4) The Company shall construct and maintain a station for both passengers and goods with all proper and sufficient works and accommodation and access to and from the estate of the owner at the point of junction"—and so on—"or as near thereto as the levels and other circumstances will permit." I will pass on to the next two, both of which are obviously for the benefit of the owner only: "(5) No more land forming part of the estate of the owner shall be entered upon taken or used by the Company than absolutely required for the purposes of the railway by this Act authorised and the stations approaches roads and works connected therewith"; and "(6) The owner may at any time hereafter make any roads," &c.

Now it is said that sub-section 4 (and sub-section 3 would follow the same reasoning) is not merely for the benefit of Sir Henry Barron, but is for the benefit somehow or other of the public also. In my opinion, on the construction of the section, that is not so. I have already pointed out that the section commences by saying that it is for the protection of Sir Henry Barron, his heirs and assigns. It gives him a power to agree otherwise. The station is to be built there for the purpose of accommodation and access to and from the estate of the owner, and I can see no ground whatever for the suggestion that it is intended to be for the benefit of the public at large or any portion of the public at large, so that Sir Henry Barron cannot, if he pleases, at his own will and for such consideration as he thinks fit, himself release the company from its liability to maintain it there.

The different sorts of provisions in a Railway Act have been considered in a great many cases, and the matter is put by Lord Watson in *Davis & Sons v. Taff Vale Railway*⁴ with his usual lucidity:

"The provisions of a Railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the Legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the Legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios*, which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because, in such a case, the form of the enactment might be held to indicate that it is to operate as a contract, and not otherwise." I think it is plain from that statement that what one has to find, if one is to say it is for the benefit of third persons, is something to shew who those persons are and words shewing that there is a benefit intended for them. On the construction of this particular case, I have no sort of doubt myself that it is simply for the benefit and protection of Sir Henry Barron, his heirs and assigns, and concerns him and the company only, and that the Legislature have in terms given both the parties power to agree to waive or alter any of those provisions. The second point, if I apprehend it rightly, is this: "Granted," it is said, "that Sir Henry Barron can, if he chooses, agree with the company, and that the company, if they make it worth his while, may be able to persuade him, still, unless and until they have so agreed, they cannot enter into a contract with the plaintiff to alter this station." Now I agree that the plaintiff cannot get specific performance. That is one thing. But to say that it is *ultra vires* is quite another thing, and I confess I do not follow the argument. It is really and merely a question of title. The railway company enter into an agreement to deal with land in a way which

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they can do legally if they can obtain the assent of A B, a person competent so to agree. I fail to see anything *ultra vires* in their agreeing that they will obtain that consent, whether they do so in terms or whether they do so by necessary implication, because they agree to do a thing which can only be done with that consent. There is nothing *ultra vires* that I can see in any such agreement. I think that the observations of Chief Baron Pollock in the case of *Savin v. Hoylake Railway*,² if authority were necessary, would be sufficient authority, but I cannot myself follow the argument which says it is *ultra vires*, because I can see nothing whatever in the nature of the bargain to make it *ultra vires* for a company to agree to do that which, under the statute, they can do if they get the consent of A B. Chief Baron Pollock says, in the case to which I have just referred: "A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest, or morality? Suppose the plaintiff had absolutely released all claim under the act, could he afterwards have recovered?" I believe, in fact, that the section in question was overlooked; but for anything that appears or was known to the plaintiff when the contract was entered into, Sir Henry Barron might have released this right; he might have entered into an agreement that he would not enforce it. There is nothing that I can see to render it any way an illegal contract or a contract *ultra vires* that the company should have agreed to do something which they can do if they obtain his consent. If they cannot obtain his consent, then they have contracted to do it, and they would be liable in damages for not having done it. I am not concerned now with any question of the measure of damages.

I do not myself follow the argument that has been addressed to me as to this agreement being *ultra vires*, because this contract with Sir Henry Barron is contained in an Act of Parliament; in fact, as I understand the decisions of Mr. Justice Bigham and the Court of Appeal in *Hamp-*

stead Borough Council v. Midland Railway,³ this point is really covered by that particular case. The question there arose as to whether a railway company were to be deemed an owner within the meaning of the Act imposing liabilities on owners in respect of streets. They had a piece of land on which they were bound to make and maintain plantations unless otherwise agreed. They had therefore the power to enter into an agreement which would render that land available for their own purposes and not sterilised—to use the word used in the case. If it had been *ultra vires* to enter into any arrangements with regard to the land unless and until they had obtained the agreement, I cannot see how Mr. Justice Bigham and the Court of Appeal could have held the company to be in a position of owners, so that they must be deemed to have done something *ultra vires* in order to expose them to liability. So far as I follow the present argument, it appears to me that the decision in that case is distinctly inconsistent with it. The result is that, in my opinion, the plaintiff is entitled to recover, and I suppose I had better make a declaration, which may be taken further if the defendants like, and then leave the rest of the case open. There will be a declaration that the agreement is binding on the defendant committee, and that they are accordingly liable for damages for breach of it.

Solicitors—King, Adams & Co., for plaintiff;
J. W. Watkin, for defendants.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J. }
 1905. } PESCOT V. WESTMINSTER
 July 26, 27. } CORPORATION.
 Aug. 8. }

Metropolis — Street Widening — Compulsory Powers — Adjudication to Take Whole of House — Part only Required for Improvement — Previous Agreement to Sell Part not Required — Bona Fides — Michael Angelo Taylor's Act, 1817 (57 Geo. 3. c. xxix.), ss. 80 and 96.

There is no rule that the owner of premises has an absolute right to restrain a local authority acting under the powers of Michael Angelo Taylor's Act, 1817, from taking more of his premises than they require for the purpose of widening a road.

Thomas v. Daw (36 L. J. Ch. 201; L. R. 2 Ch. 1), Teuliere v. St. Mary Abbott's Vestry (55 L. J. Ch. 23; 30 Ch. D. 642), and Gordon v. St. Mary Abbott's Vestry (63 L. J. M.C. 193; [1894] 2 Q.B. 742) followed.

*A local authority adjudicated that the possession, occupation, and purchase of the plaintiff's premises were necessary to enable them to carry out the widening of a certain road. The premises had a depth of 64 feet from the road, and of this the defendants proposed to throw a strip 22 feet 6 inches wide into the roadway. Prior to the adjudication the local authority had entered into a contract to sell so much of the premises as they did not require for the purposes of their improvement to an hotel company. The plaintiff was willing to sell to the local authority a strip of 22 feet 6 inches, but objected to their taking the whole of his premises:—Held, that the adjudication was not either *ultra vires* on the ground that the local authority were not proposing to throw the whole of the plaintiff's premises into the road, or *malà fide* by reason of the local authority having entered into a previous contract to sell so much of the premises as they did not require for the purposes of their improvement.*

Trial of action.

Action by the plaintiff to restrain the defendants from proceeding, under a notice, to treat for the acquisition of the

whole of his premises. The facts are fully stated in the judgment of Swinfen Eady, J., and were shortly as follows:

*The plaintiff was the lessee of the basement, ground-floor, and back part of the *entresol* of No. 30 Piccadilly, for a term which would expire on March 25, 1908. The house was six storeys high, and the ground-floor had a depth of 64 feet from the road. The leasehold interest in the house, with the exception of the plaintiff's lease, was vested in the Piccadilly Hotel, Lim.*

The defendants were proposing to widen the roadway of Piccadilly, and for this purpose it was necessary that they should acquire a strip of the plaintiff's premises of about 22 feet 6 inches in width, extending backwards from the Piccadilly front. Acting under the provisions of section 80 of Michael Angelo Taylor's Act, 1817, they adjudicated that the possession, occupation, and purchase of the whole of the house was necessary to enable them to carry out their improvements, and served on the plaintiff a notice to treat dated June 10, 1905.

*The plaintiff was willing to allow the defendants to take a strip 22 feet 6 inches wide for the purpose of widening the road, but he objected to their taking the whole of his premises. He accordingly brought the present action, alleging that the adjudication was *ultra vires* on the ground that the whole of the house was not necessary to enable the defendants to widen the roadway, and that it was not made *bona fide*, having regard to the fact that prior to its date the defendants had entered into an agreement with the P. and R. Syndicate, the predecessors in title of the Piccadilly Hotel, Lim., to sell to them so much of the premises as they did not require for their own purposes.*

Macmorran, K.C., and Chubb, for the plaintiff.—The defendants have given notice to treat for the whole of the plaintiff's premises. They only require about a quarter of the whole for the purpose of widening the roadway; but they desire to acquire the whole in order to enable them to carry out their contract with the hotel company. That is not a legitimate exercise of the powers given

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them by Michael Angelo Taylor's Act, 1817. This is the first occasion in which a local authority have, instead of acquiring the whole of a property, endeavoured to acquire the interests of persons in it. It has been held that the fact that the local authority have entered into a contract to sell such part of the premises as they do not require is evidence of want of *bona fides*. Here the defendants have entered into a contract to sell to the hotel company so much of the property as they do not require, subject to the plaintiff's right of pre-emption under section 96 of the Act. This provision as to pre-emption is no protection to the defendants: it does not render the bargain into which they have entered a legitimate one. The adjudication is therefore bad.

The plaintiff has a good business which he has built up at No. 30 Piccadilly, and it is essential to him that he should retain possession of those premises until the expiration of his lease, which has now about two and three-quarter years to run. He can carry on his business notwithstanding that the strip of land actually required by the defendants for widening the road is cut off. He has always been willing to allow the defendants to take such a strip. The defendants can only take so much of the property as they *bona fide* require for the purposes of their improvements—*Gard v. Commissioners of Sewers of the City of London* [1885].¹ The Act only authorises the defendants to take land. It does not authorise them to acquire interests in it.

Eve, K.C., and *T. T. Methold*, for the defendants.—In each case it is a question of fact whether what is left, after the local authority have taken so much of a house as they require for widening a roadway, is a house or a structure which will have to be reconstructed. If it is the latter, the local authority must take the whole house—*Aldis v. London Corporation* [1899].² *Gibbon v. Paddington Vestry* [1900].³ *Fernley v. Limehouse Board of Works* [1899].⁴ *Fernley v. Limehouse Board*

of Works [1900].⁵ and *Gordon v. St. Mary Abbott's Vestry* [1894].⁶ Here what would be left after taking so much as is necessary for widening the road would not be a house but a tower of four floors, with no means of access to it and no sufficient room to make a staircase to give such access. The decisions in cases have turned on the construction of the words "houses, walls, buildings . . . or any part thereof," in section 80 of the Act. In *Gard v. Commissioners of Sewers of the City of London*¹ Bowen, L.J., raised the question, but did not decide it, whether the words "any part thereof" were not confined to land and did not apply to houses at all. In *Teuliere v. St. Mary Abbott's Vestry* [1885],⁷ where the owners desired to sell only the part required, it was held that the vestry could not take the whole. That, however, was the case of an orphanage and grounds, and it was proved that the loss by severance could easily be made good. If the plaintiff's contention is to be allowed to prevail, the burden thrown upon the defendants will be out of all proportion to the benefit to be derived by them. The plaintiff and defendants are at arm's-length, and the plaintiff might object to the defendants going upon his land for the purpose of strutting up his premises.

Macmorran, K.C., in reply.—Under section 80 of Michael Angelo Taylor's Act, 1817, there must be an adjudication that the premises project into the street and that it is necessary to take them for the purpose of widening the street. The adjudication in the present case is inconsistent with the defendants' agreement with the P. and R. Syndicate. The defendants are really only the agents in this matter of the London County Council for the purpose of carrying out the widening of the street. In making the adjudication the defendants had two objects in view—namely, first, the widening of the street in as cheap a manner as possible; and secondly, in order to effect this, the handing over to the Piccadilly Hotel, Lim., of such part of the premises as were not required for widening the street. The

(1) 54 L. J. Ch. 698; 28 Ch. D. 486.

(2) 68 L. J. Ch. 576; [1899] 2 Ch. 169.

(3) 69 L. J. Ch. 746; [1900] 2 Ch. 794.

(4) 68 L. J. Ch. 344.

(5) 82 L. T. 524; 64 J. P. 328.

(6) 63 L. J. M.C. 193; [1894] 2 Q.B. 742.

(7) 55 L. J. Ch. 23; 30 Ch. D. 642.

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adjudication was therefore not *bona fide*. Further, the defendants do not seek to acquire the back part of the premises for the purposes of street widening.

[He also referred to *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901].⁸]

Cur. adv. vult.

Aug. 8.—SWINFEN EADY, J., read the following judgment: The plaintiff is the lessee, for a term of which about two and a-half years are unexpired, of the basement, ground-floor, and *entresol* of a house No. 30 Piccadilly, where he carries on the business of a tailor and breeches-maker, under the name of Nicholls & Co. He has sub-let part of the basement and ground-floors to Mr. Notaras, a tobacconist, for the residue of the term, with a nominal exception. The defendants claim to take the plaintiff's premises under Michael Angelo Taylor's Act, for the purpose of widening Piccadilly, and duly served a notice to treat dated June 10, 1905.

The plaintiff alleges that the adjudication made by the defendants, that the whole of the house No. 30 would be necessary for the purpose, was wrong and *ultra vires*, and he asks for an injunction to restrain the defendants from proceeding under their notice to treat. The plaintiff alleges that the defendants require only part of the house for street widening—namely, a strip extending backwards from the Piccadilly front for about 22 feet 6 inches—and that he is willing to sell that part, and cannot be required to sell the whole. He also alleges that the adjudication of the defendants that it is necessary to take the whole house was not made *bona fide*, the defendants having previously agreed to re-sell to the P. and R. Syndicate, Lim., now the Piccadilly Hotel, Lim., the portion not actually required for street widening.

On the hearing of the plaintiff's interlocutory motion it was objected that the plaintiff in any case had a right of pre-emption under section 96 of the Act, and this was conceded by the defendants, which explains why the point was not

further raised at the trial. The defendants insisted at the trial that for the purpose of the street widening it was necessary to take the whole house.

The plaintiff's premises at No. 30 Piccadilly consist of the following particulars: First, on the ground-floor two shops, having a total frontage to Piccadilly of 18 feet and a total depth of 64 feet, the width of the back being 25 feet for a depth of about 32 feet; secondly, the basement beneath the whole of the ground-floor; and thirdly, a large room of about 650 feet superficial area at the back of the premises on the *entresol* floor, the nearest side of such room to the street being 26 feet therefrom. The plaintiff has not any interest in the front portion of the *entresol* floor, nor in the first, second, third, and fourth floors of the house fronting Piccadilly, except in respect of a claim to flues and to a cistern of water, which I will mention presently. Fronting Piccadilly there are four floors above the *entresol*, with a separate entrance, part of the same house, although numbered separately, and all the upper floors extend not only over the two shops of the plaintiff, but over this separate entrance adjoining, the total width of the entire building on the Piccadilly front being about 25 feet. At the extreme rear the premises do not rise above the *entresol* floor, which is lighted by two skylights as well as by windows. This back addition extends about 24 feet or 25 feet to the rear of the main building.

The plaintiff contends that it is physically possible to pull down and remove so much of the entire building as lies to the south of a line shewn in red ink on the plans, and which is 22 feet 6 inches back from Piccadilly. This is the new building line of Piccadilly. He contends that so much of the building as is north of that line must be left standing—at all events that portion in which he is interested; that care must be taken in pulling down the front portion, so as to support properly the back portion left standing. The result of doing what the plaintiff contends for would be to leave a portion of the house 25 feet wide by about 18 feet deep resembling a tower of four floors, with the whole front removed and ex-

(8) 70 L. J. Ch. 468; [1901] 2 Ch. 37.

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posed, and no means of access to it, as the staircase is in the front portion to be pulled down, and there is not sufficient room to erect a fresh staircase. Some of the witnesses described this portion as about 18 feet square, but this is a mistake. The width of the building, so far as the plaintiff's interest extends, is only 18 feet on the Piccadilly front; but the entire width of the building, including the separate entrance to the floors and the width of the upper floors, is 25 feet, as plainly appears from the model verified by Mr. Andrew Young. This tower 25 feet by 18 feet would be of no use whatever. Mr. Alexander H. Turner, an experienced house agent now carrying on business in South Audley Street, but formerly of Piccadilly, nearly opposite the premises in dispute, a witness called by the plaintiff, said that he could not even suggest any manner in which the rear portion of the four floors could be utilised, after the front portion had been removed in the manner proposed by the plaintiff.

The conclusions of fact to which I come are that it would be physically possible to pull down the front portion and leave the rear portion standing, but that the cost of so doing would be very excessive—that it could not be done without entering upon every floor of the rear portion remaining standing, and placing struts and ties to uphold it when the front part had been removed, and also entering upon the adjoining land each side and placing raking shores there to afford the rear portion external support, and that the opinion of Mr. Stenning, the architect and surveyor, was well founded that when this had been done the district surveyor would immediately come in and condemn the back portion as a dangerous structure.

It was also put in evidence that the plaintiff has another action pending in this Court against the Piccadilly Hotel, Lim., who, he alleges, have acquired the leasehold interest in the whole house, subject to his own under-lease of a part. That company, he alleges, have acquired and pulled down the buildings surrounding No. 30, and to a small extent have commenced the demolition of No. 30.

He claims that the premises in his lease are heated by means of four fireplaces, all provided with chimney flues passing up through the building (some six storeys in height) above the roof, and that the premises are provided with a water supply by means of a cistern placed immediately under the roof, with pipes passing down through the building to the plaintiff's said premises, providing him with an excellent supply of water at high pressure. The plaintiff in that action claims an injunction to restrain any interference with the upper portion of the premises No. 30 so as to interfere with his chimneys and flues, water tanks, and supply pipes. The position, therefore, is that the rear portion would be useless and probably dangerous to leave standing, but that the plaintiff is seeking to restrain its being pulled down, as thereby damage would be occasioned to the easements and appurtenances of his premises.

There are other difficulties in the plaintiff's way. If the front portion only of his premises is acquired, there must be a considerable time when he will be totally excluded from his premises by reason of the danger involved in pulling down, and when this is completed he will be cut off from access to the public street until the roadway and path can be formed and made into a fit state to throw open to the public. The defendants explained that they have to construct vaults under the path, and to turn arches over them, and the headway above the arches where the men will be working is too low to allow of wooden gangways being placed in position so as to give temporary access to the plaintiff's shop over the heads of the workmen engaged.

The plaintiff based his case upon this—that as the whole ground area proposed to be taken under the notice to treat was not intended to be thrown into the public roadway, the defendants must be restricted to the part actually intended to be so dealt with, as he was willing to convey that part only. In my opinion, the plaintiff has not any absolute right to restrain the defendants from taking more land than is intended to be actually dedicated to the public. The statute contemplates that they may take more:

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section 80 empowers the local authority to lay the sites of houses, walls, and buildings, and also other lands, tenements, and hereditaments acquired by them, "or so much thereof as they . . . shall think proper, into the said streets or public places." Lord Chelmsford pointed out in *Thomas v. Daw* [1866]⁹ that the words "or so much thereof" must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the Commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. Again, section 96 of the Act enables the local authority to re-sell lands purchased by them, after they have first been offered for sale to the persons from whom they were purchased. This also shews that the statute contemplated that they might take more land than the actual strip required for street widening.

In my judgment, the question which I have to determine is whether the defendants have honestly and in good faith adjudged that the whole of the house or building No. 30 projects into, or obstructs, or prevents them from altering, widening, or extending Piccadilly, and that the possession, occupation, and purchase of the whole of the house will be necessary for that purpose. That is the adjudication which the defendants have made, and I have arrived at the conclusion that they have done this in good faith, and that in their view the possession, occupation, and purchase of the whole building will be necessary to enable them to widen Piccadilly as they propose.

The position and dimensions of the building, the structural arrangement of its contents, the considerable portion of its site actually intended to be thrown into the public street, and the subdivision of the house into portions held for different terms, with the claim to chimneys and flues going up the full height of the building, and to a water-cistern at the top with service pipes from it, all point to the wisdom and prudence of the course adopted by the defendants. With this, however, I am not concerned. If, however, it were necessary for me to

form a judgment as to whether the possession, occupation, and purchase of the whole building were necessary to enable the defendants to widen Piccadilly to the extent proposed, I should decide that question in the affirmative.

It was insisted by the plaintiff that, as a matter of law, the defendants could not take compulsorily more than the site intended to be thrown into the street, if, as was the case, he was willing to part with that portion. Such a rule, if it existed, would be productive of the greatest inconvenience where a house is divided into different floors, which, or parts of which, are leased separately, and where some of the lessees might require the whole of their interest to be purchased, while others took the opposite view and claimed to retain everything not intended to be thrown into the street. Moreover, such a rule would enable the owner of a very limited interest in a small part only of a house to require that part to be left, although the removal of the portion necessary to be pulled down might render the whole of the rest of the house perfectly useless. The language of the Act itself does not afford any support for such an argument.

In *Teuliere v. St. Mary Abbott's Vestry*⁷ Mr. Justice Pearson put the case of a vestry taking so much of the buildings that the portion left was a mere wall, or a staircase and one or two kitchens, and said that it would be unreasonable as regards the owners for the vestry not to take the whole, and as regards the vestry to make them pay for all damage by severance. He certainly, therefore, took the view that if only a small portion of the building was left, not actually required for the street, the owner would have no right to restrict the vestry to the portion intended for the street and to make the vestry pay compensation for severance. Again, in *Gordon v. St. Mary Abbott's Vestry*⁶ it was said by the present Master of the Rolls: "If a particular part of a house can be pointed to which the vestry, *bona fide*, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say

(9) 36 L. J. Ch. 201, 204; L. R. 2 Ch. 1, 7.

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that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that 'part thereof' only obstructs, or that 'part thereof' only is necessary to be removed for the purpose of the improvement. Under those circumstances, I am of opinion that the vestry could not stop short of taking the whole."

In the present case it is quite clear that the portion of the building which is necessary to be removed, to lay the site of it into the street, is so indissolubly linked with the whole fabric of the house that it cannot be removed without practically destroying the identity of the house as a house. The identity is altogether gone when nearly two-thirds of the main building is removed and four upper floors are left as a mere shell with no means of access and no space to make one. Under these circumstances the defendants could not stop short of taking the whole.

I may add that when once the conclusion of fact has been arrived at, that it is essential for the defendants to acquire the whole building for the purpose of widening Piccadilly, the adjudication of the defendants to that effect does not become *ultra vires*, nor can *mala fides* be attributed to the defendants because, before the date of the adjudication, an arrangement had been come to with regard to the re-sale of so much of the site of the building as was not required for street widening. So far as the plaintiff's interest is concerned, this is subject to his right of pre-emption; and upon the facts it is clear that the defendants are not putting in force their compulsory powers colourably only as regards street widening in respect of any part of the building. There is no ground for the contention that as regards the rear portion the ostensible purpose of the defendants is not the real one, and that the real pur-

pose is to re-sell the back portion to the hotel company. I am quite satisfied that the real purpose of the defendants, the purpose for which their compulsory powers are being used—honestly and *bona fide*—is to acquire the whole building for the purpose alone of street widening. The result is that the action fails, and must be dismissed with costs.

Solicitors—Mead & Sons, for plaintiff;
W. A. Blaxland, for defendants.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} BADISCHE ANILIN- UND SODA-FABRIK v. HICKSON.
STIRLING, L.J.	
COZENS-HARDY, L.J.	
1905. Aug. 2.	

*Patent—Infringement—Exercise and
Vend—Profit and Advantage—Contract
in England—Delivery Abroad.*

The defendant contracted in England to sell to a purchaser in England goods manufactured abroad according to an invention protected by the plaintiffs' English patent, and pursuant to the contract completed the sale by delivery of the goods to the purchaser's order in Switzerland. The purchaser afterwards imported the goods into England:—Held, that there had been no infringement of the plaintiffs' patent by the defendant.

Saccharin Corporation v. Reitmeyer & Co. (69 L. J. Ch. 761; [1900] 2 Ch. 659) approved and followed.

Appeal by the plaintiffs from so much of a decision of Warrington, J., as refused to grant the plaintiffs relief in respect of the alleged infringement by the defendant of one of their patents.

The patent was in the usual form, conferring upon the patentee the sole privilege and authority to "make, use, exercise, and vend" the invention

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within the United Kingdom of Great Britain and Ireland, and Isle of Man, and that the patentee should have and enjoy "the whole profit and advantage" from time to time accruing by reason of the said invention, and commanding all subjects within the United Kingdom of Great Britain and Ireland, and the Isle of Man, not to either directly or indirectly make use of or put in practice the said invention.

The defendant was a commission agent, residing in England, who entered into a contract with manufacturers in England for the sale of dyes manufactured abroad by means of the invention, it being a stipulation of the contract that the goods should be delivered to the purchasers at Basle in Switzerland. The defendant then purchased the goods from the foreign manufacturers, who delivered them to his order to a forwarding agent at Basle. The defendant then intimated to the English manufacturers that the goods were lying with the forwarding agent at Basle at their disposal, and instructed the forwarding agent accordingly. The English manufacturers afterwards imported the goods into the United Kingdom. The Court considered that the bargain and sale between the defendant and the English manufacturers was completed in England when the goods lying at Basle were thus appropriated to the contract, but that there had been no delivery of the goods in the United Kingdom by the defendant. It was admitted that the goods, if manufactured in this country, would have infringed the plaintiffs' patent.

Warrington, J., considered that the case was covered by the decision of Cozens-Hardy, J., in *Saccharin Corporation v. Reitmeyer & Co.* [1900],¹ and refused to grant any relief to the plaintiffs against the defendant in respect of the alleged infringement.

The plaintiffs appealed.

J. Graham and Colefax, for the appellants.—The case is no doubt very similar to *Saccharin Corporation v. Reitmeyer & Co.*¹; but it does not appear that in that

case there had been any actual sale of the article in England.

[*A. J. Walter*.—From the report of the case in the *Patent Cases Reports* it is clear that there had been.²]

If the facts are undistinguishable, the present appeal is really an appeal from that decision too, which was wrong. The actual sale by the defendant took place in this country, and he "exercised" or "vended" the invention. *Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler* [1897],³ per Lord Herschell. In that case the sale as well as the delivery of the goods took place abroad, and the actual decision therefore is no authority against the appellants.

In any case the defendant made a profit by dealing in the patented article in this country, and not only made a profit himself, but also deprived the patentees of the profit which they would otherwise have presumably made. This is a direct infringement of that part of the letters patent which gives to the patentees "the whole profit and advantage" of the invention. All the words of the letters patent must be looked at and given effect to—*Sykes v. Howarth* [1879]⁴ and *British Motor Syndicate v. John Taylor & Sons* [1900].⁵ It is true that there was no delivery of the goods in this country by the defendant, but he made use of the invention in this country to his own profit and to the plaintiffs' detriment.

A. J. Walter, for the respondent.—The appeal is based on a misconception of the nature of monopoly, which assumes that the infringing article is in the United Kingdom. The monopoly conferred by the letters patent is strictly territorial—*Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler*³—per Lord Halsbury, L.C. The word "vend" involves delivery in this country, and does not cover a contract for sale entered into in this country of goods delivered abroad.

[*VAUGHAN WILLIAMS, L.J.*, referred to the speech of Lord Halsbury, L.C., in

(2) This fact also appears in the *Law Journal* report of the case.

(3) 67 L. J. Ch. 141; [1898] A.C. 200.

(4) 48 L. J. Ch. 769; 12 Ch. D. 826.

(5) 69 L. J. Ch. 377; [1900] 1 Ch. 577.

(1) 69 L. J. Ch. 761; [1900] 2 Ch. 659; 17 Rep. Pat. Cts. 606.

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Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler,³ where he said: "The answer is that there was no illegal act done on the hypothesis which I have adopted. It was perfectly lawful for the defendant to sell in Basle, and it was perfectly lawful for the defendant to deliver in Basle, and if I am right the sale and delivery both took place outside of our jurisdiction."]

The ultimate destination of the goods lay with the purchaser alone; but even if the defendant was aware that they were probably coming to England, that was not his business.

[STIRLING, L.J., referred to *Dunlop Pneumatic Tyre Co. v. Moseley & Sons* [1904].⁶]

Colefax, in reply, referred to *Elmslie v. Boursier* [1869].⁷

VAUGHAN WILLIAMS, L.J.—This is a case in which there has been in one sense a sale within the realm, because there has been a contract for sale and such subsequent appropriation of goods that property has passed, and that contract of sale is a contract which, on the facts, I take it took place in England. Then it is suggested that those facts are sufficient to constitute an infringement of the statutory rights of the patentee.

The whole question is whether there is any infringement of the statutory rights of the patentee unless there has been a sale accompanied by a delivery in England—meaning thereby a delivery by the person who entered into or was a party to the contract of sale, and who is the defendant in the action. In the present case Mr. Hickson is the defendant in the action, and there has been a delivery by Mr. Hickson. That delivery, however, was not within the realm, but was a delivery on the Continent, and that was a delivery made in pursuance of the contract. The question which thus arises in the present case is one which, in my opinion, was not absolutely decided in the case of *Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler*,³ in the House of Lords. I should point

(6) 73 L. J. Ch. 227, 417; [1904] 1 Ch. 164, 612.

(7) 39 L. J. Ch. 328; L. R. 9 Eq. 217.

out with reference to that case that Lord Davey, who delivered the last judgment, says, "Like my noble and learned friend opposite (Lord Herschell), I desire to express no opinion upon the nice question which might have arisen under other circumstances, but which in my opinion does not arise in the circumstances of this case." That is what Lord Davey says; and, looking at the speeches of Lord Halsbury, L.C., and Lord Herschell, they both of them seem to take as a material fact to be considered in the case before them that the sale in the sense of the contract for sale had not been made within the jurisdiction. I need not read again the passage to which I called attention in the course of the argument in Lord Halsbury's speech; but it seems to me that both Lord Halsbury and Lord Herschell expressly refrained from dealing with what might be the result on the question of infringement if the contract had been made, as the contract here was made, in England. I had thought from the report in the *Law Reports* that in the case of *Saccharin Corporation v. Reitmeier & Co.*,¹ before Lord Justice Cozens-Hardy, the contract in that case, too, was made abroad; but counsel has drawn our attention to another report, from which it appears that the contract in that case, as in this case, was made in England, and therefore the decision of Lord Justice Cozens-Hardy in that case really covers the present.

I think it must have occurred very often in past times that there have been agents and merchants in England who have made it their business to sell English patented productions which have been manufactured abroad, and I have no doubt that of recent years the practice has been to evade the intention of the Monopolies Act and the intention of the grant to the patentees by taking care that in form the merchant thus selling the goods is not a party to the delivery in England. Under these circumstances, I do not think that we ought to extend the rule that was arrived at in *Elmslie v. Boursier*⁷ beyond the point to which it has already gone. *Elmslie v. Boursier*⁷ was a case where under the contract the

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goods were delivered in England. The contract was one that was made by an Englishman in France. There have been several attempts to extend the doctrine of that case further, and they have not been successful. It is not for me to offer any opinion as to whether it is desirable, in the interests of English patentees and the promotion of invention in England, that any statutory legislation should be passed for the further protection of the privileges with which the Legislature has already thought it right that the inventors of useful inventions should be rewarded. But if it were right to do such a thing, I have no doubt it would be done, because there have been quite sufficient cases in late years to draw the attention of the Legislature, and everybody else, to this practice; in fact, the practice has now become so prevalent that every one knows the exact steps that a man must take to enable him to get patented articles distributed within the realm, and yet deprive the patentee of the remuneration which he thinks he ought to have.

I ought to have said a word upon one part of the argument which counsel for the appellants addressed to us—namely putting the case upon there having been a sale within the realm at all, but putting it upon the words in the letters patent with regard to the profit and advantage of the invention, and urging that there had been a depriving of the patentee of the profit and advantage that the statute intended him to have. Upon that I will only say that I do not think that any one of the decisions ever came within any practical distance of holding such a proposition to be accurate.

The result is that this appeal is dismissed, with costs.

STIRLING, L.J.—I am of the same opinion. The question is whether in this case the defendant has infringed the plaintiffs' patent. Now, in order that that may be established, I think that it must be made out that the defendant made, used, exercised, or vended the patented invention within the United Kingdom. That is the mode in which the letters patent are expressed, and

that is the mode in which the law is stated by Lord Herschell at the commencement of his speech advising the House of Lords in the case of *Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler*.² What is said here is that the defendant has vended a patented article in this country. What has taken place is this: He entered in this country into a contract with another person in this country for the sale to a purchaser of a certain quantity of the patented article, it being a stipulation of the contract that the article sold should be delivered to the purchaser, not in this country, but at Basle.

He procured the subject-matter of the contract abroad, and had it delivered to his orders in Basle. He then directed the persons in whose custody it was physically in Basle to hold it to the order of the purchaser, and then in England he communicated the fact that it was at the order of the purchaser at Basle to the purchaser in England, and thus he completed the bargain and sale to the purchaser in England of this article, which was all the time outside the realm at Basle. Then the purchaser brought it into England. The purchaser is not before the Court, and we have nothing to do with him; the simple question is whether the defendant in these circumstances has infringed. The question, therefore, is whether a bargain and sale, such as within the realm would by the law of this country pass the property in the article to the purchaser, is a vending of the article within the meaning of the letters patent. I think it is not.

There is very little precise authority on the question; but, as I have pointed out already, it seems to have been the opinion of Lord Herschell in the case to which I have just referred, that in order that a vending in this country should take place it was necessary that both the sale and delivery should be in this country. That was also the decision in the case of *Saatchi Corporation v. Reitmeyer & Co.*¹ by my brother Cozens-Hardy in 1900, and from that decision I am not prepared to depart. I think that the consequences of holding otherwise might be serious in

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this country. Articles which are subject to English patents, but which are made and sold in large quantities abroad, may be the subject of mercantile contracts in this country, the patented article never being brought within this country, but being sold and transferred abroad; and under these circumstances, with regard to such articles, according to English law the property might pass from one merchant to another. I think it would be an extremely serious thing to interfere with contracts of that sort. It is true in the present case the article was intended to be brought within the realm, and probably an infringement was committed when the article was brought within the realm. But I do not see that we can look at that. The intention in other cases might be perfectly harmless, being simply that the property should be dealt with entirely abroad, should remain abroad, and never come within the realm at all.

For these reasons I think that the decision appealed from is quite right, and that the appeal should be dismissed.

COZENS-HARDY, L.J.—This is really an appeal from my own decision in *Saccharin Corporation v. Reitmeyer & Co.*¹ I therefore content myself with saying that the extremely able argument of counsel has not satisfied me that the views which I expressed five years ago are inaccurate:

Appeal dismissed.

Solicitors—J. H. & J. Y. Johnson, for the appellants; Emmet & Co., agents for Rawnsley & Peacock, Bradford, for the respondent.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

BUCKLEY, J. } VICTORIAN DAYLESFORD
1905. } SYNDICATE v. DOTT.
Aug. 5, 7, 8. }

Money-lender—Re-opening Transaction—Harsh and Unconscionable—Misstatement of Fact—Contracting without being Registered—Prohibitory Statute—Illegal Contract—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1, sub-s. 1; s. 2, sub-ss. 1 (a) (b) (c), 2, and 3.

Where by a statute a penalty is imposed—not solely for protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal.

So if a money-lender enters into any agreement or takes any security in contravention of section 2, sub-section 1 (c) of the Money-lenders Act, 1900, without having registered himself as required by section 2, sub-section 1 (a), his contract cannot be enforced, and there is no transaction to re-open under the powers of section 1, sub-section 1.

A misstatement made by a money-lender to a borrower during negotiations is a fact to be borne in mind in determining whether the transaction is harsh and unconscionable.

Action to re-open a money-lending transaction. The defendant, a money-lender not registered as required by the Money-lenders Act, 1900,¹ advanced 500*l.*

(1) Money-lenders Act, 1900:

Section 2, sub-section 1: "A money-lender, as defined by this Act—

"(a) shall register himself as a money-lender in accordance with regulations under this Act, at an office provided for the purpose by the Commissioners of Inland Revenue, under his own or usual trade name, and in no other name, and with the address, or all the addresses if more than one, at which he carries on his business of money-lending; and

"(b) shall carry on the money-lending business in his registered name, and in no other name and under no other description, and at his registered address or addresses, and at no other address; and

"(c) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and

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to the plaintiff syndicate on March 31, 1904, on a bill of exchange for 525*l.*, payable in a month. The bill was drawn on behalf of the syndicate by two of its directors (one of them, Mr. Bonnard, being joined as co-plaintiff), and was accepted by the Victorian Cornish Gold Mines, Lim., a company which had been promoted by the syndicate, and for whose use the money was required. Two thousand fully paid 1*l.* shares in that company were deposited as collateral security, and the defendant received, as further consideration for the loan, 100 fully paid 1*l.* shares in the same company, and also an option to purchase 500 more at 7*s.* 6*d.* per share within a certain number of months.

The bill was renewed from month to month on seven occasions, and on each renewal the defendant received 25*l.* in cash, 100 fully paid 1*l.* shares in the said company, and an option to purchase 500 more at 7*s.* 6*d.* each, at various periods measured by months. The bill was paid in full, and the 2,000 deposited shares returned, on December 23, 1904, and on the following day the plaintiffs issued their writ asking that the transaction might be re-opened and an account taken, and for consequential relief. They also asked that the defendant might be restrained from exercising the options, so far as they remained in force, and from dealing with the shares in his possession, and that the options might be cancelled

repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name; . . ."

Sub-section 2: "If a money-lender fails to register himself as required by this Act, or carries on business otherwise than in his registered name, or in more than one name, or elsewhere than at his registered address, or fails to comply with any other requirement of this section, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding 100*l.*, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding 100*l.*, or to both. . ."

Sub-section 3: "A prosecution under sub-section 1 (a) of this section shall not be instituted except with the consent in England of the Attorney-General or Solicitor-General. . . ."

and the shares re-transferred so far as they might be found excessive and part of a harsh and unconscionable transaction.

The defendant had sold 400 of the 800 shares received by him for 303*l.* 13*s.* 9*d.*, so that the total sum in cash of which an account was asked was 503*l.* 13*s.* 9*d.*, including the eight monthly payments of 25*l.* The market price of the shares at the date of trial was fully 15*s.*, so that the 400 in the defendant's hands were worth 300*l.*, while the selling profit of those under option would be 1,125*l.*

The defendant counterclaimed for specific performance of six several contracts to transfer to him an aggregate number of 3,000 shares. Two of the options he had allowed to lapse, but the remaining six he claimed to exercise after the issue of the writ, but, as he contended, within the respective specified periods. There was, however, a question—not found necessary to determine—whether the term "months" meant lunar or calendar months.

It appeared from the evidence that the terms of the loan and of the renewals, if they had not been actually proposed by Mr. Bonnard and other directors of the syndicate, who negotiated the matter with the defendant, had at least been willingly agreed to by them. It was, however, stated by Bonnard, but denied by the defendant, that the latter had represented the money as having been advanced not by himself, but by a Mr. Richard Webster, who was to receive only the eight sums of 25*l.* as his interest, while the defendant himself was to take the shares and options, which he alleged to be of speculative value, as his remuneration for guaranteeing the loan.

Astbury, K.C., Goss-Browne, K.C., S. G. Lushington, and W. E. Vernon, for the plaintiffs.—The bargain is harsh and unconscionable. The monthly payments amount to 60 per cent. per annum, which was amply sufficient without the bonus shares and options. Moreover, the defendant had a deposit of 2,000 shares as collateral security. A company borrowing is as much entitled to protection as an individual. The effect of non-registra-

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tion is to render all transactions void, but we only rely on it in regard to the counterclaim, which is wholly bad even if the options had not lapsed, as we contend they have—*Cope v. Rowlands* [1836]² and *Fergusson v. Norman* [1838].³ An Act imposing penalties, as this does, for the protection of the public, and not wholly for revenue purposes, is prohibitive where its requirements are not complied with—*Benjamin on Sale* (4th ed.), pp. 518, 523.

[BUCKLEY, J., referred to *Leary v. Bracken* [1893].⁴]

With regard to the claim, we ask that the transaction be re-opened and a fair and proper remuneration allotted to the defendant.

[BUCKLEY, J.—Is there any principle on which the Court can fix a sum?]

The Act gives power to re-open if it considers the transaction harsh and unconscionable, even though it be not one in which equity would have given relief before the Act—*A Debtor, In re; The Debtor, ex parte* [1903].⁵

J. B. Matthews, for the defendant.—The defendant, not being registered, cannot commit an offence against sub-clause (c), for he has no registered name. The options, except those dropped by the defendant, have been duly exercised, and the plaintiffs have failed to carry out their contracts. There is authority for differentiating between a corporation and an individual where it is a question of applying the remedial provisions of a statute—*National Trustees &c. Agency Co. of Australasia v. General Finance &c. Co. of Australasia* [1905].⁶ Moreover, an individual may be more subject to pressure, in respect of bankruptcy or of the preservation of his personal character, and therefore a more fit object for protection. Here, however, there is no evidence of pressure or unfair dealing, for the directors themselves proposed the terms. To say they were “excessive” at once suggests the question “Excessive over what?” The Court must lay down some principle in order that business men

may know how they stand; but the only test that can be suggested is this: Could the plaintiffs have obtained better terms elsewhere? If not, then the renewals were not harsh and unconscionable.

Astbury, K.C., in reply.—We are willing that a generous view should be taken of the defendant's rights, and that he should keep the 60 per cent. No doubt it is a large profit, but he took some risk. The question is as to his retaining the shares and the proceeds of those he has sold. As to laying down a principle, *Lindley, L.J.*, in *Saunders v. Saunders* [1897],⁷ said, “It appears to me wrong in principle for any Court or judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises.”

Cur. adv. vult.

Aug. 8.—BUCKLEY, J., stated the facts, and, after observing that the defendant's interest on 500*l.* for, roughly, nine months amounted to no less a sum than 1,928*l.* 13*s.* 9*d.*, proceeded as follows: The plaintiffs say two things—first, that the defendant being a money-lender not registered under the Money-lenders Act, 1900, the contract is void; and secondly, that, even if that is not so, the terms are harsh and unconscionable.

Upon the first question the relevant provisions of the Act are two—namely, first, that a money-lender, which the defendant is, must register himself under the Act; and secondly, that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. Counsel for the defendant argues that, inasmuch as he has not complied with the first of those provisions he is not amenable to the second of them—that he escapes altogether from the provision of the Act that he shall not enter into any agreement in the course of his business as a money-lender except in his registered name, by failing to comply with the provision of the Act that he shall have a registered name. I am unable to adopt that argument. The argument is rested upon this—that it is said, and truly, that sub-section 3 of

(2) 6 L. J. Ex. 63, 65; 2 M. & W. 149, 158.

(3) 8 L. J. C.P. 3; 5 Bing. N.C. 76.

(4) 63 L. J. Q.B. 96; [1894] 1 Q.B. 114.

(5) 72 L. J. K.B. 382; [1903] 1 K.B. 705.

(6) 74 L. J. P.C. 73; [1905] A.C. 373, 381.

(7) 66 L. J. P. 57, 60; [1897] P. 89, 95.

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section 2 requires that, if a money-lender is prosecuted under clause (a) for not registering himself, you must get the consent of a law officer of the Crown, and that a like consent is not required for a prosecution under clause (c). I do not know, but I can easily understand that the intention of the Act may be this—that it would be a hardship to put upon a person to prosecute him for the non-registration as a money-lender without getting the consent of a law officer of the Crown, when the fact in debate would be the very difficult one whether he is a money-lender or not within the Act; whereas, if that is not the question, but he is prosecuted for the offence of failing to contract in his registered name, that that consent is not required. That may be the meaning; I do not know. But suppose it is so, the defendant's counsel wants to contend that clause (c) relates only to the registered money-lender when he contracts otherwise than in his registered name. I think the contention is not supported by the provisions of the Act. If the unregistered money-lender be prosecuted, whether under clause (a) or clause (c), it would be necessary to aver that he, being a money-lender, has contracted otherwise than in his registered name—in other words, the question of fact would arise whether he is a money-lender or not; and I do not know that it follows at all that you could, without the consent of the law officer, prosecute under clause (c) a person who is not registered as a money-lender. But it is quite unnecessary for me to determine that. That will have to be determined if ever any such prosecution should be instituted. To my mind it does not at all follow as a matter of construction of the Act that clause (c) does not apply to an unregistered money-lender. In my opinion it does. It follows from that that the defendant has committed a breach of that clause of the Act of Parliament which requires him to contract, in the course of his business as a money-lender, in a registered name.

The next question is whether the Act is so expressed as that the contract which is made is prohibited and rendered illegal. Now of course there is no ques-

tion at all about this—that a contract which is prohibited, whether expressly or by implication, by a statute, is illegal and cannot be enforced. I have got to see whether that is so in this case. Here the authorities may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes of the protection of the revenue, and those where a penalty is imposed upon an act not merely for revenue purposes but also for the protection of the public. That distinction will be found commented upon in numerous cases, including those which have been cited of *Cope v. Rowlands*² and *Fergusson v. Norman*.³ Mr. Baron Parke in the former case says the question to determine is whether the Act is “meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it: or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers.” If you arrive at the conclusion that one of its objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. What I desire to point out is that this case is one that is abundantly plain, because there is no question of the protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name, obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently one which is illegal. The short effect of the statute, as it seems to me, is this—that it provides that a money-lender's contract must be in that money-lender's registered name, otherwise a penalty is imposed upon him; the result being that the act done is an act forbidden by statute, and is illegal. There is one other consideration which leads in exactly the same direction, and it is this; not a bad test to apply is to see whether the penalty in the Act is imposed once for all, or whether it is a recurrent penalty imposed

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as often as the act is done. If it be the latter, then it shews that the act is a prohibited act because every time the act is done the penalty is imposed. Now here the penalty is imposed every time the act is done. The Act goes on to provide that on a second or subsequent conviction a man may be imprisoned, with or without hard labour, for a term not exceeding three months. Every time the money-lender contracts otherwise than in his registered name he is subject to a penalty which is set out in the Act.

For these reasons I come to the conclusion that the contract under which the defendant was to receive the sums which he was supposed to receive was an illegal contract on which he cannot sue. The result is that his counterclaim fails, and I dismiss the counterclaim with costs.

In the action the plaintiffs say that they do not wish to rely upon the non-registration of the defendant; that they are desirous that the man should have what is a fair return for his money. I am sorry to say I cannot put myself in that position. I have held that that contract is void. I cannot then set myself to see whether under the Act of Parliament I cannot set it aside, because there is nothing to set aside; and I cannot say how its terms ought to be reduced, because there are no terms to reduce; but in case this matter should go further and the Court of Appeal should want to know what my judgment is upon the facts, so far as they are material on this part of the case, I will add this. There is a dispute of fact between Mr. Bonnard and Mr. Dott as to what passed when the bargain was originally made. Mr. Bonnard says that Mr. Dott represented himself not as being able himself to advance the money, but as knowing Mr. Richard Webster (who, according to the defendant's case, did not exist), who was willing to lend the money on the terms that he should have 60 per cent. (25*l.* a month) and certain fully paid shares, and that Dott said that he himself, as his remuneration, would want calls on 500 Cornish fully paid shares upon the terms that were agreed. Dott says that is not so; that no Mr. Richard Webster was ever mentioned at all. On

that question of fact I think that Bonnard was speaking the truth, and that Dott was not. There are other cases in which Dott professed himself unable to find the money, and one has to conclude whether or not he is likely to have done so in the present case. One consideration which should be borne in mind in determining whether or not this was a harsh and unconscionable transaction is, I think, that the original bargain was obtained by a misstatement as to how these payments which were to be made for the loan were to be claimed as between Dott and the supposed Mr. Richard Webster.

Another matter which should be borne in mind is this—that Dott was certainly getting all the liability of the Cornish company, such as it was; he was getting the liability, such as it was, of Bonnard and Dillon who signed the note, and he was getting the security of 2,000 fully paid shares in the Cornish company. That is a strong element in estimating the risk run by the defendant. On the other hand, it seems to me it is very necessary to bear in mind that, so far as I see, except in the particulars which I have stated, the terms were not, I think, extorted from Bonnard at all. As far as I see, he was willing to pay this for a transaction which no doubt was not one of ordinary money-lending, in which there might be considerable risk. All those are matters which should be borne in mind; and if I had had to estimate as best I could what would have been a fair return for the money, I do not know that I should have arrived at any larger figure than that which the plaintiffs are willing to concede; and in point of fact the plaintiffs say this: "We do not seek to get back the 25*l.* a month—the 60 per cent. on the 500*l.*; let the defendant keep that." I can put this into the order: "That the plaintiffs voluntarily offering to allow the defendant to retain the 60 per cent.; order the defendant to repay the other sums, and to re-transfer the shares." I believe all the figures are agreed between the parties, and it seems to me that there will be an order for the repayment of 303*l.* 13*s.* 9*d.*; there will be an order to re-transfer 400 fully paid shares in the Cornish company, and the dismissal of the

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counterclaim. As regards the costs, the defendant must pay the costs of the action, and, as I have already said, the costs of the counterclaim.

I may add that, in arriving at this conclusion, I do so largely, not upon the basis of any merits of the plaintiffs, but upon the demerits of the defendant.

Solicitors—John Vernon, Son & Stephen, for plaintiffs; Morton & Patterson, for defendant.

[Reported by R. Hill, Esq.,
Barrister-at-Law.]

BUCKLEY, J. }
1905. } MAY v. BELLVILLE.
July 10, 11, 12. }

Vendor and Purchaser—Right of Way—Reservation of "all rights of way hitherto exercised"—Unity of Title—Way used by Tenant of one Property—Conveyance not Executed by Purchaser.

The plaintiff purchased two farms, W. and C., which had been held in unity of title for thirty-five years, during which time there had been user, in favour of C., of a way over W. He sold W. The contract contained a reservation of "all rights of way hitherto exercised" over W. The conveyance contained a similar reservation, but was not executed by the purchaser. The purchaser entered into possession and executed a mortgage. The mortgage became vested in the defendant, who took possession. The plaintiff's tenant of C. having been interfered with by the defendant in the use of the way over W.,—Held, that the plaintiff was entitled to an injunction restraining the defendant from interfering with the user of the way over W.

Witness action to restrain the defendant, who was mortgagee in possession of a farm in Wiltshire known as White Lodge, and her servants, tenants, and agents, from hindering the plaintiffs, who were respectively the owners and the occupiers of two other farms adjacent to White Lodge, and known respectively as Coxhill and Middle Bury Hill, in the

free use of an alleged right of way along a road through White Lodge.

For the purposes of the present report it is necessary to deal with the facts of the case only so far as they affect the right of way claimed for Coxhill, and not so far as they affect Middle Bury Hill, as regards which no decision was asked for at the trial, the defendant having, pending the proceedings, acquired the rights of Middle Bury Hill.

For a period of thirty-five years, commencing with 1867, prior to which date there was no common ownership of the farms, they were held in unity of title by the Neeld family, and by two indentures of March 26, 1902, were conveyed, together with other hereditaments, to Mr. Hubert May, one of the plaintiffs.

By a contract dated May 16, 1902, Mr. Hubert May agreed to sell White Lodge to Captain Harvey Jay. The agreement was signed by a Mr. Dighton, acting as agent for the purchaser, and was annexed to printed particulars which contained in manuscript the following reservation: "there is also reserved to the vendor his heirs and assigns the owners and occupiers for the time being of Lots 24 and 33" (being Coxhill and Middle Bury Hill respectively) "and their servants and others authorised by them all rights of way hitherto exercised by them in respect of such lots over any portion of this Lot 27" (White Lodge). This reservation was initialled by Mr. Dighton.

By an indenture of June 24, 1902, made between Mr. Hubert May and Captain Jay, and reciting that Mr. Hubert May had agreed to sell White Lodge to Captain Jay, the premises with other hereditaments were conveyed to Captain Jay in fee. The conveyance contained a reservation as follows: "Except and always reserved unto the said Hubert May his heirs and assigns the owners and occupiers for the time being of two other farms forming part of the said Red Lodge Estate and respectively known as Coxhill Farm and Middle Bury Hill Farm and their servants and others authorised by them all rights of way hitherto exercised in respect of such farms over any portions of the hereditaments hereinbefore described and

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intended to be hereby conveyed." The deed was not executed by Captain Jay, who was abroad when it was completed.

Captain Jay took possession of White Lodge under the conveyance shortly afterwards, and mortgaged it. The mortgage ultimately became vested by transfer in one Mrs. Bellville, the defendant (the deeds being examined by her solicitors), who in January, 1905, entered into possession as first mortgagee.

Mr. Hubert May's tenant of Coxhill having been interfered with both by Captain Jay and the defendant in the use of the alleged right of way over White Lodge, this action was commenced on January 31, 1905.

The evidence, as Buckley, J., found, shewed that for a period of thirty-five years up to 1902, whether by leave or not, and whether permission was asked or not, the way in question had been regularly and systematically used by the tenants of Coxhill.

Astbury, K.C., and *H. Greenwood*, for the plaintiffs.—The plaintiffs admit that a reservation of a right of way operates by way of re-grant—*Durham and Sunderland Railway v. Walker* [1842]¹; see *Shepherd's Touchstone*. It will probably be contended by the defendant that as Jay never executed the deed of June 24, 1902, there was no re-grant. But that does not really touch the case. If a person sells a property reserving his rights as to passage, there is an equitable right which this Court will protect. Moreover, the defendant is estopped from denying the existence of the right of way. The parties could only have meant ways which were *de facto* enjoyed, not rights of way in the strict legal sense—*Kay v. Oxley* [1875]² and *Bayley v. Great Western Railway* [1884]³. Jay could have been compelled to execute the deed—*Walsh v. Lonsdale* [1882]⁴. He could not possibly hold the property against his vendor free from the right of way, nor can the defendant, his assignee, do so any more than he could.

(1) 11 L. J. Ex. 440, 446; 2 Q.B. 940, 967.

(2) 44 L. J. Q.B. 210; L. R. 10 Q.B. 360.

(3) 26 Ch. D. 434.

(4) 52 L. J. Ch. 2; 21 Ch. D. 9.

Buckmaster, K.C., and *Harman*, for the defendant.—There never was, in fact, any passage as of right. If the deed had been executed by Jay, it would have operated to reserve such rights of way as had been exercised as of right. But as none had been exercised as of right, none would have been reserved. But it was not executed by Jay, and *a fortiori* there was no effective reservation. It is said the vendor could have compelled Jay to execute the deed, and *Walsh v. Lonsdale*⁴ is cited to support that view; but that case goes upon the doctrine that equity considers that as done which can be compelled to be done. That depends here on whether the Court would decree specific performance against Jay. The answer is, No, because he knew nothing about the matter; he was abroad, and had fixed the purchase-price on the footing that there were no such rights. The case is, of course, *a fortiori* as against the defendant, who was Jay's assignee. The defendant had no notice, either actual, constructive, or imputed, of any rights, and there could be no specific performance against her. The contract was recited in the deed for the express purpose of excluding any question as to what its terms were. The actual contract between the parties can only be looked for and found in the completed conveyance—*Leggott v. Barrett* [1880]⁵. The plaintiffs cannot succeed.

Astbury, K.C., in reply.—It is not denied that a contract cannot, as a rule, be looked at after there is a conveyance; but here the contract can be looked at outside the conveyance, because Jay never executed the deed, and therefore there was, so far, no deed. Dighton made a contract for Jay, and Jay amply ratified it by going into possession on the footing of it. The defendant knew there ought to be a right of way, and she had no knowledge of anything to raise a dispute as to it; she did not know Jay had not executed the conveyance. Specific performance could have been granted both against Jay and against the defendant. General words incorporated in a conveyance pass to a purchaser all ways actually used by him, though used only by

(5) 51 L. J. Ch. 90, 92; 15 Ch. D. 306, 309.

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permission of the vendor—*International Tea Stores v. Hobbs* [1903] ⁶

BUCKLEY, J.—As regards the title the matter stands thus. Down to the year 1867 there was not unity of title as regards the three farms, Coxhill, White Lodge, and Middle Bury Hill. On March 25, 1867, there became unity of title, because at that date the owner of Middle Bury Hill and White Lodge purchased Coxhill. After there was unity of title, of course there could be no acquisition of a right of way by one farm as against the other. On March 26, 1902, the then owner sold all three farms to May. In the same year, a month or two later, May was minded to sell, and he offered the properties under certain conditions of sale, and an agreement to buy White Lodge was signed by a Mr. Probyn Dighton for Captain Jay, on May 16, 1902. There is inserted in manuscript into the particulars, and initialled by Dighton, these words: "there is also reserved to the vendor his heirs and assigns the owners and occupiers for the time being of Lots 24 and 33"—that is, Middle Bury Hill and Coxhill—"and their servants and others authorised by them all rights of way hitherto exercised by them in respect of such lots over any portion of this Lot 27." It seems to me that this is admissible and valuable for this purpose—that May, the owner at that moment of all three farms, was asserting, rightly or wrongly, that White Lodge was subject to some rights of way in favour of Middle Bury Hill and Coxhill. As I have said, rights of way in a legal sense cannot have existed, because there was unity of title between the three farms. It has been suggested at the Bar that a possible state of things would be that as between tenant and tenant, whether by the insistence of the common owner or not, the one tenant might have been compelled or compellable to allow the other to pass over his farm. That is a possible state of things. No doubt that would be a right of way in a sense—that is to say, the tenant of White Lodge might take White Lodge upon terms imposed upon him by his landlord that he

(6) 72 L. J. Ch. 543; [1903] 2 Ch. 165.

should let Coxhill through his grounds. Suppose that was so, then May was saying by these words that there was such a right; that he had imposed that obligation on his tenant. Another possible view is that the common owner had not imposed any such obligation on the tenant, but that in point of fact as between tenant and tenant there always had been a user by the one of a right of way over the other, and, if that was so, again May, the common owner, was, as it seems to me, asserting it by these words which he introduced into the particulars and conditions of sale. In other words, these words are valuable, I think, as shewing that May, the common owner, was stating at that time that there existed a right of way in favour of Coxhill over White Lodge.

Jay became the buyer. Jay's contract, in point of fact, was carried through by Probyn Dighton. Jay left England for a short time, and the contract was carried through by Dighton on his behalf. To my mind, nothing arises upon that. The rights, whatever they are, arise by reason of the fact that Jay accepted a conveyance and took possession upon certain terms. The conveyance was not executed by Jay. The conveyance was executed by the vendor, and contained these words: "Except and always reserved unto the said Hubert May his heirs and assigns the owners and occupiers for the time being of two other farms forming part of the said Red Lodge Estate and respectively known as Coxhill Farm and Middle Bury Hill Farm and their servants and others authorised by them all rights of way hitherto exercised in respect of such farms over any portions of the hereditaments hereinbefore described and intended to be hereby conveyed." That deed was not executed by Jay. The agreement of May 16, 1902, had been executed by Probyn Dighton on his behalf and had incorporated the words in the conditions reserving the rights to which I have referred. Under that conveyance Jay took possession. Was Jay, then, entitled to say that, inasmuch as the right of way could only be created by grant, and he did not execute the deed, there existed no right of way, and the

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reservation effected nothing? In other words, if there were rights of way hitherto exercised in respect of such farms, could he say, by reason of his non-execution of the deed, "I am not bound by that"? In my opinion he could not. Suppose that Jay were the defendant in this action, he is a person who has taken possession of the property under a conveyance which shews that he is to be a certain grantor. What right has he to say that he is not bound in equity to give effect to the terms upon which he so obtained possession? The Statute of Frauds does not apply, there is part performance, the bargain is shewn by the terms of the conveyance. He can be called upon by the plaintiffs to give effect to the terms upon which he obtained possession—namely, the creation of those rights of way. The defendant is not Jay, but derives title under Jay. She is a person who became a transferee of a mortgage which was executed by Jay. She necessarily has notice of the deed of June 24, 1902, and of the reservation which I have read which was contained in it. How can she say she is not bound by the rights which existed, as it seems to me they did, as against Jay? It has been sought to argue that she had no notice of the contract of May 16, 1902, which referred to "all rights of way" in the conditions, because that contract had been executed by the conveyance. It seems to me that is not so; it had not been executed by the conveyance, so far as it required a grant by Jay of the rights of way reserved; it was still executory as regards that. She was put, as it seems to me, upon enquiry to ascertain what were the ways spoken of in the conveyance as being rights of way hitherto exercised in respect of certain farms. She cannot say that she took without notice of that. Therefore there exist as against the defendant the same rights as would have existed against Jay in respect of this matter.

That being so, I have to determine whether in point of fact there were "rights of way hitherto exercised." No doubt there were no rights of way in the sense of legal rights of way, easements enjoyed by the one property as against

the other, because all three properties were in one hand. But there is the principle of *Kay v. Oxley*² and *Bayley v. Great Western Railway*.³ I am, under these circumstances, entitled to look and see whether there were rights of way exercised, not as being legal rights of way, but rights of way enjoyed or exercised in fact by the one tenant over the land of the other. That is a question of fact. The result of the evidence, to my mind, is that whether by leave, whether permission was asked, or however it came about, Coxhill did regularly and systematically use this way, by the Davenport Gate, always keeping south of the railway and passing White Lodge either by going north or south of it. That has gone on for thirty-five years. Then came the deed. Were there or were there not rights which in 1902 could be called "rights of way hitherto exercised" in respect of Coxhill over White Lodge? I think that there were. I think this roadway from Davenport Gate by the level crossing and on to the Minety Road was a right of way in 1902 exercised in respect of Coxhill. It was not a legal right of way. Was it a right of way to which Jay, under the deed of June 24, 1902, was bound to give effect? I answer Yes, it was; that he could be compelled, and the defendant taking under him could be compelled, to give effect to it. It seems to me to follow that the plaintiffs are entitled to an injunction restraining the defendant from interfering with that right of way; and therefore I grant an injunction, and the defendant must pay the costs.

Solicitors—Gribble, Oddie, Sinclair & Johnson, agents for Hewett & Churchill, Reading, for plaintiffs; Lee & Pemberton, for defendant.

[Reported by Arthur Lawrence, Esq.
Barrister-at-Law.]

WARRINGTON, J. }

1905.

June 23. }

LEWIS v. GREEN.

Practice—Originating Summons—Construction of Document—Questions of Fact—Jurisdiction—Rules of Supreme Court, Order LIV.A, rules 1 and 4.

An originating summons under Order LIV.A, rule 1 is not the proper mode of procedure in a case where questions both of fact and of construction of a written instrument arise, and where the decision of the questions of construction will not necessarily put an end to the litigation.

Originating summons.

W. Hatfield Green, the respondent to the summons, was the executor and trustee of the will of J. Hatfield, under which his nephew, W. J. Hatfield Green, took an interest. There was some doubt how far the gift to the nephew took effect, and by a deed of December 10, 1897, W. Hatfield Green agreed to transfer certain securities to his nephew; the nephew released the uncle and the testator's estate except in respect of two items of property, indemnified him against claims by next-of-kin to the extent of 2,500*l.*, and charged the transferred securities for that purpose; the certificates of the securities were to be held by the uncle during the continuance of the charge; the charge was to exist till December 31, 1903, when, if no claim had been made by other persons, the uncle was to hand over the certificates to the nephew; the uncle guaranteed that the annual income from the securities should be 123*l.* 1*s.* 8*d.* at least until December 31, 1903, and that the aggregate value of the securities should then be not less than 2,461*l.* 15*s.* 6*d.*

On March 9, 1898, the nephew executed a mortgage for 200*l.* of all his estate and interest in the testator's estate and under the deed of December 10, 1897, to F. Austin and J. A. Holdsworth.

This mortgage recited the will and the deed of December 10, 1897, but did not mention the guarantee.

On April 29, 1898, the nephew mortgaged the same property to the same mortgagees to secure another sum of

200*l.* The guarantee was not referred to in this mortgage.

By a deed of March 24, 1899, which recited the will and the deed of December 10, 1897, including the guarantee and the two mortgages, Austin and Holdsworth, in consideration of 800*l.*, conveyed to the applicant, J. D. B. Lewis, "all the premises comprised in and assigned by the hereinbefore recited indentures of March 9, 1898, and April 29, 1898, as the same are more particularly described in the first schedule hereto," and all the interest of the nephew under the will. The first schedule contained a list of securities, but no reference to the guarantee.

On November 4, 1904, Lewis issued a writ in the King's Bench Division against W. Hatfield Green, claiming under the guarantee 1,476*l.* 10*s.* 6*d.* alleged to be the difference between the guaranteed value of the capital and income and the amounts received and realised. The respondent pointed out that it was an inconvenient action to try in the King's Bench Division. That action was accordingly discontinued and the costs were, by agreement, made costs in the Chancery action.

Lewis proposed to proceed by originating summons, but the respondent's solicitors replied that questions of fact would arise, and that the proper course was by writ. Accordingly on November 26, 1904, Lewis issued a writ in the Chancery Division.

On January 3, 1905, Austin and Holdsworth executed a deed conveying and assigning to Lewis by way of confirmation all the premises comprised in the mortgages. On January 10, 1905, Lewis served notice discontinuing the Chancery action, and took out an originating summons under Order LIV.A, asking for a declaration that according to the true construction of the above-mentioned deeds the benefit of the guarantee had been assigned to and was vested in him. He asked the respondent's solicitors to accept service of it. In answer to that request, on January 25, 1905, they wrote saying they could not accept service of the originating summons, that the defendant was abroad, and saying this: "We again invite you to issue a writ in the Chancery

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Division. If you do this we will at once enter appearance for the defendant. We are advised that for the reasons stated in our letter of November 24 last, the proceedings should be by writ, and not by originating summons." Lewis, however, persisted in proceeding with the summons, and it now came on for hearing.

H. Terrell, K.C., and C. G. Church, for the applicant.—The summons raises questions of construction of the deeds.

Rowden, K.C., and Sargant, for the respondent, took the preliminary objection that the case could not be tried on originating summons. Order LIV.A is confined to enabling the Court to decide questions of construction, and nothing else, and it does not enable the Court to grant any relief; therefore the account which is asked for cannot be directed on this summons. The construction of the deeds will not settle the matter: in order to dispose of it, it will be necessary to decide several questions of fact. When the case comes on for trial we shall prove that the deed of January 3, 1905, was in fact and in law, quite independently of construction, ineffectual to pass the benefit of the guarantee to the applicant. Further, even assuming that the benefit of the guarantee has passed to the applicant, we shall prove that the nephew has so acted as to deprive himself of the benefit of it. Further, we shall prove that the applicant has suffered no damage. The proper procedure was by writ.

H. Terrell, K.C., in reply.—The summons raises questions of construction, and there is no reason why they should not be tried now. If they are decided against us, the litigation will be at an end. Questions of fact can be determined under Order LIV.A. He referred to *Nobbs v. Law Reversionary Interest Society* [1896],¹ *Mason v. Schuppisser* [1899],² and *Nicholls v. Nicholls* [1899].³

WARRINGTON, J.—This summons is issued under Order LIV.A., rule 1, which

provides this: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested." Then there are provisions for service which I need not mention, and rule 4 is as follows: "The Court or a Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

In the first place, the Order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute; but in order to raise any question of construction some facts must be proved or admitted. But for all that, the Order is confined to enabling the Court to decide questions of construction and nothing else, and the Order does not enable the Court to grant any relief; it can only determine the question of construction and declare the rights of the parties. So in any case I could not order the account to be taken which is asked for by the summons.

[His Lordship stated the facts, and continued:] Now this originating summons comes on. The objection is at once renewed which was made as soon as it was issued, that the procedure under Order LIV.A is not the appropriate procedure. What is said is this: "The construction of the deeds will not settle the matter, because on a case of mixed fact and law, I, the respondent, have another defence to the action—namely, that the deed of 1905, in the circumstances which I shall prove when the action comes on for trial, was in fact and in law, quite independently of construction, ineffectual to pass the benefit of the guarantee to the applicant. Further than that, I shall say also when the matter comes on for trial that, even assuming that the benefit of the guarantee has passed to the applicant, I, the respondent, have a complete answer to the action, arising partly from the conduct of the

(1) 65 L. J. Ch. 908; [1896] 2 Ch. 830.

(2) 81 L. T. 147.

(3) 81 L. T. 811.

LEWIS v. GREEN.

person to whom the guarantee was given ; and, further, I have also a complete answer, because I shall have to call upon the applicant to prove damages for breach of the guarantee, which he will not be able to establish." Now under those circumstances the applicant persists in asking me to determine this question of construction. In my opinion I ought not to do so. It seems to me that under such circumstances as these under which this summons was issued, Order LIV.A is not the appropriate mode of procedure. The result might be this : The Court may, after considerable litigation involving an argument in the Court of first instance, an argument in the Court of Appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the question of construction raised by this summons the applicant is right. Well, what then ? No relief can be given on that. There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the question of construction, he is ultimately wrong. The respondent would have to pay all the expense of the litigation on the question of construction, which will be utterly useless. It seems to me that where one finds circumstances such as I find here, the procedure under Order LIV.A is improper. It is only intended to enable the Court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. It is not intended that questions of construction which, if they are decided in one way only will settle the dispute between the parties, should come up for decision on an originating summons. It seems to me it would be most inconvenient to resort to the order in a case where it is uncertain what may be the ultimate decision on the point of construction, and where, if the decision is in one way, it involves further litigation. I think the summons in this case is misconceived ; and, having regard to the warning which the applicant had from respondent's solicitors, I think the only thing I can do is to refuse to make any

order on the summons except to order the applicant to pay the costs of it.

Solicitors—J. D. B. Lewis, for applicant ;
W. W. Wynne & Sons, for respondent.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.]

WARRINGTON, J. } VERSCHURE &
1905. } Zoon's TRADE MARK,
Aug. 10. } In re.

Trade Mark—Word representing Sound of Letters—Registration—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), s. 64—Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), s. 10.

The applicants were owners of an old trade mark consisting of the letters "V Z." An application by them for the registration of the word "Vezet" was granted.

Whether a word which is merely a combination of the sounds of letters can be registered as a new mark, quære.

Motion.

The applicants, J. M. Verschure & Zoon, of Rotterdam and London, carried on business in the manufacture and sale of margarine, cheese, and articles of dairy produce, and other goods of a similar character.

They were the owners of a trade mark for cheese, consisting of the letters "V Z," which had been registered on July 9, 1885, as an old mark in use for about eleven years before August 13, 1875, and the registration of which had been renewed for eleven years from July 9, 1899.

They desired to register as their property in the United Kingdom, and for the purposes of their British trade, a new mark, and accordingly adopted the word "Vezet," which had been registered as their property in Holland, the Dutch Indies, Belgium, Spain, France, Italy, Switzerland, British India, Germany, and other countries.

On October 29, 1904, they applied for the registration of "Vezet" as a trade mark for cheese only (having previously

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made a similar application, which had been refused, for cheese, butter, and margarine), as being an invented word and as having no reference to the character or quality of the goods.

The Comptroller of Patents refused the application on the ground that the word "Vezet" was not within the definition of section 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by section 10 of the Patents, Designs, and Trade Marks Act, 1888,¹ his objection being that "Vezet" seemed to be merely the initials "V Z" in Dutch.

On January 21, 1905, the applicants gave notice of their intention to appeal to the Board of Trade from the Comptroller's decision.

The Board of Trade referred the appeal to the High Court.

The applicants now moved accordingly that the Comptroller's decision might be reversed and the registration proceeded with.

Cave, K.C., and *Sebastian*, for the applicants.—In view of what *Lindley, L.J.*, said in *Farbenfabriken's Trade Mark, In re* [1894],² as to the discretion of the Comptroller, and its limitations, in refusing to register a trade mark, this is clearly a case in which the Court should direct the registration to proceed.

R. J. Parker, for the Comptroller.—The Comptroller's discretion should not be interfered with. Letters cannot be registered as a new mark under the Acts;

(1) Section 64 of the Patents, Designs, and Trade Marks Act, 1883, as amended by section 10 of the Patents, Designs, and Trade Marks Act, 1888, enacts:

"(1) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:

"(a.) A name of an individual or firm . . . ;

or

"(b.) A written signature or copy of a written signature of the individual or firm . . . ; or

"(c.) A distinctive device, mark, brand, heading, label, or ticket; or

"(d.) An invented word or invented words;

or

"(e.) A word or words having no reference to the character or quality of the goods, and not being a geographical name. . . ."

(2) 63 L. J. Ch. 257, 259; [1894] 1 Ch. 645, 652.

they do not constitute one of the "essential particulars" required by the Acts, and no initials not combined as a monogram have ever been registered as a mark unless used before 1875. If letters cannot be registered as a mark, the names of letters cannot be, and it has not been the practice of the office since 1890 to register them. For example, as the letters "J G" cannot be registered, the word "Jaygee," representing the sound of the letters, has not been considered an invented word. It has been thought in the first place that the use of the word "Jaygee" would lead to deception, and interfere with the use of the letters "J G" by other persons, and as a matter of discretion the registration of marks of such a character has been refused. "Vezet" to a Dutchman is the equivalent of the letters "V Z." Secondly, no person has a right to inclose any part of the open common of the English language. The only distinction of this case from others is that the applicants are already the registered owners of "V Z" as an old mark. But, even so, there is not sufficient in what *Lindley, L.J.*, said in *Farbenfabriken's Trade Mark, In re*,³ to exclude the Comptroller's discretion.

WARRINGTON, J.—This is an application by way of appeal from the Comptroller, who has refused to register a proposed trade mark. The trade mark proposed to be registered is a word spelt "V-e-z-e-t," and it is said to be properly pronounced "Vézét," with the accent on the last syllable. Whether it is properly so pronounced, or whether it would generally be so pronounced, or not, may be doubtful, but the word which is sought to be registered is that word "Vézet" or "Vézét," or however it may be pronounced.

The facts are these. The applicants, who are cheese merchants carrying on business in Holland, with a branch here, have had on the register for twenty years the letters "V Z" registered as an old mark used about eleven years before August 13, 1875. The well-known section of the Act contains amongst the "essential particulars" (sub-sections d and e) "an invented word or invented

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words; or a word or words having no reference to the character or quality of the goods, and not being a geographical name." In my opinion, this word "Vezet," as I will call it, which seems to be the proper pronunciation, falls under both these heads. It is not said to be a word in any known human language. The utmost that can be said against the contention that it is an invented word is that it is a combination of the two sounds which in Dutch are used to represent the two letters "V" and "Z." It seems to me therefore that *prima facie* this word comes within the "essential particulars," and as such can be registered.

Now the existing section with regard to what may be registered as a trade mark excludes letters as essential parts unless they have been used as old marks prior to August 13, 1875. When I say it excludes them, what I mean is that it does not include letters unless they have been so used. Now the Comptroller states that it has been the practice ever since the year 1890 to refuse to register words which merely represent the sound of letters. That refusal has, as I understand, been based on two grounds—first, that it is an evasion of the restriction imposed by section 64; and secondly, that it is calculated to deceive in this way—that, to take the example given in the Comptroller's affidavit, if you register the word "Jaygee," and that is allowed to be used as a trade mark in connection with goods, persons are apt to know those as "Jaygee" goods, and then it may be said that for some one else afterwards to use the letters "J G" in connection with those goods would be a colourable imitation, and therefore an infringement of the trade mark, because those second goods would tend to be bought as "Jaygee" goods. Now I do not want to say anything about the general exercise of his discretion by the Comptroller in this matter; I do not want to upset the practice which he has pursued hitherto. What I have to consider is the mark now before me, and to say whether there is or is not in my opinion any good reason for not registering this particular mark. In the first place I have said that I think that this *prima facie* comes within the "essen-

tial particulars" of a trade mark in section 64. What Lord Justice Lindley said in the "Somatose" case which is reported under the name of *Farbenfabriken's Trade Mark, In re*,² was: "These sections" (that is, sections 70, 72, and 73 of the Act of 1883), "and the discretion given by section 62, sub-section 4, of the Act of 1883 to the Comptroller to refuse to register a trade mark, would clearly justify the rejection of any trade mark, even if it contains one of the statutory requisites, if such a mark be of an indecent or libellous character, or if it infringes the right of some other person, or if it is identical with or so similar to one already registered as to be calculated to deceive. But I can find no other restriction; and if a person seeks to register a trade mark which is open to none of these objections, and which does contain one of the essentials mentioned in section 10 of the Act of 1888, I am aware of no legal principle which would justify the Court in refusing to direct its registration. This discretion given to the Comptroller is subject to appeal to the Board of Trade (section 62, sub-section 4, of the Act of 1883); and, the Board of Trade having remitted the appeal to the Court under section 62, sub-section 5, of the same Act, the Court must decide the question in accordance with legal principles, and cannot properly decline to review the decision of the Comptroller." Now I do not say that those words of Lord Justice Lindley are intended to be absolutely exclusive, but they do at any rate come to this—that when the Comptroller is dealing with any particular mark he must find some legal principle which would justify the refusal to direct registration. In this particular case it seems to me that neither of the objections which the Comptroller has thought sufficiently forcible to induce him to adopt the general practice which I have referred to applies. In the first place, I do not consider that the use of this word is an attempt to appropriate the letters "V Z" as a new mark. It seems to me that no Englishman of ordinary experience would suppose that that the word "Vezet" or "Vezet" means the English letters "V Z." It requires a knowledge of the Dutch lan-

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guage, with which not many people in England are familiar, to translate that word into the letters "V Z." In the second place, I do not think it is likely to lead to the consequences which the Comptroller apprehends in the case of other marks which are merely letters written out in full, for this reason, that, assuming that "Vezet" is merely the letters "V Z" written out in full, there have for twenty years been on the register the letters "V Z" in regard to cheese, that being the only article in respect of which the applicants propose to register this mark. It seems to me therefore that the applicants must have in twenty years acquired such an exclusive right to use these letters "V Z" that nobody now who was to put these letters "V Z" on his goods could avoid being stopped. It seems to me, therefore, that both the objections which are made to the registration of words representing letters written out in full, which the Comptroller has adopted as sufficient in general to prevent him from registering such words, do not apply to this particular case. I think, therefore, the applicants are entitled to have their mark registered.

[At the request of counsel for the Comptroller, Warrington, J., added that a note would be put upon the register that the registration of this mark was not intended to interfere with the use by any person of the letters "V Z." That would not affect the applicants' rights under their old registration.]

Solicitors—Ellis, Munday & Clarke, for applicants; Solicitor to Board of Trade, for Comptroller.

[Reported by Arthur Lawrence, Esq., Barrister-at-Law.]

WARRINGTON, J. }
1905.
June 24. }

WRAY v. WRAY.

*Vendor and Purchaser—Conveyance—
Realty—Misdescription of Purchaser—
Evidence of Identity.*

William Wray, in partnership with his two sons and another person, carried on business at Laurel House, North Hill, Highgate, under the style of "William Wray," without the addition of the words "& Co." or any other words. William Wray died in 1885, and his widow was admitted as a partner in his place and the business was carried on as before and under the same name. In 1890 the partners bought North Hill House, Highgate, as an investment, and paid for it out of partnership assets. The conveyance was made between the vendor of the one part and "William Wray of Laurel House, North Hill, Highgate," of the other part, and the property was conveyed to William Wray in fee-simple:—Held, that the legal estate passed by the conveyance to the four partners as joint tenants.

Maughan v. Sharpe (34 L. J. C.P. 19; 17 C. B. (N.S.) 443) followed.

Adjourned summons.

William Wray carried on business under his own name at Laurel House, North Hill, Highgate. He took into partnership his sons Henry Wray and William James Wray, and Joseph Turnbull, and the business was carried on by them under the style of "William Wray," without the addition of the words "& Co." or any other words. William Wray died in 1885, and his widow, Eliza Wray, was admitted as a partner in his place. The business was carried on as before and under the same name. In 1890 the partners bought North House, Highgate, as an investment for 1,150*l.*, which was paid out of the partnership assets. In order to carry into effect this purchase a conveyance was executed on September 22, 1890. It was made between the vendor of the one part and "William Wray of Laurel House, North Hill, Highgate, in the county of Middlesex, optician (hereinafter called the purchaser) of the other

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part," and witnessed that "in consideration of the sum of 1,150*l.* as purchase-money to the vendor paid by the purchaser on or before the execution of these presents . . . the vendor as beneficial owner hereby conveys unto the purchaser" North Hill House, "to hold the same unto and to the use of the purchaser in fee simple." The conveyance was executed by the vendor, and also by Henry Wray, who signed the name "William Wray" at the end of the conveyance with the concurrence of the other partners. Henry Wray retired from the partnership, receiving from his partners the full value of his share in the partnership assets, including North Hill House, and died in 1902. His widow was his sole executrix and representative, and did not claim any beneficial interest in the property.

The heir-at-law of William Wray was William James Wray, one of the partners.

Since the purchase North Hill House had always been dealt with as part of the partnership assets.

This was a summons taken out by the three continuing partners against Henry Wray's widow for a declaration that upon the true construction of the conveyance the legal estate in North Hill House "passed by such indenture to the persons then carrying on business under the style or firm of William Wray namely the plaintiffs and the late Henry Wray as part of their partnership property."

H. Greenwood, for the summons.—The house was paid for out of partnership assets of the firm of "William Wray." At the time of the conveyance there was no such person as William Wray living at the address. Evidence will be admissible to shew who was meant by "William Wray"—*Lindley on Partnerships* (7th ed.), p. 129, and *Maughan v. Sharpe* [1864].¹ It is clear that the conveyance was intended to be to the four partners. They took the legal estate as joint tenants, and in equity the property is held as personalty by the surviving partners as tenants in common—*Elphinstone on Interpretation of Deeds*, p. 281, rule 105, 4th exception.

C. J. Mathew, for the representative of Henry Wray.

WARRINGTON, J., stated the facts, and continued: The only question I have to decide is what has become of the legal estate in North Hill House, for under the circumstances the legal interest and the beneficial interest go in the same way. The question turns upon the meaning to be given to the conveyance to William Wray. An authority has been cited which, although it does not deal with real estate, appears to be exactly in point—*Maughan v. Sharpe*.¹ In that case, so far as material to this question, the facts were very simple. A certain person called William Dolby, to secure an allowance made by two persons named Sharpe and Baker, who carried on business under the style of the City Investment and Advance Co., executed a deed whereby he assigned by way of mortgage certain chattels to the City Investment and Advance Co. The question arose in the case as to the effect of that deed and as to the rights of Sharpe and Baker under it; and on that part of the case Chief Justice Erle and Mr. Justice Williams made the remarks which I am about to read. The Chief Justice said this: "The bill of sale under which the defendants claim purports to convey the property to the City Investment and Advance Company, and not to the defendants by name; and it was contended for the plaintiff that the goods could not pass to Sharpe and Baker. No doubt, Dolby considered that there was a company of which the one was manager and the other secretary. It is clear that individuals may carry on business under any name and style which they may choose to adopt: and I see no reason why the defendants may not do so under the name of the City Investment and Advance Company. If parties pretend to be a corporation, and presume to usurp the rights and powers of a corporate body as against the Crown, they may render themselves liable to be proceeded against for so doing. But, as between these parties, the City Investment and Advance Company, are Sharpe and Baker, and consequently the conveyance in ques-

(1) 34 L. J. C.P. 19; 17 C. B. (N.S.) 443.

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tion is a conveyance to those individuals." Mr. Justice Williams made the following remarks: "It has been objected on the part of the plaintiff that that conveyance is inoperative, because it is necessary in a grant that the grantees should be named, otherwise the grant can in law have no operation. I apprehend, however, it is fully settled that a grant may be good, though the grantee be not named by his christian or surname. In *Sheppard's Touchstone*, p. 236, the learned author, after discussing the consequences of a mistake in the christian name or surname of the grantee, goes on to say,— 'And yet, if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism:' for, he adds, 'Id certum est quod certum reddi potest.' In this case, I apprehend, the meaning of the grant is plain: the deed purports and intends to convey the goods to those persons who use the style and firm of the City Investment and Advance Company. They may or may not be a corporation: but, when it is ascertained that those who carry on business under that name are the defendants, the deed operates to convey the property to them."

It seems to me that, although the decision in that case only dealt with chattels, the reasoning of the judgment applies to the particular case before me. I have to ascertain who is meant by the person described as William Wray in the deed; and I find on the authority of this judgment that I may, instead of reading this as a conveyance to William Wray, read the deed as a conveyance to the four partners Eliza Wray, Henry Wray, William James Wray, and Joseph Turnbull. So reading the deed and inserting the names of the partners, it becomes a conveyance to these four persons. The legal estate is not affected by the fact that the purchase-money was partnership property, and the beneficial interest was already vested in the four partners.

I will therefore make a declaration that the legal estate passed to the plaintiffs and Henry Wray as joint-tenants,

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and that on the death of Henry Wray it passed to and is now vested in the plaintiffs in fee-simple.

Solicitors—Howard & Shelton.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

FARWELL, J. }
1905. } HOLE, *In re*; DAVIES v.
June 26. } WITTS.

Estate Duty — Lunatic — Committee — Estate Duty on Real Estate Paid out of Personal Estate — Charge on Real Estate — Surplus Rents — Discharge of Incumbrance — Next-of-Kin — Heir-at-Law — Incidences of Duty — Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9, sub.-s. 1.

The committee of a lunatic absolutely entitled to residuary real and personal estate paid the estate duty on the real estate out of the personal estate, the committee himself being the executor and devisee in trust of the real estate under the will. The surplus rents of the real estate, after providing rateably for the lunatic's maintenance, would have been sufficient, if so applied during the lunatic's life, to keep down the interest on and pay off the capital amount of the estate duty paid in respect of the real estate.

On a petition by the lunatic's next-of-kin for a declaration that they were entitled to a charge on his real estate in respect of the estate duty in question, the Court, assuming, but without deciding, that the estate duty so paid became a charge on the real estate under section 9, sub-section 1 of the Finance Act, 1894,— Held, that the surplus rents of real estate ought to be treated as having been applied in discharging the incumbrance—in the first place by keeping down the interest, and then by paying off out of the accumulations the charge itself.

LORD ST. LEONARDS' decision in Leitrim (Lord) v. Enery (6 Ir. Eq. 357) adopted and followed.

Petition.

Under the will of the above-named testatrix, Algernon Davies, a lunatic so

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found, became absolutely entitled to her residuary real and personal estate, and Canon Davies, the committee of the lunatic, was her executor and devisee in trust of her real estate.

Upon the death of the testatrix in 1896, the committee of the lunatic paid the estate duty out of her personal estate, the duty payable in respect of the real estate amounting to 816*l.* 15*s.*

The income of the residuary estate was more than sufficient to maintain the lunatic, and consequently the matter had never been before the Court in Lunacy, and the committee had not obtained a charge upon the real estate for the estate duty paid in respect thereof. The income of the residuary estate was, in fact, produced in nearly equal amounts by the real and personal estate, and was sufficient not only to maintain the lunatic, but to leave a balance of rents of real estate (after deducting the rateable proportion for maintenance) sufficient both to pay the interest on a charge of 816*l.* 15*s.* and, by the accumulations of the surplus rents, to discharge the capital charge itself.

The lunatic died in 1903, intestate, and this was a petition by his next-of-kin asking for a declaration that they were entitled to a charge upon the lunatic's real estate for the estate duty paid in respect thereof out of the lunatic's personal estate by his committee.

Jenkins, K.C., and *S. Dickinson*, for the petitioners.

Butcher, K.C., and *W. Higgins*, for the heir-at-law. — The committee paid this duty presumably under section 6, sub-section 2 of the Finance Act, 1894, at the request of the person accountable—that is, the lunatic. He had no power otherwise to pay it, as it was not under his control within the meaning of that sub-section. However, no question will be raised as to that. It is right that the duty should now be borne by the personal estate. By section 9, sub-section 1 of the Act, estate duty is made a charge on the estate, but when the duty in this case was paid the charge was gone, because Algernon was an absolute owner; and the fact that he was a lunatic makes no

difference, because the charge was not kept alive, and it ought not to be kept alive for the benefit of the next-of-kin. If an application had been made to the Court in Lunacy it would have applied the surplus income in paying off this charge, just as any ordinary private owner would have done. There is no equity in favour of the next-of-kin, but the heir-at-law is entitled to the benefit of the payment off—*Grimstone, Ex parte* [1772],¹ followed in *Newcombe v. Newcombe* [1841],²; and *Leitrim (Lord) v. Enery* [1844],³ cited with approval in *Gist, In re* [1904].⁴ Those cases are in favour of the heir-at-law. Section 123 of the Lunacy Act, 1890, keeps alive the rights of the parties.

Leeming, In re [1861],⁵ and *Att.-Gen. v. Ailesbury (Marquis)* [1887]⁶ have no bearing on this case. Although in fact paid off out of the personality, this charge must be treated as if the surplus rents had been applied in paying it off.

Upjohn, K.C., and *R. J. Parker*, for other next-of-kin.—Section 6, sub-section 2 of the Finance Act, 1894, did not give the committee power to apply any part of the personal estate in paying the estate duty in respect of the real estate, and by using part of the personal estate for that purpose he could not alter its nature so as to benefit the heir-at-law—*Att.-Gen. v. Ailesbury (Marquis)*⁶—and the next-of-kin are consequently entitled to a charge upon the real estate for the amount so paid. In that case Lord Macnaghten gives *Leeming, In re*,⁵ as an example of how the Court deals with an application to pay out of a lunatic's personal property a mortgage on his realty, the Court directing that the sum expended out of personal estate in paying off the mortgage should be raised out of the real estate comprised in the mortgage and dealt with as personal estate. The same principle is directly applicable here. It is admitted that the interest on the charge ought to be kept down out of the income of the estate, but it has never

(1) 2 Amb. 706.

(2) 3 Ir. Eq. 414.

(3) 6 Ir. Eq. 357.

(4) 73 L. J. Ch. 251; [1904] 1 Ch. 398.

(5) 30 L. J. Ch. 263; 3 De G. F. & J. 43.

(6) 57 L. J. Q.B. 83; 12 App. Cas. 672.

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been held that the income is to be applied in paying off the principal.

Vaisey, for the committee.

Jenkins, K.C., in reply.—In *Melly, In re* [1883],⁷ following *Leeming, In re*,⁸ an order was made for the payment off of a mortgage upon a lunatic's leaseholds without prejudice to the question how the mortgage debt should ultimately be borne, and for the transfer of the mortgage debt to the committee, to be disposed of as the Court might direct.

FARWELL, J.—This is a point which I think it is proper for this Court to decide, although I confess I should have been better satisfied had I seen my way to sending it to the Court in Lunacy. I am certainly not deciding it from any desire to trench on their jurisdiction, but because I do not see my way clear to send it to them to decide for me.

The question relates to the estate duty of 816*l.* 15*s.*, which was paid in 1897. It arose on the death of Mrs. Hole, who died in December, 1896. In the events that happened Canon Davies was her legal personal representative and the devisee in trust of her real estate. Her universal beneficiary was a gentleman called Algernon Davies, who was a lunatic so found. Canon Davies was also his committee. When Mrs. Hole died, it became necessary for Canon Davies, as her legal personal representative and as the trustee of her real estate, to pay this estate duty, and he accordingly did so. I assume, at any rate, that he paid it under section 6, sub-section 2 of the Finance Act, 1894. [His Lordship read the sub-section, and continued:] The committee paid the duty under that sub-section. Then section 9, sub-section 1, provides that "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable"; and I must assume for the purposes of my judgment in this case that the duty that was so paid by the committee became thereupon a charge on the real estate. I do not desire to decide that, because it seems to

me that there may be a question whether that sub-section means more than to create a charge upon it for the benefit of the Crown, or whether it also means to create a charge for the benefit of any person who may find the money to pay the duty, being a person other than the person accountable.

Now in the present case, if Algernon Davies had not been a person of unsound mind it was absolutely immaterial how the duty was paid, whether out of his real estate or out of his personal estate; but inasmuch as he was of unsound mind his committee paid the duty, properly, in my opinion, and I have to say what the effect of section 9, in view of subsequent events, has been. The income of the lunatic was sufficient to maintain him—in fact, it was, indeed, in very nearly equal amounts produced by real and personal estate. It was enough to maintain him and to leave a balance, after deducting the maintenance rateably from the rents of the realty and the personalty, not only sufficient to keep down the interest on this charge, but also, if that be proper, to discharge it altogether. Now, assuming section 9, sub-section 1, to have created a charge, it was a charge vested in the committee, who was the person in receipt of the rents and profits and who was also the legal owner of the personal property. I have the guidance of a decision of Lord St. Leonards which appears to me to be very much in point in the present case, and to do, as nearly as may be, absolute justice. This matter has never come before the Court in Lunacy. Probably the committee could have applied originally if he had thought fit, but it was not necessary for him to do so, because he did not require to apply to the Court for the payment of the money; consequently he made the payment merely by his inherent power. It is now the duty of the Court to consider whether that payment has operated to alter the rights of the real and personal representatives of the lunatic as between themselves. In Lunacy, the Court always, so far as possible, but subject to the paramount duty of seeing to the interests of the lunatic, avoids interfering with the rights of the real and

(7) 53 L. J. Ch. 248.

HOLE, IN RE.

personal representatives *inter se*. Now, in the events that have happened, what is fair between the parties?—what will interfere least with the rights of the personal representatives? It is admitted by counsel for the petitioners and other next-of-kin, and I think rightly, that the interest on this charge ought to have been kept down out of the rents of the real estate, and, if that be so, I cannot myself see why it does not logically follow that the chargee, the committee, must be treated as mortgagee in possession for all purposes. That is the view of Lord St. Leonards in the Irish case of *Leitrim (Lord) v. Enery*,³ which has been cited in the course of the argument. At page 365 the Lord Chancellor says this: "The Chancellor therefore, acting as the lunatic himself if sane would act, may apply the general personal estate in discharge of any encumbrance on the real estate, if it be for the lunatic's benefit to do so, whether the lunatic be or be not personally liable to the payment of the debt; and the heir may thus be benefited at the expense of the next-of-kin. Of course, if there be a surplus of the rents of the real estate, after providing for the lunatic's maintenance, the estate may be made to discharge its own burthen by applying the surplus rents from time to time in discharge of the encumbrance; or if the rents have been accumulated, although they form part of the personal estate, they may be applied in paying it off." Now, it appears to me that I am bound to regard the charge as having been paid off in the way there suggested by the Lord Chancellor. That being so, there is no claim now existing in respect of this estate duty, and the petitioners are not entitled to the declaration which they seek.

Solicitors—Currie, Williams & Williams, for petitioner; R. Ballard, for heir-at-law; Trower, Still, Freeling & Parkin, for other next-of-kin; Ernest Bevir, for committee.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} KINNAIRD (LORD) v. FIELD.
STIRLING, L.J.	
COZENS-HARDY, L.J.	
1905.	
July 12, 19.	

Practice — Trial — Action in Chancery Division—Counterclaim for Slander, Libel, and Malicious Prosecution — Defendant's Right to Trial by Jury—Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100—Rules of Supreme Court, 1883, Order XXXVI. rules 2 and 7 (a).

A defendant to an action in the Chancery Division, who counterclaims for libel, slander, or any of the other matters mentioned in rule 2 of Order XXXVI., is not by virtue of that rule entitled to have the action and counterclaim transferred to the King's Bench Division for trial by a Judge with a jury; but the Court, in the exercise of its discretion under rule 7 (a) of the same Order, will, at the defendant's request, generally direct the issues raised by the counterclaim, so far as they relate to libel, slander, or the other matters mentioned in rule 2, to be tried by a Judge with a jury.

Appeal by the defendant against the refusal of Warrington, J., of his application that the action and his counterclaim might be transferred to the King's Bench Division and tried by a Judge with a jury.

The action was brought in the Chancery Division by Lord Kinnaird, William Heathcote Seagrim, and John Wood, on behalf of themselves and all other the members of the Council of the Evangelical Alliance (British Organisation) against Edward Percy Field, their former secretary; and the plaintiffs by their statement of claim claimed—first, specific performance of an agreement of August 17, 1903, for the stay of a former action between the same parties; secondly, a perpetual injunction to restrain the defendant from trespassing upon the offices of the Alliance or interfering with their servants, detaining the keys or other property of the Alliance, removing from the offices any letters or papers, intercepting the delivery of any letters,

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or representing himself as a member of the Alliance or attending or speaking at any meeting thereof; and thirdly, damages.

The defendant put in a defence and counterclaim, to which he made the three plaintiffs and fourteen other persons defendants, stated to be sued as representing themselves and all the individual members of the Evangelical Alliance (British Organisation), and also sued on behalf of themselves and all others the members of the Council of the said Evangelical Alliance (British Organisation); and claimed damages for alleged libel, slander, and malicious proceedings; and also specific performance of a certain undertaking dated June 29, 1903; four months' salary; and a perpetual injunction to restrain the plaintiffs and their co-defendants to the counterclaim from alleging that the defendant was not a member of the Alliance, and from neglecting to forward his letters received at the office of the Alliance.

The action had been set down for trial in the Chancery Division, and was in the paper for trial on July 20. The defendant alleged that by rule 2 of Order XXXVI. of the Rules of Court¹ he was entitled as

of right to have the whole action and counterclaim tried by a Judge with a jury.

Warrington, J., dismissed the application, but gave leave to appeal.

The defendant appealed.

The *Defendant*, in person.—The plaintiff in a counterclaim is entitled to trial before a jury of any of the matters mentioned in rule 2 of Order XXXVI.¹ just as much as the plaintiff in an original action. If the plaintiffs in this case had wished to retain the original action, as distinguished from the counterclaim, in the Chancery Division, they might have made an application for that purpose under Order XIX. rule 3. Not having done so, they must be taken to have acquiesced in the defendant's right to have both action and counterclaim tried before a jury. The Judge in the Court below having exercised his discretion in the way he did through a mistake of law, this Court has the right and is bound to interfere with that discretion. The defendant claims a right under Order XXXVI. rule 2¹ to the transfer to the King's Bench Division and trial before a jury of the whole action and counterclaim—*Annual Practice*, 1905, p. 286; *Roberts v. Booth* [1892],² *Stumore v. Campbell & Co.* [1891],³ *Baring Bros. & Co. v. North-Western of Uruguay Railway* [1893],⁴ *Coles v. Civil Service Supply Association* [1884],⁵ *Amon v. Bobbett* [1889],⁶ *Ormerod v. Todmorden Joint-Stock Mill Co.* [1882],⁷ *Jenkins v. Bushby* [1891],⁸ *Martin, In re; Hunt v.*

Court; and shall not include a criminal proceeding by the Crown.

" 'Plaintiff' shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

" 'Defendant' shall include every person served with any writ of summons or process, or served with notice of or entitled to attend any proceedings."

(2) [1893] 1 Ch. 52.

(3) 61 L. J. Q.B. 463; [1892] 1 Q.B. 314.

(4) [1893] 2 Q.B. 406.

(5) 53 L. J. Ch. 638; 26 Ch. D. 529.

(6) 58 L. J. Q.B. 219; 22 Q.B. D. 543.

(7) 51 L. J. Q.B. 348; 8 Q.B. D. 664.

(8) 60 L. J. Ch. 254; [1891] 1 Ch. 484.

(1) Order XXXVI. rule 2: "In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial to be given as hereinafter provided, and the defendant may, upon giving notice within four days from the time of the service of notice of trial or within such extended time as the Court or a judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried."

Rule 7 (a): "In every cause or matter, unless under the provisions of rule 6 of this Order a trial with a jury is ordered, or under rule 2 of this Order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury; provided that in any such case the Court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."

Supreme Court of Judicature Act, 1873, s. 100: "'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of

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Chambers [1882],⁹ and *Jones v. Macaulay* [1890].¹⁰

Buckmaster, K.C., and *H. Greenwood*, for the respondents.—The defendant is not entitled to what he asks as of right, since rule 2 of Order XXXVI.¹ does not apply to the plaintiff in a counterclaim. The provisions of the rule are such that it is impossible to apply them to the case of a defendant counterclaiming. The defendant, for example, does not give notice of trial. Moreover, the definitions of "plaintiff" and "action" contained in section 100 of the Judicature Act, 1873¹ (which by Order LXXI. rule 1 are to apply to the Rules of Court), shew that a defendant counterclaiming is not a plaintiff within the meaning of rule 2 of Order XXXVI.¹

[They further cited on this point *Lewin v. Trimming* [1888],¹¹ *Sheppard v. Gilmore* [1886],¹² and *Story v. Waddle* [1879].¹³]

Treating it as a matter of discretion, the action is one which, though not specially assigned to the Chancery Division under the Judicature Act, 1873, s. 34, sub-s. 3, was quite properly brought in the Chancery Division, and the Court ought not to order a transfer to the King's Bench Division of either the action or counterclaim unless satisfied that they cannot be satisfactorily tried in the Chancery Division by a Judge without a jury.

The *Defendant*, in reply, referred, in addition to Order XXXVI. rules 4 and 6, to *Forrester v. Jones* [1899],¹⁴ *Att.-Gen. v. Wilson* [1900],¹⁵ and *Piercy v. Young* [1860].¹⁶

VAUGHAN WILLIAMS, L.J.—This is a case involving the construction of Order XXXVI. rule 2, which is somewhat difficult of construction. Lord Justice Stirling and Lord Justice Cozens-Hardy are prepared to put upon rule 2 the construction which has been contended for by the respondent's counsel. There is, according to my view, no reported case

which in any way determines this question. I may say further that I think the decided cases go to shew that the word "action" is occasionally used in these Rules and Orders as including a cross-action and a counterclaim. At all events, the decision in *Jones v. Macaulay*¹⁰ on Order XXVII. rule 11 shews that the word "plaintiff" is used in these Orders as including a plaintiff in a counterclaim. And it is undoubted that in reference to many matters the plaintiff in a counterclaim is regarded as the plaintiff in the action. I think that in *Shumore v. Campbell & Co.*³ Lord Justice Kay very happily described the result of the legislation of the Judicature Act, 1873, when he said that all that the Judicature Act did with respect to the counterclaim was to allow a cross-action to be brought which should be tried at the same time as the original action. Under these circumstances, speaking for myself, I should have been disposed to look at Order XXXVI. rule 2 to see really what was the principle which was enunciated by that rule. I cannot doubt myself but that the principle there enunciated is this—that as regards actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, the party who is making complaint in respect of any of these matters ought to have a right to have the question of the justice of his complaint tried before a Judge and jury independently of the discretion of any Judge. Unless that was the view of the Legislature, I cannot understand why it should have provided, as it has provided by rule 2, that the plaintiff should have a right in those cases to insist upon having his action tried by a jury. If that is the true principle of this rule, it obviously can make no difference, so far as that principle is concerned, whether the claim is made by the plaintiff in an original action or by the plaintiff in a counterclaim. Every reason which would apply to induce the Legislature to say that the plaintiff in such a case was entitled as of right to a jury in an original action, equally applies to an action by the plaintiff in a counterclaim. But it is said (and there is great force in the argument) that the words of the rule are such as to exclude the existence of this right in a

(9) 51 L. J. Ch. 683; 20 Ch. D. 365.

(10) 60 L. J. Q.B. 258; [1891] 1 Q.B. 221.

(11) 21 Q.B. D. 230.

(12) 34 W. R. 179.

(13) 4 Q.B. D. 289.

(14) 34 L. J. N.C. 294; W. N. (1899), 78.

(15) 70 L. J. Ch. 234.

(16) 15 Ch. D. 475.

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portion of the class of persons apparently included in this principle. It is said that not only does the wording of the rule point exclusively to a plaintiff in an action who has issued his writ, but that the definitions of "action" and "plaintiff" in section 100 of the Judicature Act, 1873, are such as to make it difficult to include a plaintiff in a counterclaim, and that in cases of doubt the Rules ought to be construed in the same way, especially as rule 1 of Order LXXI. in express terms incorporated the definitions in section 100 into the Rules themselves.

Mr. Justice Warrington has decided this case upon the basis of the construction contended for by the respondents. I do not think that I ought under these circumstances to do more than give a decided expression to the doubts which have passed through my mind, and particularise the reasons which I think are somewhat weighty in favour of the opposite view. Therefore I tried before delivering this judgment to see whether the parties would not accept a decision in this case which would have prevented the necessity of laying down a construction of this rule, which I cannot help thinking will be found extremely inconvenient hereafter, as, for example, in a case where the Court is trying two common-law actions in respect of a chain of facts which may properly be described as one. But our suggestions were not acceded to. This is a case in which it is very urgent that our decision should be given to-day. Under these circumstances, with some hesitation, I accept the view taken by Mr. Justice Warrington, although I consider that conclusion somewhat difficult to reconcile with the spirit of the Judicature Act itself.

Having decided this much, we must consider what order ought to be made in this case. We might make an order simply affirming the decision of Mr. Justice Warrington, but we have power independently of rule 2 of Order XXXVI., under rule 7 (a) of Order XXXVI., to order any cause, matter or issue to be tried by a Judge with a jury; and if the appellant thinks fit to apply to us to order any particular issues to be tried with a jury we shall have to consider

it. Subject to that observation, I think that the appeal must be dismissed with costs.

STIRLING, L.J.—This is an application by the defendant in the action asking that the action may be tried by a jury. The action is one brought by the plaintiffs to enforce an agreement for the staying of a previous action between the same parties. That action was stayed upon terms, and the plaintiffs in the present action complain that the terms of that agreement have been violated by the defendant, and they claim specific performance, an injunction, and damages. The agreement was not one which in any way related to the sale or purchase of land, and I doubt whether specific performance of it would be ordered by the Court; but at any rate it is not a case of specific performance specially assigned to the Chancery Division. The whole action might perfectly well have been brought in the King's Bench Division, although it is perfectly correctly brought in the Chancery Division, being an action which before the Judicature Act might have been brought in the old Court of Chancery. To that action the defendant has put in a defence and a counterclaim, and in the counterclaim he alleges in the first six paragraphs that he has suffered damage by reason of the various acts on the part of the plaintiffs defamatory of himself, those acts being partly in the nature of libel and partly in the nature of slander. In respect of these matters he claims damages. He also claims specific performance of an undertaking given to the Court on June 29, 1903. As to that I think that specific performance could not be decreed. He also claims four months' salary and an injunction. A reply to the counterclaim has been delivered and notice of trial given by the plaintiffs before a Judge without a jury. The defendant has given notice of his desire to have the action and counterclaim tried by a jury.

The first question to be determined is whether he is entitled as a matter of right to have the issues of fact tried by a jury. The rule relates to actions of slander, libel, false imprisonment,

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malicious prosecution, seduction, or breach of promise. The original action does not fall under any of those heads, and the only way in which this rule could be invoked would be by alleging that, inasmuch as the counterclaim contained issues of libel and slander, the counterclaim ought to be treated as an action of libel and slander. I have great difficulty in seeing how that can be. I feel the force of the remarks made by my Lord, but it appears to me that rule 2 of Order XXXVI. does not apply, considering that we must bear in mind that rule 1 of Order LXXI. incorporates the provisions of section 100 of the Judicature Act, 1873, which gives definitions of various terms used in the Rules. [His Lordship read the definitions of "cause," "action," "plaintiff," and "defendant."] Now I do not think that a counterclaim is an "action" within that definition. It is certainly not a civil proceeding commenced by writ, nor can it be met by the subsequent words of the definition, "or in such other manner as may be prescribed by Rules of Court." From the definition of "plaintiff" is excluded a person seeking relief by way of counterclaim as a defendant. Under these circumstances it appears to me that rule 2 of Order XXXVI. does not in terms cover the case of a defendant who has brought a counterclaim claiming relief in respect of the matters mentioned in the rule. At the same time I think that the framers of this rule have clearly indicated an intention that any person who is making a claim for relief in respect of these matters should have these issues tried by a Judge and jury if possible; and I think that the greatest weight ought to be given to this consideration in exercising any discretion which the Court possesses under the subsequent rules. Rule 3 does not apply, as it relates to matters assigned to the Chancery Division. Rule 4 enables the Court to direct a trial without a jury of any issue of fact, or partly of fact and partly of law, arising in a case which without any consent of parties was formerly triable without a jury. That includes all that large class of cases which are not now assigned to the Chancery Division, but which would have been tried

by the old Court of Chancery previously to the passing of the Judicature Act.

Then rule 6 deals with "any other cause or matter." That includes all matters not mentioned in the previous rules, and provides that, as regards those matters, either party may demand a jury. None of these rules, in my opinion, applies to the present case. But then we come to rule 7. That rule provides by clause (a) that "In every cause or matter, unless under the provisions of rule 6 of this order a trial with a jury is ordered, or under rule 2 of this order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury," but it empowers the Court or a Judge to order any cause, matter, or issue to be tried with a jury. That embraces the present case. Here the defendant has seen fit to counterclaim in respect of libel and slander, and, speaking for myself, I should be prepared to exercise that discretion by directing that the issues in those portions of the counterclaim which relate to libel and slander should be tried by a Judge and jury. This view of the case has really never been considered by Mr. Justice Warrington. Therefore, while deciding that the plaintiff is not liable as of right to a jury, that is the order which, in the absence of special circumstances, I should be disposed to make in favour of the counterclaiming defendant.

COZENS-HARDY, L.J.—This appeal has not been argued upon any matter of form. In form this was an application to transfer the whole action to the King's Bench Division, but it has been argued as an application based on Order XXXVI. rule 2, and the main question which we have to decide is whether, as a matter of right, a defendant who counterclaims to an action brought in the Chancery Division can, by the mere fact of tacking on to his counterclaim a claim for slander, successfully assert a right to deprive the plaintiff of the privilege of having the action tried without a jury, and insist upon the right of having the whole action tried by a Judge and jury.

I have arrived at the same conclusion as Lord Justice Stirling. I do not think that the word "action" in rule 2 applies

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to a counterclaim, or that the word "plaintiff" applies to a counterclaiming defendant. I think that the meaning of those words in that rule is governed by section 100 of the Judicature Act, 1873, which makes it quite clear that a "plaintiff" does not include a counterclaiming defendant, and that an "action" does not include a counterclaim, unless there is anything in the context which is repugnant to the meaning given in the section. I look in vain for anything in this rule to enable me to construe "action" and "plaintiff" in any other than their natural meaning. I am therefore driven to the conclusion that rule 2 of Order XXXVI. does not confer any such right upon a counterclaiming defendant as is alleged by the appellant. But although I think that, I also think that in any case in which the defendant by his counterclaim claims relief in respect of any of the matters specified in rule 2 there is very strong ground for applying to a Judge to exercise his discretion in such a manner as to give the defendant a right to have either the whole action, or at least the particular issues relating to the specified matters, tried by a jury. Now, as I read rule 2, it applies to the whole action and to all the issues to be tried in the action, and also to everything which is being tried in the counterclaim, and it does not contemplate the trial of particular issues. But the Court has under the subsequent rules the widest discretion either to order the whole action to be tried by a jury or to leave the action and such part of the counterclaim as does not relate to the matters enumerated in rule 2 to be tried by a Judge alone, and send the rest to be tried by a jury.

In the present case I think it would be extremely wrong to make an order directing the whole action to be tried by a jury. It is to be in the list for to-morrow. It would have been tried already but for this pending appeal. Therefore we ought not, in the exercise of our discretion, to make such an order as the appellant asks for. But if he thinks fit to sever the issues, and asks that the issues relating to defamation alone shall be tried before a Judge and

jury, the rest of the action and counterclaim coming on for trial to-morrow, I think, subject to anything that may be said on behalf of the respondents, we should accede to the application.

Appeal dismissed.

Solicitors—Andrew, Wood, Purves & Sutton,
for respondents.

[Reported by A. Cordery, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. } CREDITON (BISHOP) v.
1905. } EXETER (BISHOP).
July 14.

Deed—Signature—Subsequent Alteration of Date—Material Alteration—Validity.

A deed is not invalid merely because of an alteration, subsequent to execution, in a part that is not material, by whomsoever such alteration be made.

Pigot's Case (11 Co. Rep. 266) dissented from. Aldous v. Cornwell (37 L. J. Q.B. 201; L. R. 3 Q.B. 573) followed.

Trial of action.

By an instrument in writing purporting to be dated January 26, 1900, it was provided that the advowson, patronage, and perpetual right of presentation of and to the then intended new church of St. Simon, Plymouth, should be vested in and exercisable by certain trustees. And it was thereby further provided that if, within six months from the date thereof, there should not have been subscribed for the purposes of building and endowing the said new church the sum of 3,000l. at least, then the deed now in question should, at the end of six months, be deemed to be void and of no effect.

This instrument was executed by all the parties thereto, except the Bishop of Exeter and a certain John Shelley, on October 21, 1899; and on or about October 23, 1899, it was also executed by John Shelley. At the times of these respective executions the *testimonium* was dated 1899, but the month and day were left in blank.

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Subsequently, on November 4, 1899, the instrument was forwarded, for his signature, to the then Bishop of Exeter, but for some reason this was not immediately affixed. Ultimately, however, the deed was executed by the bishop, but not until January 26, 1900. On this occasion the blank spaces for the day and month were duly filled up, and the date 1900 was substituted for the date 1899.

The required sum of 3,000*l.* was subsequently raised within six months from January 26, 1900, but not within six months from the last day of 1899.

A question having arisen as to whether under the circumstances the deed was valid, or, if valid, whether the sum of 3,000*l.* had been raised within six months from the date thereof, the present action was commenced for a declaration that the patronage of the proposed new church was effectively vested in the trustees.

Austen-Cartmell, for the plaintiffs.—It is laid down in *Sheppard's Touchstone*, at ch. iv. p. 55 ("Of a Deed"), that "Also a deed is good, albeit it mention no time or place of date or making, or have a false date, i.e. be dated at one time and delivered at another." It follows from this that the alteration effected in the present deed was at any rate an immaterial alteration. It is laid down again in *Doe d. Lewis v. Bingham* [1821]¹ that subsequent immaterial alterations do not affect the validity of a deed. To the same effect are *Hudson v. Revett* [1829],² *Adsetts v. Hives* [1863],³ and *Howgate and Osborn's Contract, In re* [1902].⁴

[SWINFEN EADY, J., referred to *Sheppard's Touchstone*, ch. iv. p. 53, and *Paget v. Paget* [1687].⁵]

As to *Pigot's Case* [1614],⁶ part of that case was considered and dissented from in *Aldous v. Cornwell* [1868],⁷ in the case of a promissory note. This last case also dissented from the earlier nameless decision, having to do with an abbot and

convent in Ireland—*A Case from Ireland* [1567]⁸—on which *Pigot's Case*⁶ is mainly founded.

The defendant did not appear, and the costs had been arranged.

SWINFEN EADY, J.—In my judgment this instrument effectively vests in the trustees the perpetual right of presentation to the proposed new church, [His Lordship stated the facts, and continued:] Now, in the first place, it is to be observed that the alteration of the date was only a technical alteration. It was always intended by everybody from the beginning that the instrument should take effect only from the date of the Bishop of Exeter's signing, and this intention is carried out by the instrument as altered. The alteration therefore is only technical—it is not one of substance. But, in the second place, even if the alteration were one of substance—even if it did not strictly carry out the original intention of the parties—yet, even so, it is still immaterial. Now in *Pigot's Case*⁶ it was resolved that "the alteration of a deed by the obligee in a point material or not material, avoids the deed: but the alteration by a stranger without the privity of the obligee does not avoid the deed, unless the alteration is in a material point." Yet in *Pigot's Case*⁶ it was found as a fact that the alteration was made by a stranger, and that it was also immaterial. In that case, accordingly, the Court was not called on actually to consider the present case—the alteration by parties to the instrument of a non-material detail. *Pigot's Case*⁶ was considered in *Aldous v. Cornwell*,⁷ in which Mr. Justice Lush (in delivering the judgment of the Court), after reviewing the authorities, continued: "... we think we are not bound by the doctrine in *Pigot's Case*,⁶ or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note." In other words, *Pigot's Case*⁶ is no authority to shew that a deed is void merely because of a subsequent alteration in a matter that is not mate

(1) 4 B. & Ald. 672.

(2) 7 L. J. (o.s.) C.P. 145; 5 Bing. 368, 390.

(3) 33 Beav. 52.

(4) 71 L. J. Ch. 279; [1902] 1 Ch. 451.

(5) 2 Ch. Rep. 187.

(6) 11 Co. Rep. 26b.

(7) 37 L. J. Q.B. 201, 203; L. R. 3 Q.B. 573, 579.

(8) Dyer, 261b.

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rial. To the same effect is the statement in *Sheppard's Touchstone*, and some others of the authorities cited. I think, again, that the language of Mr. Justice Gaselee, in *Hudson v. Revett*² is not without bearing on the present case: "And the way in which I consider that this deed is good is this,—that it was an imperfect execution, with an agreement at the time that it should take effect when the blanks were filled up." In substance, those words are exactly descriptive of the present case. Under all these circumstances I must make a declaration in the terms asked for by the plaintiffs.

Solicitors—Ravenscroft, Woodward & Co., for plaintiffs.

[Reported by Joseph E. Morris, Esq.,
Barrister-at-Law.

SWINFEN EADY, J. } MARVIN, *In re*;
1905. } CRAWTER v. MARVIN.
Aug. 3, 4, 10. }

Executor—Retainer—Creditor—Judgment against Executrix—No Plea of Plene Administravit or Retainer—Subsequent Administration Action—Insolvent Estate—Right to Set up Retainer against Judgment Creditor.

Where an action is brought by a creditor against an executor in respect of a debt due to him from the testator, and in the action the executor does not either plead *plene administravit*, or set up his retainer, and the creditor recovers judgment, the executor cannot in an action brought to administer his testator's estate set up his right of retainer as against the judgment creditor.

Further consideration.

Richard Marvin, who died on June 30, 1899, appointed his wife, the defendant Mary Jane Marvin, executrix of his will.

On April 30, 1900, the plaintiff Elizabeth Crawter, a simple contract creditor, suing on behalf of herself and all other creditors, issued a summons for the administration of the testator's estate.

On May 10, 1900, the plaintiff commenced an action in the King's Bench Division against the defendant for payment of her debt, and on May 18, 1900, she recovered judgment *de bonis testatoris* against the defendant for 4,513*l.* 1*s.* In that action the defendant did not plead *plene administravit* or set up her retainer.

On May 28, 1900, the usual creditor's order for administration was made in the Chancery action.

The estate proved insolvent.

The Master had made his certificate, from which it appeared that there was due to the defendant from the testator's estate the sum of 4,821*l.*

On the further consideration of the action, one of the questions raised was whether the defendant was entitled to exercise her right of retainer in respect of this sum as against the plaintiff, the judgment creditor.

Theobald, K.C., and *W. Baker*, for simple contract creditors having the conduct of the action.—The executrix can retain against the judgment creditor.

Micklem, K.C., and *Waggett*, for the executrix, adopted the same contention. The executrix is entitled to retain as against all creditors of equal degree with herself.

Eve, K.C., and *T. T. Methold*, for the judgment creditor.—The executrix cannot assert her right of retainer as against the judgment creditor. There is a great absence of authority on the point. The nearest case is *Hubback, In re; International Hydropathic Co. v. Hawes* [1885],¹ where the question arose with reference to a balance order, and it was held that the order did not give the liquidator priority over a debt due to the executor from the testator, and that he was therefore entitled to exercise his right of retainer.

Theobald, K.C., in reply.—*Hubback, In re; International Hydropathic Co. v. Hawes*,¹ does not apply. The only point there decided was that a balance order was not a judgment. The case did not decide that an executrix was bound to plead *plene administravit* if it is not necessary. By not pleading it in the

(1) 54 L. J. Ch. 923; 29 Ch. D. 934.

MARVIN, IN RE.

present case the executrix has saved the estate the costs. The judgment creditor by bringing the administration action has precluded herself from receiving her debt in full. A judgment creditor, who is unable to obtain payment of his debt in full in an administration cannot issue execution against the executor for the balance—*Vernon v. Thellusson* [1841]² and *Lee v. Park* [1836].³ The simple contract creditors will be prejudiced if it is held that the executrix cannot retain as against the judgment creditor. The Judicature Act, 1875, does not affect the right of retainer.

[SWINFEN EADY, J.—Before the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), an executor had no right of retainer as against specialty debts.]

That was because they were debts of a higher degree. The priority of judgment debts has been abolished.

SWINFEN EADY, J. — The short point raised in this case is whether the executrix can exercise her right of retainer as against the plaintiff, the judgment creditor. The plaintiff obtained judgment against the executrix on May 18, 1900, and an order for the administration of the testator's estate on May 28, 1900, ten days later. The judgment was a common-law judgment *de bonis testatoris*, and was in the ordinary form. The executrix did not plead *plene administravit* or set up her retainer.

It is laid down in *Williams on Executors* (8th ed.), at p. 1986, "that the difference in effect, between these two kinds of judgments against an executor or administrator, is not so great as it may appear at first sight. For, although the judgment is only *de bonis testatoris*, yet the executor, upon a deficiency of assets, must ultimately pay the debt as well as costs recovered, out of his own pocket; because the judgment is in law a proof that he has assets to satisfy it. . . ." The early history of the law is dealt with in the notes to *Wheatley v. Lane* [1667].⁴ It is also pointed out in *Williams on Executors* (8th ed.), at p. 1920, that it is optional in

the executor either to plead a retainer for a debt or to give it in evidence under a plea of *plene administravit*. If, however, the executor does not set up the retainer in one form or another the judgment is conclusive against him that he has assets to satisfy the judgment debt. Under these circumstances it seems to me that an executor cannot in an action to administer his testator's estate set up his right of retainer as against a judgment creditor. The question, of course, only arises where the assets are insufficient. In effect the executrix here is claiming to retain assets to pay her own debt and at the same time saying to the judgment creditor, "There is not enough for you." I think that that principle was so applied by the Court of Appeal in *Hubback, In re; International Hydropathic Co. v. Harves*.¹ That was a case of a balance order obtained against an executrix, and the Court considered the form of the order, and pointed out that, having regard to its form, under which the executrix was ordered to pay the call "out of the assets of the deceased in her hands as such legal personal representative to be administered in due course of administration," the order was not a judgment or admission of assets, and therefore stood in a different position to a judgment, and the distinction between the two was there pointed out. In the present case there was a judgment against the executrix, with no plea of retainer or of *plene administravit*, and it is therefore now too late for her to set up her right of retainer.

Solicitors—Williamson, Hill & Co.; Emmet & Co., agents for C. W. Bowling, Southsea.

[Reported by W. Ivimey Cook, Esq.,
Barrister-at-Law.]

(2) 14 L. J. Ch. 83; 1 Ph. 466.

(3) 6 L. J. Ch. 93; 1 Keen, 714.

(4) 1 Wms. Saund. 239, 249.

SWINFEN EADY, J. } KELSEY, *In re*;
1905. } WOOLLEY v. KELSEY;
Aug. 2. } KELSEY v. KELSEY.

*Will—Construction—Residuary Legatee
—Erroneous Recital of Indebtedness—
Account.*

A testator in his will recited that a son, to whom he had previously given a share of residue, was indebted to him in the sum of 5,000*l.*, and that he (the testator) was desirous of reducing the amount of such indebtedness to 3,000*l.*, and then proceeded to forgive the son the balance of his debt over and above 3,000*l.*, and to declare that the said sum of 3,000*l.*, or so much thereof as should remain unpaid at the period of distribution, should be deducted and taken into account as part of his son's share of residue. The recital was erroneous, and the son, in fact, was never indebted to his father in the sum of 5,000*l.* or any other sum as stated, the only sum his father had ever advanced on his account being a sum of 80*l.* for an indenture of apprenticeship:—Held, that on the true construction of the will, the testator only intended the son to bring into account so much, not exceeding 3,000*l.*, of the sum which the son owed the testator and as remained unpaid at the period of distribution. The only sum, therefore, for which the son was liable to account was the sum of 80*l.*

Taylor's Estate, *In re*; Tomlin v. Underhay (22 Ch. D. 495), followed.

Further consideration.

By his will, Thomas Kelsey, the above-named testator, directed his trustees to stand possessed of his residuary trust estate after the death or re-marriage of his wife, the defendant Elizabeth Mary Kelsey, upon trust for his children living at his decease and the issue of children previously deceased, equally between them *per stirpes* as therein mentioned. After giving his trustees a power of advancement in favour of any such child or issue to the extent of one-half of his or her actual or presumptive share, the testator directed as follows: "And inasmuch as my son Thomas Owen Kelsey is at the date of this my will indebted to me in the sum of one thousand two hundred pounds and my son Arnold Robert Kelsey is indebted to me in the sum of four thousand pounds and my son

Stanley Woolley Kelsey is indebted to me in the sum of five thousand pounds and I am desirous of reducing the amount in which they are respectively so indebted to me as follows that is to say As to the said Thomas Owen Kelsey to the sum of six hundred pounds as to the said Arnold Robert Kelsey to the sum of two thousand pounds and as to the said Stanley Woolley Kelsey to the sum of three thousand pounds Now therefore I hereby forgive to my said three sons the balances of the respective sums in which they are respectively indebted to me over and above the said respective sums of six hundred pounds two thousand pounds and three thousand pounds And I declare that the said respective sums of six hundred pounds two thousand pounds and three thousand pounds or so much thereof respectively as shall remain unpaid at the time of the decease or remarriage of my said wife shall be deducted and taken into account as part of their respective shares in my trust estate And I also declare that in case any other sums shall be entered in my private ledger as owing to me by any of my children the sums so entered in my private ledger shall be deducted from and taken into account as part of the shares of my children against whom such claim may be entered and that any such entries in my private ledger shall be final and conclusive evidence as to the amounts owing to me or my estate by any of my said children but the said sums of six hundred pounds two thousand pounds and three thousand pounds are to be considered as due to me at my decease unless previously repaid although not entered in such private ledger." The testator appointed his said wife during her widowhood, his brother Henry Richard Kelsey, and the plaintiff Thomas Boyle Woolley executors and trustees of his said will. The testator died on February 15, 1885. His will was duly proved, and subsequently the present action was commenced for the administration of his estate.

Stanley Woolley Kelsey denied that the sum of 5,000*l.* mentioned in the will had ever been advanced to him or was owing by him at all, or that there was any entry in his father's private ledger of any sum due from him to his father; and he alleged that the only sum advanced by

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the testator on his account was a sum of 80*l.* paid by the testator in 1878 for his indenture of apprenticeship. In answer to certain enquiries directed in the action, the Master certified that except as to the 80*l.* above mentioned, no sum was in fact owing by Stanley Woolley Kelsey to the testator at the time of the latter's death.

The question now before the Court was whether S. W. Kelsey was under liability to account for the full sum of 3,000*l.* or only for the 80*l.* actually advanced, as to which latter sum the son did not dispute his liability to account.

Martelli, for the trustees.

A. J. Spencer, for Stanley Woolley Kelsey.—The recital is erroneous. This son was never indebted to the testator in the sum of 5,000*l.* or any other sum beyond the 80*l.* advanced for his apprenticeship. The recital is not binding on him, and he is not debarred from shewing that nothing was due from him beyond the 80*l.*, and that is the only amount by which his share of residue must be reduced—*Taylor's Estate, In re; Tomlin v. Underhay* [1882],¹ which is a decision of the Court of Appeal. In that case, *Aird's Estate, In re; Aird v. Quick* [1879],² in which the legatee was held bound by an erroneous recital, and which was subsequently followed by North, J., in a later case of *Wood, In re; Ward v. Wood* [1886],³ was cited in argument, and, though not referred to in the judgments of the Court, was deliberately not followed. The decision in *Taylor's Estate, In re*,¹ must, in case of conflict, prevail. The testator did not intend any sum not in fact owing by his sons to be brought into account.

Eve, K.C., and *L. Roston*, for other residuary legatees.—The view taken by North, J., in *Wood, In re*,³ is the right one—namely, that the Court of Appeal in *Taylor's Estate, In re*,¹ did not say that the decision in *Aird's Estate, In re*,² was wrong, and that decision is therefore still an authority on this question, and is exactly in point in the present case. It is not open to the son to claim under the will and yet dispute the recital; he must

be deemed to be bound by the recital and is liable to bring into account the whole 3,000*l.* *Taylor's Estate, In re*,¹ was a very special case, as North, J., pointed out, and did not affect the decision in *Aird's Estate, In re*.²

SWINFEN EADY, J.—I think that the cases dealing with the question raised resolve themselves into two classes—namely, one where the testator by apt words directs a legatee to bring into account a particular sum; he may recite—perhaps erroneously—that a particular sum has been advanced and direct a legatee to bring into account the sum “hereinbefore recited to have been advanced,” or he may by other appropriate language shew an intention that the legatee shall absolutely and in any event bring into account the sum mentioned in the other part of his will. In other words, the testator directs that the legatee shall only take upon the footing that he brings a particular sum into account, and then shall only receive the balance that would be payable to him on that footing. In the other class of cases, the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs that the debt, or so much as shall remain unpaid at the time of the testator's death, shall be deducted and brought into account. In the second class of case the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of the testator's death. The question which I have to determine is within which class the present case falls.

In my judgment the present case more nearly resembles *Taylor's Estate, In re*,¹ a decision of the Court of Appeal, and properly falls within the second class, and the son is, I think, only liable to bring into account the sum really owing. Now here the testator, upon the face of the will, shews an intention to benefit this son. He recites that his son Stanley Woolley Kelsey is indebted to him in the sum of 5,000*l.*, and then says he is desirous of reducing the amount in which he is so indebted to him; and after dealing with the case of two other sons, he says that as to Stanley Woolley Kelsey he is

(1) 22 Ch. D. 495.

(2) 48 L. J. Ch. 631; 12 Ch. D. 291.

(3) 55 L. J. Ch. 720; 32 Ch. D. 517.

KELSEY, IN RE.

desirous of reducing it to the sum of 3,000*l.*, and then "Now therefore I hereby forgive to my said three sons the balance of the respective sums in which they are respectively indebted to me over and above the said respective sums of six hundred pounds two thousand pounds and three thousand pounds." In other words, after reciting that Stanley is indebted to the testator in the sum of 5,000*l.*, he forgives him 2,000*l.*, part of the 5,000*l.*, leaving 3,000*l.* remaining owing. Now it appears, in fact, that no 5,000*l.* had been advanced or was owing at all, but that the only sum advanced by the testator to this son was a sum of 80*l.* paid for an indenture of apprenticeship when he was a lad of fifteen. My opinion is that, according to the true construction of this will, the testator only intended the son to bring into account so much, not exceeding 3,000*l.*, of the sum which the son owed the testator and as remained unpaid at the date of the period of distribution. In the present case the Master has found that, except to the extent of the 80*l.* advanced, no sum was owing by this son to the testator. Under these circumstances, I am of opinion that 80*l.* is the only sum which the son is under any liability to bring into account.

It is said that there is no conflict between the case of *Aird's Estate, In re*,² and the decision in the Court of Appeal, *Taylor's Estate, In re*¹; and that in the later case of *Wood, In re*,³ Mr. Justice North followed the earlier case of *Aird's Estate, In re*.² Now I think that the case before Mr. Justice North was an instance of the former of the two classes. It was a case in which the legatee was to bring into account "a sum hereinbefore recited to have been advanced." But if the cases cannot stand together, then the decision of the Court of Appeal must prevail. I hold, therefore, that the son is only bound to bring into account 80*l.*

Solicitors—Gush, Phillips, Walters & Williams, for trustees and residuary legatees; Berkeley-Calcott, Holloway & Blount, for S. W. Kelsey.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.
ROMER, L.J.
STIRLING, L.J.

1905.

May 25, 26, 29.

Aug. 11.

SOOTHILL
UPPER
URBAN
COUNCIL v.
WAKEFIELD
RURAL
COUNCIL.

Local Government—Water Supply to Adjoining District—Contract for Supply—Enlargement of District—Sanction of Local Government Board—Penalty Clause—Avoidance of Contract—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 61 and 174, sub-s. 2.

The sanction of the Local Government Board required by section 61 of the Public Health Act, 1875, for the supply of water by a local authority to the local authority of an adjoining district, is a sanction merely to the supply, and not to the terms of the agreement under which such supply is to be furnished.

The sanction can be properly limited to particular places in a district.

Prior to 1895 the plaintiffs made certain contracts with the defendants for the supply of water, the sanction of the Local Government Board under section 61 of the Public Health Act, 1875, being obtained for the supply to particular places within the defendants' district. In 1895 it was contemplated that the plaintiffs should furnish a larger supply for the defendants' whole district, and a new agreement was made whereby the plaintiffs agreed to deliver and the defendants to take for the supply of their district, or such part thereof as they might wish to supply, or any place outside their district which they might contract to supply, the quantities agreed on, the minimum being largely increased beyond the minimum under the previous contracts. Clause 9 provided that unless within six months the sanction of the Board to the agreement should be obtained or found to be unnecessary, the agreement should be void. The Board having refused to give a general sanction to the extended area contemplated by the agreement,—Held, that the previous sanctions were limited to the particular places, and that, no sanction having been given to the extended area contemplated by

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the agreement, clause 9 applied and the agreement was void.

Held also (VAUGHAN WILLIAMS, L.J., dissenting), that section 174, sub-section 2 of the Public Health Act, 1875, which, with regard to contracts made by an urban authority under the Act, requires that they shall specify some pecuniary penalty in case the terms of the contract are not duly performed, is directory only, and a contract of an urban authority containing no penalty clause is not void on that account.

Appeal by the defendants against a decision of Swinfen Eady, J. (reported ante, p. 116; [1905] 1 Ch. 53).

On December 24, 1881, the Soothill Upper Local Board (the predecessors of the plaintiffs) and the guardians of the Wakefield Union, acting as a rural sanitary authority (being the predecessors of the Wakefield Rural District Council), jointly applied in writing to the Local Government Board to sanction the supply by Soothill to Wakefield, for the townships of East and West Ardsley, of water which Soothill obtained in bulk from the Corporation of Halifax. A question also arose between the parties upon a clause of the draft agreement then being negotiated, and, as they were unable to agree upon this clause, an application was made to the Local Government Board to determine the matter. In reply, the Local Government Board, on May 15 and 17, 1882, stated in writing to the two authorities respectively that, as regards the supply of water by Soothill to Wakefield, the Board were not aware of any reason why, at the proper time, their consent should not be given; but they pointed out that under the statute no sanction on their part was required to the proposed terms of agreement, and that they had no power to deal with the question in dispute between the parties.

Shortly afterwards an agreement under seal dated July 17, 1882, was come to between the two authorities for the supply of water within certain minimum and maximum limits of supply by the Soothill Upper Local Board to the Wakefield Union at the price therein mentioned. Clause 12 of this agreement provided that all payments for water thereunder

should be made quarterly, and that if any quarterly payment should be in arrear and not paid for one calendar month from the day appointed for payment thereof, the Wakefield Union should pay interest thereon to the Soothill Upper Local Board at the rate of 5 per cent. per annum.

Clause 13 provided that if at any time and from any cause the water meters should cease to indicate correctly the quantity of water passing through them, or if any of them should have been removed for the purpose of repairs, the Soothill authority should, until the meters should be repaired or replaced, be entitled to charge, and the Wakefield authority liable to pay, for the full quantity of water to which the Wakefield authority should for the time being be entitled under that agreement within the minimum and maximum limits then applicable.

Water was duly supplied by Soothill to Wakefield on the terms of the agreement, but it did not appear that any further formal sanction was then given by the Local Government Board. In 1885 it was proposed that Soothill should give to Wakefield an increased supply; and on June 26, 1885, the clerk to the Soothill Upper Local Board wrote to the Local Government Board stating that it was proposed to increase the supply, and sent a copy of the proposed agreement for that purpose, and expressly asked for the sanction of the Local Government Board under section 61. In reply, the Local Government Board, on July 15, 1885, stated in writing that, under section 61 of the Public Health Act, 1875, the Board thereby sanctioned the supply of water by the Soothill Upper Local Board to the Rural Sanitary Authority of the Wakefield Union "for the benefit of the parishes of East and West Ardsley." An agreement under seal dated September 29, 1885, was entered into for carrying out this increased supply which confirmed in other respects the agreement of July 17, 1882.

On November 16, 1889, the Local Government Board, understanding that an agreement had been come to between the Wakefield and Hunslet Unions for the supply of water to the latter union for the township of Middleton, gave their

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sanction, under section 61, to the supply by Wakefield to Hunslet for the purposes of that district, and at the same time forwarded to the Wakefield authority a copy of the letter addressed by the Local Government Board to the Soothill authority sanctioning the supply given by Soothill to Wakefield. By an agreement under seal dated December 3, 1890, being supplemental to the agreements of July 17, 1882, and September 29, 1885, the Soothill Upper Local Board agreed with the Wakefield Union that it should be lawful for the Wakefield Union to supply the Hunslet Union Rural Sanitary Authority with water supplied by the Soothill Upper Local Board under the said two agreements, and provision was made as to such supply. In other respects the two former agreements were confirmed.

In 1895 the plaintiffs and the Wakefield Rural Council (the successors of the authorities previously mentioned) negotiated a new water agreement dated January 31, 1895, which was the agreement sued upon in this action, whereby the plaintiffs agreed to deliver and the Wakefield Rural Council agreed to take "for the supply of their said district or such part thereof as the purchasers may for the time being wish to supply or any place outside their said district which for the time being they may contract to supply," the quantities therein stated, the minimum being largely increased beyond the minimum which the Wakefield Rural Council were then bound to take under their previous agreements. Clause 9 provided: "The vendors shall forthwith apply for and with all due diligence endeavour to obtain the sanction of the Local Government Board to these presents, and unless within six calendar months from the date hereof such sanction shall be obtained or it shall be ascertained that no such sanction is necessary then this agreement shall be void." This agreement, and the former agreements of July 17, 1882, September 29, 1885, and December 3, 1890, contained no penalty clause for non-performance of the contract pursuant to section 174, sub-section 2 of the Public Health Act, 1875, except so far as clauses 12 and 13 of the agreement of

July 17, 1882, were a compliance with the section. A contemporaneous agreement was also made between the same parties by which, in the event of the above agreement becoming void under clause 9, the parties were thrown back on their pre-existing agreements.

On January 28, 1895, the plaintiffs wrote to the Local Government Board forwarding a copy of the proposed agreement, and asking for the sanction of the Local Government Board to the agreement. In reply the Board stated that under section 61 of the Public Health Act the Board's sanction was only required to the supply of water by one authority to another, and that it was not their practice to approve of the agreement entered into by the authorities. They added that, if the area for which the supply under the new agreement was to be given was the same as, or wholly comprised in the area for which the Board previously sanctioned the supply, no further sanction on the part of the Board was required. On May 22, 1895, the Local Government Board added that it was not their practice "to give a general sanction in respect of all the contributory places in a rural district," but they would consider applications in respect of particular contributory places when the supply was actually furnished. This correspondence is stated in detail in the judgment of Romer, L.J.

By the Ardsley East and West (Constitution of Urban District) Order, 1895, as confirmed by the County of the West Riding of Yorkshire (Ardsley East and West) Confirmation Order, 1895, the townships of Ardsley East and Ardsley West were together constituted an urban district within the meaning of the Public Health Act, 1875, and the Local Government Act, 1894, article 8 of the Order containing the usual consequential provisions, directing that all powers, rights, duties, &c., and property within the new urban district relating exclusively to such urban district which, under the Public Health Act, 1875, &c., were exercisable by or vested in the local authority having jurisdiction in the district included in the urban district, should vest in the urban district council. By an agreement dated March 24, 1897, between the Wakefield

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Rural Council and the Ardsley Council, it was agreed that the water agreement should become the sole property of the Ardsley Council, who should be entitled exclusively to all the benefits and be exclusively liable and responsible for all liabilities thereunder, and should indemnify the Wakefield Council therefrom, and that the parties thereto should use their utmost endeavours to obtain the sanction of the plaintiffs to such of the clauses as affected (*inter alia*) the said water agreement of 1895, and until such sanction was obtained the clauses of the agreement should be binding upon the defendants *inter se* who should indemnify the other of them in respect of the liabilities and stipulations for which such parties had respectively made themselves liable.

On January 16, 1900, the plaintiffs wrote to the Local Government Board with reference to the correspondence of 1895, and asked whether they were right in regarding as they had done the sanction given by the Local Government Board in 1882 to a supply of water by Soothill Upper to Wakefield Rural Sanitary Authority for the use of the inhabitants of East and West Ardsley, as extending to sanction a supply of water to East and West Ardsley under the agreement of 1895, so far as such supply was confined to the district of East and West Ardsley. The Local Government Board, in reply, by a letter dated February 28, 1900, expressed their opinion that the terms of the order constituting the urban district of Ardsley East and West were sufficiently wide to cover the transfer of any powers vested in the Wakefield authority by virtue of any sanction given by the Board under section 61 of the Public Health Act, 1875, so far as such powers related to the area formed into the urban district of any part of such area. The Board expressed themselves as not prepared to discuss the bearing of any such sanction on the agreement of 1895, and stated it was not their practice in cases under section 61 of the Act of 1875 to go beyond the actual duty imposed on them by that section—namely, sanctioning the supply of water by the one authority to the other. On March 8, 1900, the plaintiffs wrote to the Board that from their letter the plaintiffs gathered

that they still had the sanction of the Local Government Board to the supply of water by them to the Urban District Council of East and West Ardsley, and asked if that understanding was correct, and in reply the Board stated that they had nothing to add to their letter of February 28, 1900.

The plaintiffs sought to enforce their claims under the agreement of January 31, 1895, claiming in the alternative against the Wakefield Rural Council and the Ardsley East and West Urban Council for a declaration that the agreement of January 31, 1895, was valid and binding, and for payment of certain sums due thereunder. In the result the question was narrowed down to one of liability, the defendants having agreed between themselves that if the plaintiffs succeeded in point of law, judgment should be given against the Ardsley East and West Urban Council.

In the event of the agreement of January 31, 1895, not being held valid, the plaintiffs claimed a declaration that the agreements of July 17, 1882, and September 29, 1885, were valid and binding on the defendants.

Swinfen Eady, J., held—first, that the sanction of the Local Government Board required by section 61 of the Public Health Act, 1875,¹ is the sanction to the

(1) Public Health Act, 1875, s. 61: "Any local authority for the time being supplying water within their own district may, with the sanction of the Local Government Board, supply water to the local authority of any adjoining district on such terms as may be agreed on between such authorities, or as, in case of dispute, may be settled by arbitration in manner provided by this Act."

Section 174: "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed; (namely):

Sub-section 1: "Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority:"

Sub-section 2: "Every such contract shall specify the work materials matters or things to be furnished had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed:"

Sub-section 3: "Before contracting for the execution of any works under the provisions of

supply and not to the terms of the agreement, and that in the present case the sanction originally given by the Board was sufficient to render any further sanction unnecessary; and secondly, that the agreement was not void for want of a penalty clause under section 174, sub-section 2¹ of the same Act, and gave judgment for the plaintiffs.

The defendants appealed.

The question was first argued whether the agreement of January 31, 1895, was void by virtue of clause 9 thereof.

Micklem, K.C., R. J. Parker, and Tomlin, for the appellants.—The sanction of the Local Government Board to the contract of January 31, 1895, has never been given as required by section 61 of the Public Health Act, 1875,¹ and the contract is therefore void, and cannot be enforced. The Court is asked to construe the sanction given for the small district of Ardsley as a sanction for the whole district of Wakefield, but it cannot be so

this Act, an urban authority shall obtain from their surveyor an estimate in writing, as well of the probable expense of executing the work in a substantial manner as of the annual expense of repairing the same; also a report as to the most advantageous mode of contracting, that is to say, whether by contracting only for the execution of the work, or for executing and also maintaining the same in repair during a term of years or otherwise."

Sub-section 4: "Before any contract of the value or amount of £100 or upwards is entered into by an urban authority ten days' public notice at the least shall be given, expressing the nature and purpose thereof and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same."

Sub-section 5: "Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors and on all other parties thereto and their executors administrators successors or assigns to all intents and purposes: Provided that an urban authority may compound with any contractor or other person in respect of any penalty incurred by reason of the non-performance of any contract entered into as aforesaid, whether such penalty is mentioned in any such contract, or in any bond or otherwise, for such sums of money or other recompense as to such authority may seem proper."

treated—that is, as if the words "for the benefit of the parishes of East and West Ardsley" had been omitted from the sanction. Different considerations arise in the two cases. In the case of Wakefield a larger supply and a larger outlay for pipes would be required. A consent given for a limited purpose cannot be treated as given for an unlimited or general purpose.

Providing a supply of water is a "special expense" within section 229 of the Public Health Act, and there would be a special rate for Ardsley in respect of the supply to it under the first agreement. The defendants are being sued for the price of the minimum supply of water, which they have not taken. The plaintiffs have not tendered the minimum, although the defendants have done everything in their power to obtain it.

Eve, K.C., and E. Clayton, for the respondents.—No sanction on the part of the Local Government Board to the agreement of January 31, 1895, was required. The only sanction required was to the supply, and that had been already obtained in 1885, when the Board sanctioned the supply by the plaintiff's predecessors to the predecessors of the defendant council. That was a sufficient sanction for all purposes, and the subsequent sanction for the supply to the township of Middleton was not in strictness required. The new agreement of 1895 did not involve any extension of supply, but only a diversion of the East and West Ardsley supply of Soothill water already authorised. In the correspondence which followed, so far as it was a matter of supply, the Board treated the sanction as having been already given, and, so far as related to the terms of the agreement, treated it as requiring no sanction. It is not left to the Board to sanction the nature of the user by the local authority under section 61, though they have a wider right as to drainage under section 28.

[ROMER, L.J.—Cannot the Board give a partial sanction under section 61?]

Yes, if that is all that is asked for; if they are asked to sanction what think is too much they can only refuse not sanction less than is asked for.

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[They cited *Halifax Corporation v. Southill Upper Local Board* [1874].²]

R. J. Parker, in reply.—The real meaning of clause 9 was that if the sanction of the Board to the extended supply contemplated by the agreement was not obtained within six months the agreement should be void.

VAUGHAN WILLIAMS, L.J.—Upon this first point I am of opinion that the sanction of the Local Government Board was necessary in respect of the agreement of January 31, 1895, and that it has not been obtained, and therefore that the defendants are not either of them—that is to say, either the Wakefield District Council or the East and West Ardsley District Council—bound to pay for the water that they have not had under this minimum clause.

Now the agreement in question is an agreement which, if one looks generally at the clauses providing for the works which are to be executed, and also at clause 4, makes it plain that the Wakefield Council, which was the party to this agreement other than the Soothill Council, contemplated a scheme under which the Wakefield Council intended to supply the whole of their district, and intended not only to take water for the supply of their own district, but for "any place outside the said district which for the time being they may contract to supply, the quantities of water following." Then it sets out the minimum and maximum, and this agreement by clause 9 says, "The vendors shall forthwith apply for and with all due diligence endeavour to obtain the sanction of the Local Government Board to these presents, and, unless within six calendar months from the date hereof such sanction shall be obtained or it shall be ascertained that no such sanction is necessary, then this agreement shall be void." In my judgment, in construing clause 9 one must not construe the words "the sanction of the Local Government Board to these presents" as merely meaning the sanction of the Local Government Board to these two public bodies entering into this agreement, but construe it as referring to the sanction of

(2) 31 L. T. 6.

the Local Government Board to those things which are contemplated by the scheme which is set forth in this agreement, for which the sanction of the Local Government Board is necessary. It was known to all the parties to this agreement that the sanction of the Local Government Board to this agreement as a mere agreement was quite unnecessary. In the correspondence that had passed in earlier years between the Local Government Board and these public authorities, that had been pointed out again and again, and in my judgment the sanction which is referred to in clause 9 is the sanction to this action which is contemplated by the Wakefield District Council under this agreement. When one remembers that they contemplated a supply of water within such areas as obviously would require the sanction of the Local Government Board, in my judgment it is a condition precedent to the validity of this agreement and to the application of this agreement that that sanction should be obtained within the six months. The parties did actually apply to the Local Government Board for the sanction, and the Local Government Board, taking into consideration really that that which they were being asked to sanction was future supplies in such a manner as to prevent the necessity of any reference to the Local Government Board in future by the Wakefield District Council for sanction of the supplies contemplated, refused the application.

I have dealt with the matter at present as if the only defendants here were the Wakefield District Council, but really there is very little which need be added with regard to the East and West Ardsley District Council as an independent local body, which they have now been constituted. They are defendants as well as the Wakefield District Council in this action. With regard to them, one only has to look at the Order of August 8, 1895, which constitutes them an independent authority to see that the terms of clause 8 of that Order clearly do not operate to throw upon the East and West Ardsley District Council any liability in respect of this contract. In the first place, it is plain that no liability can be

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transferred from the Wakefield District Council to the East and West Ardsley District Council, except in respect of a contract under which the Wakefield District Council themselves were liable at the moment of the segregation of the East and West Ardsley District Council.

For the reasons I have already given, I am of opinion that the contract of 1895 is not a contract which could have been enforced against the Wakefield District Council; and even apart from that, if one had been of opinion that the contract was a contract binding upon the Wakefield District Council, it is perfectly impossible to say that the contract, which, admittedly—to put it shortly—was a contract for the purpose of enabling the Wakefield District Council to supply water throughout their district, and take their supply of water for that purpose, could fall within these words, which only apply to contracts which exclusively relate to the area which is taken over by the newly constituted urban authority.

For these reasons I think that on this first point we must decide in favour of the objection of the defendants, and hold that this contract is not a contract which is enforceable against either of the defendant bodies.

ROMER, L.J.—I have come to the same conclusion. With regard to the construction of section 61 of the Public Health Act, 1875, it appears to me that the Local Government Board, when an application is made to it for its consent under the section, may give a consent limited to a supply by the local authority to another local authority of water for the use of a particular district, part of the larger district over which the local authority has power. This view is one that has clearly been taken consistently by the Local Government Board throughout the correspondence which is in evidence in this case, and I think is a correct view. It is to my mind impossible to suppose that if an application is made for the Board's consent to the supply of water to a particular district, not constituting the whole of the district of the local authority requiring it, the Local Government Board are in this

dilemma—namely, that if they should think it is right that a consent to the supply of water be given for that particular district, but not to the whole district, they are either obliged to refuse to sanction the supply for the purpose of the limited area, or are obliged to sanction the supply to the whole of the area of the authority requiring the water, which they might think very undesirable. To my mind, section 61 does give power to the Local Government Board to give such a limited consent as I have indicated—that is to say, to limit the area for the use of which the water is to be supplied. Indeed, I do not think that the view that I am expressing is one which is really challenged by the respondents in the present case. There was an application made originally to the Local Government Board by the Soothill Local Board for a certain consent. The application was first made by a letter of February 13, 1882, from the Wakefield Rural Sanitary Authority, and the application is made in this form. It is a joint application sent in by the clerk of the rural sanitary authority of the Wakefield Union, which is the district requiring the water, and the clerk to the Soothill Local Board, the authority supplying the water, for the sanction to a scheme of water supply for the townships of East and West Ardsley, together with a draft of the proposed agreement. Now with reference to that application the Local Government Board took the view which I have expressed; so far as concerned the area for which the supply of water was to be used they had to consider that question, of course, and their consent had to be obtained before one authority could supply another with water for the purpose of their area. They point out that it is the view they have always taken—and I am not for a moment disposed to say that the Local Government Board were wrong in the view they took—that, so far as concerned the details of the agreement between the parties, the two local authorities, when once the sanction of the Board was given for the supply of water, the question as to terms was one that was left to the two authorities themselves, and the Local Government Board

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was not concerned with those terms at all. Accordingly, the letter I have mentioned was replied to by letter dated February 23, 1882, which refers to the application as being one in connection with the intended supply of water to the parishes of East and West Ardsley from the mains of the Soothill Local Board. So that both the application and the reply shew that the application is treated as one limited to the supply of water to the two particular parishes. On May 15, 1882, the Local Government Board, having in the meantime with reference to a proposed loan held an enquiry, wrote a further letter, in which they state that they have had a report and they are considering the application for the Board's consent under section 61 of the Public Health Act, 1875, to a supply of water being furnished to the Wakefield Rural Sanitary Authority by the Soothill Upper Local Board for the use of the inhabitants of these parishes—shewing the view that was taken both by the applicants and the Local Government Board of the limited nature of the consent asked for and ultimately given. In the same letter the Local Government Board say that no sanction of theirs is required to the proposed terms of the agreement between the two authorities, and they accordingly return the draft agreement between the parties which had been forwarded to them. Then on May 17, 1882, again the Local Government Board refer to the application for their consent under section 61 to a supply of water being furnished by the Soothill Local Board to the sanitary authority of the Wakefield Union for the use of the inhabitants of the parishes of East and West Ardsley, and that ultimately culminates in the formal consent being given. It was given on July 15, 1885, and sanctioned "the supply of water by the Soothill Upper Local Board to the Rural Sanitary Authority of the Wakefield Union for the benefit of the Parishes of East and West Ardsley." It is therefore clear that the application was treated by both parties as one limited to the supply of a particular area and for the benefit of that area—"for the benefit of the two parishes" as it is termed—and that the consent given

was limited to that. So far it appears to me that there is no ground for any contention that the Local Government Board had given any consent to the Soothill Local Board except to the supply of water limited to the use of the two parishes. A little later on a further application was made to the Local Government Board on behalf of the Soothill Local Board for the supply of water to a larger area. In this respect the Wakefield local authority, in whose district East and West Ardsley were, wanted authority for the water to be supplied from East and West Ardsley to a place called Middleton, which is an adjoining district. Accordingly, I find on November 16, 1889, the Local Government Board wrote to the Soothill Local Board that they understood arrangements had been made between the Wakefield Union and the Hunslet Union for the supply of water for the use of the township of Middleton, that being the adjoining district to East and West Ardsley, and that these arrangements had necessitated a modification of the agreements subsisting between the Soothill Upper Local Board and the first-named authority. The letter proceeded: "Under these circumstances it appears to the Board that their further sanction is required under section 61 of the Public Health Act, 1875, to the supply of water by the Local Board to the Rural Sanitary Authority of the Wakefield Union, and such sanction is hereby given." In my opinion the Local Government Board was quite correct in the view it took that, inasmuch as the area of supply was being extended, the sanction of the Local Government Board was necessary in order to justify or entitle the Soothill Upper Local Board to supply that extra area, and the consent is obviously limited to my mind in its true construction to the extension of the limited area to the township of Middleton.

We have then, so far, the consent of the Local Government Board given to the supply for East and West Ardsley, and we have further the extension of the right of supply for East and West Ardsley to supply a part of their water supply to Middleton. Now no further consent has ever been given by the Local Government

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Board to any extension of the area for the supply of water by the Soothill Urban Council to the Wakefield Rural Council. When the agreement which we have to consider of January 31, 1895, was come to it is clear, as it appears to me, that the parties to it considered—and I think rightly considered—that the agreement might require, at any rate as to the supply of water by the Soothill Urban Council, the consent of the Local Government Board, for that agreement was one which on the face of it extended the area of the supply of water by the Soothill Urban Council. It contracted for the supply of water to the Wakefield Council for the whole of the district of the Wakefield Council, of which East and West Ardsley formed a part, and a comparatively small part, and it was not even limited to that, for it contemplated a supply for the benefit of or for the use of any place outside their district which for the time being the Wakefield Council might contract to supply with water. It is clear to my mind that by that agreement there was a minimum amount of water fixed, which was fixed—at least I cannot help thinking it must be taken to have been fixed—with reference to the larger area. It was a different minimum from that provided for by the prior agreements which had been entered into under the sanction of the Local Government Board, to which I have before adverted. Now, that being the nature of the agreement come to, an application was made to the Local Government Board for its consent, and the application states in the clearest possible way the view of the Soothill Urban Council as to the effect and scope of the agreement. By the letter of April 11, 1895, the Soothill Urban Council called the attention of the Local Government Board to the fact that the supply for which sanction was now asked was for the whole of the district of the Rural District Council of Wakefield. Then follows the clause of the agreement: “or such part thereof as the purchasers may for the time being wish to supply or any place outside their said district which for the time being they may contract to supply.” That is clearly the correct view. There

were other provisions that I need not advert to, shewing that the view which I have expressed as to the true meaning and extent and effect of the agreement is the correct one—such, for example, as the provision for the establishment of means of storage at any place within their large district which the Wakefield Council might select for the holding of water to be supplied, and other provisions to the same effect. Now when the application was made to the Local Government Board for their consent to the supply of water by the Soothill Council to this greatly enlarged district, their answer is as clear as daylight. It is a clear refusal. On May 22, 1895, the answer is this: “It would not accord with the practice of the Board to give a general sanction to the supply in respect of all the contributory places in the Rural District by the Urban District Council, but the Board will be prepared to consider applications for such sanction in respect of particular contributory places when the supply is actually to be furnished.”

That to my mind is as clearly expressed a view as we could have. They were asked to sanction the supply to the whole of this area. The answer was: “We refuse; you must come, if you want to have extensions of area, and ask for extensions of area, and ask for extensions shewing the particular parts you want, and we will consider those separately and say whether we will or not give our consent.” It is clear that to that application at least a refusal is given. Two things then follow, to my mind: first, that to this agreement of January 31, 1895, the consent of the Local Government Board was to be obtained, and that the consent of the Local Government Board was refused. That being so, there is the provision in the agreement itself providing for the case where, if the consent of the Local Government Board was necessary, and was not obtained within the six months there specified, the agreement should come to an end. In my opinion, the consent of the Local Government Board was necessary to validate it. That consent was not obtained within the time fixed, and the whole agreement came to an end; for the agreement is not one which can be severed.

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I have tried to see whether I could construe the agreement as one which could be in some shape or form limited to East and West Ardsley and to the supply by East and West Ardsley. I cannot arrive at that. The agreement appears to me to be one which is not capable of division. I cannot think that the agreement is one which could be validated in any such way. I cannot make out any fresh agreement between the parties to the effect contained in the agreement of January 31, 1895, but so limited as to make it valid.

It appears to me, therefore, that, so far as this case is concerned, the rights of the plaintiffs must depend on the prior agreements, and not upon the provision of this agreement of January 31, 1895, and so far I do not agree with the decision of the Court below.

STIRLING, L.J.—I agree with what has been said by my brethren, and I have very little to add; but, as we are differing from Mr. Justice Swinfen Eady, I shall indicate very briefly the grounds on which my judgment is based. Under section 61 of the Public Health Act, 1875, any local authority supplying water within their own district may, with the sanction of the Local Government Board, supply to the local authority of any adjoining district on such terms as may be agreed on between such authorities. The supply of the water cannot be made without the sanction of the Local Government Board, but I agree with the view which has been adopted by the Local Government Board themselves, that if that Board consider the supply of water to be proper and sanctions it, this section does not throw upon them the obligation of entering into the nature of the terms upon which the two authorities propose to deal with one another in reference to the supply of water. Where the authority which desires to be supplied with water has jurisdiction extending over a wide area subdivided into various contributory districts it has been the practice of the Local Government Board, as shewn by the correspondence in this case, when an application is made for their sanction with respect to the supply of one of those con-

tributory districts, to grant that in a limited form—that is to say, the supply is sanctioned for the benefit of that contributory district, and no more; and if the authority which is to be supplied at a later date requires an extension of the authority so as to supply the water to another contributory district, the view taken by the Local Government Board is that they must come again, when the matter would receive further consideration and sanction be given or withheld according to the view which the Local Government Board may form at the time of the subsequent application. It seems to me that practice is one which the Local Government Board are justified in adopting by the terms of this Act.

Now, that being so, I may state the point which we have to deal with very shortly. Previously to January 31, 1895, the Soothill Local Board, which has the control of a large supply of water, had obtained the sanction of the Local Government Board to the supply of water to the district consisting of the parishes of East and West Ardsley, which is a contributory district within the Wakefield local authority. That sanction had afterwards been extended to the supply of the township of Middleton, which is another part, but beyond that the sanction had not gone. In January, 1895, the Soothill Urban Council and the Wakefield local authority came to terms as to the future supply, by which the Soothill authority were to come under obligation to supply water, and the Wakefield authority came under obligation to take a supply not merely for the portion of the Wakefield district in respect of which sanction had already been given by the Local Government Board, but for the supply of water to the whole of the Wakefield district, or such part thereof as for the time being they might wish to supply, and also outside their district. An agreement is entered into between the parties which contains a clause which has already been read. [His Lordship read clause 9, and proceeded:] And that is emphasised by a contemporary agreement bearing date the same day, by which, in the event of this agreement of January 31, 1895, becoming

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void under that clause, the parties are thrown back on the pre-existing agreements. Well, the application was made to the Local Government Board, and it took the form of an application to sanction the new agreement, of which a copy was sent to the Local Government Board. The answer of the Local Government Board is clear and distinct: "So far as we are asked to sanction the particular document which you have submitted to us, that is a matter with which we have nothing to do; we decline to sanction that document in itself. So far as regards matters to which our sanction is requisite, that is the sanction to the supply of water beyond the limited portions of the Wakefield district to which a supply has been already sanctioned, we refuse it." They say, "It is not in accordance with our practice, and we therefore decline to sanction any such supply until the time arrives when the supply is necessary."

Then what is the nature of this scheme. This scheme was one which contemplated the erection, amongst other things, of what is called means of storage at some place within the district capable of containing not less than 500,000 gallons of water, under certain conditions involving a large expenditure on the part of the board. It is obvious, I think, reading this document, that the meaning of clause 9 was this: "We are not to be in a position to be called upon to embark on the expenditure until we are satisfied that the Local Government Board will give such a sanction as will enable us to secure a customer for the large amount of supply which we are contemplating." That being so, it seems to me that the sanction which the Local Government Board refused to give was one which was necessary for the purposes of the agreement, and was not obtained. The sanction which was asked and which was sought to be obtained was one without which the agreement could not be legally carried into effect. It seems to me, that being so, on these short grounds, and agreeing with the rest of what has been said, that in this case we ought not to agree with the judgment of the learned Judge in the Court below.

The point as to the absence of any penalty clause in the prior agreements was then argued.

Micklem, K.C., R. J. Parker, and Tomlin, for the appellants.—The earlier agreements are not in the statutory form required by section 174 of the Public Health Act, 1875.¹ It is essential that there should be a pecuniary penalty for breach of the contract, and sub-section 2 is as obligatory as sub-section 1, and covers all contracts within sub-section 1—*Young & Co. v. Leamington Corporation* [1883]² and *British Insulated Wire Co. v. Prescott Urban Council* [1895].⁴

[*VAUGHAN WILLIAMS, L.J.*, referred to *Hunt v. Wimbledon Local Board* [1878].³]

The Judge in the Court below having held that the agreement of 1895 was valid, had to apply section 174, sub-section 2, to that agreement, under which there were no such works to be constructed as are included in the earlier agreements on which the question now arises. For instance, the appellants are under the obligation to lay pipes which are to vest in the respondents.

E. Clayton (Eve, K.C., with him), for the respondents.—First, section 174, sub-section 2, is directory only; and secondly, the present contracts are not the class of contract contemplated by that provision. It is to be confined to a works contract, under which works are to be done for the benefit of the authority. So far as the 1882 agreement imposes a duty of laying pipes on the appellants, that part of the agreement has been performed, and the plaintiffs are not suing on that part of the agreement; nor is it a work to be done by the appellants for a "price to be paid."

[*STIRLING, L.J.*—The "price" is the water.]

This contract is not such a one as is contemplated by section 174. Anyhow, the contract would not be altogether void, but only so far as the penalty

(3) 52 L. J. Q.B. 713; 8 App. Cas. 517.

(4) 64 L. J. Q.B. 811; 65 L. J. Q.B. 190; [1895] 2 Q.B. 463, 538.

(5) 47 L. J. C.P. 540; 48 L. J. C.P. 207; 3 C.P. D. 208; 4 C.P. D. 48.

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clause is necessary. It is like the case of a bill of sale not in accordance with the form in the Schedule to the Bills of Sale Act, 1882, which is only held to be void as regards the personal chattels comprised in it—*Burdett, In re; Byrne, ex parte* [1888].⁶ The penalty was only intended to be for the protection of the ratepayers of the urban authority, but a penalty on this urban authority itself would not be for their protection. No penalty could have been imposed on the rural authority for non-payment of the money due; a penalty clause to secure payment would have been quite futile. Sub-section 5 of section 174¹ supports the view that the penalty clause only applies in case of contracts for the supply of materials or for work to be done. No penalty could be imposed for non-payment of money.

[VAUGHAN WILLIAMS, L.J., referred to *Bullen and Leake's Precedents of Pleadings* (3rd ed.), p. 217.]

The provision for payment of interest in clause 12 and the provisions of clause 13 of the agreement of July 17, 1882, are a sufficient compliance with the requirement of a penalty. The contract did not require sealing, as it was not a contract necessary for carrying the Act into execution—*Att.-Gen. v. Gaskill* [1882].⁷ The general provisions of section 174 were not intended to apply to every contract made by an urban authority. It is not compulsory under the Public Health Act, 1875, for a local authority to supply water, though the Public Health (Water) Act, 1878, makes it compulsory on a rural authority. Sections 51 to 67 of the Act of 1875 contain complete provisions for the installing of a system of water supply. This agreement is merely for supply. The contracts for the supply of water to consumers which are authorised by the Act cannot come within section 174. If this section affects every contract in cases of an urban authority, their contracts will be in one form, those of a rural authority in another form.

Micklem, K.C., in reply.—It is clear that sub-section 1 of section 174 is obligatory whether the contracts are for

works or not; and sub-section 2 applies to "every such contract." It is not a question of what can be recovered, but of the procedure for recovering it.

[*Eve, K.C.*, referred to sections 33 and 52 of the Waterworks Clauses Act, 1847.]

Cur. adv. vult.

Aug. 11. — ROMER, L.J., read the following judgment: The question has been argued in this case whether the provision in section 174, sub-section 2 of the Public Health Act, 1875, as to some pecuniary penalty being stated is directory only or imperative. Although it is not necessary for the purposes of this appeal to decide the point, I think there is good ground for the view that the whole of sub-section 2 is directory only. Sub-section 1 is undoubtedly imperative. It requires every contract of the value or amount of 50*l.* to be in writing and sealed with the common seal of the urban authority. Now to carry that requirement out it follows that all the essential terms of the contract must appear in the written contract as sealed. That being so, when we come to consider the first part of sub-section 2 it is clear that it only points out what obviously are or may be essential terms in such a contract. If imperative, it would add nothing to the effect of sub-section 1, and the first part of sub-section 2, therefore, can only be useful in the view that it is directory, inserted in the section for the guidance and direction of the authority, in order to call its attention to what are ordinarily essential terms, which may exist, and which, if existing, ought to be inserted therein. Bearing that in mind, I think that the directory nature of sub-section 2 as a whole is further supported by the provision in the second part of the sub-section as to a penalty, for that provision in itself appears to me to be directory, for reasons which I will hereafter state in detail. It is, moreover, noticeable that sub-sections 3 and 4, which immediately follow, are clearly directory only. But, even assuming that the first part of sub-section 2, which, shortly speaking, requires that all the terms of the contracts coming within the operation of the sub-section

(6) 57 L. J. Q.B. 263; 20 Q.B. D. 310.

(7) 52 L. J. Ch. 163; 22 Ch. D. 537.

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shall be duly set forth, is imperative, it does not of necessity follow that the second part of the sub-section, dealing with the matter of a penalty, is not directory. The provision as to the penalty is distinct in character from the general provisions of the first part of sub-section 2. Those general provisions concern matters arranged between the parties, and require those matters to be truly stated. The provision as to the penalty points to the necessity or propriety of a particular clause being made to form part of the contract otherwise agreed to by the parties. It may well be, then, that the penalty provision is directory only, though the other provisions are imperative.

Now there are several considerations which, in my opinion, strongly support the view that the penalty provision must have been intended by the Legislature to be, and ought to be construed as being, directory only. In the first place, it is clear that some discretion as to the penalty is left to the urban authority. The amount of the pecuniary penalty and the form it should take are entirely in the discretion of the authority. Is it, then, unreasonable to suppose that in other respects the urban authority is to have a discretion? Suppose that in a particular case the authority has to make a necessary contract, in regard to which a substantial pecuniary penalty would be inappropriate, or would be so injurious as to prevent responsible contractors coming forward. Can the Legislature have intended that in such a case there should be no discretion on the part of the authority and no power on its part to impose no penalty, or to impose a merely nominal penalty? I add "impose a merely nominal penalty," for, if the provision be imperative, a nominal penalty might be impeached as a non-compliance with the sub-section. I think the Legislature could not have intended this, and I think my view is supported by the second part of sub-section 5, for that gives full power to an urban authority to compound for any penalty which may have been actually incurred, and, moreover, appears to contemplate the penalty being not in the contract, but in some independent bond or other document. If

the penalty clause was imperative, it must have appeared in the contract itself. But, further, it is clear that the penalty referred to in sub-section 2 is to be imposed not on the authority but on the contractors. The provision as to penalty is intended to benefit the authority and its ratepayers. It is difficult to suppose that the Legislature intended that the authority, acting in the interests of the ratepayers, should have no power to waive a provision intended only for the benefit of the authority and its ratepayers. Again, if the matter be regarded from the point of view of the contractor, it is difficult to suppose that by the sub-section a duty was cast upon him, in a case where the authority did not require a penalty, of insisting that a penalty must be imposed upon him in order to give him a valid contract.

It appears to me that to hold that the penalty provision is not directory only would lead to consequences that could not have been intended by the Legislature. Take a case where the authority, by a contract duly set forth and executed, contracts to sell goods to a contractor who contracts to pay for the same at a future time. Can the Legislature have intended that, if the authority did not impose a penalty on the contractor for non-payment at the time fixed, he, after obtaining and consuming the goods, could defeat an action against him for the price, because he was not required to pay a penalty for non-payment? It appears to me difficult so to hold.

For these reasons I think that the penalty clause should be held to be directory, though I fully admit that the point is one of great difficulty. This view renders it unnecessary for me to determine the question whether, assuming the penalty clause to be imperative, it has not been in substance complied with in the present case. This question itself is not free from difficulty, for the action is said by the plaintiffs to be based on the agreements of September 29, 1885, and December 3, 1890, which only continued the then existing provisions of the original agreement of July 17, 1882, those existing provisions, so far as they relate to acts to be performed by the

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defendants, being (shortly stated) for payment by them of the price of the water supplied, and for the keeping by them in due order of the water meters. As to these two provisions it is contended on behalf of the plaintiffs that a penalty, not in form, but in substance, has been imposed by clauses 12 and 13 of the original agreement; but, as I have said, in the view which I take as to the penalty clause, it is not necessary for me to decide upon this last-mentioned contention.

The further question was also argued whether sub-section 2 was not confined to cases of work done for or goods supplied to the urban authority, but under the circumstances this further question need not be determined by me.

VAUGHAN WILLIAMS, L.J.—Section 174, being a section which is intended, amongst other things, to protect ratepayers by the terms contained in the contract in the case of contracts entered into by the local authority, I cannot bring myself to hold that section 174, sub-section 2, is only directory. I should naturally, in a case like the present, have desired so to hold and defeat this defence.

STIRLING, L.J.—I feel the difficulty of the case, but I have brought myself to agree with the view of Lord Justice Romer.

Appeal allowed.

Solicitors—Barton & Pearman, agents for Scatcherd, Hopkins & Middlebrooks, Leeds, for appellants; Jaques & Co., agents for Scholesfield, Taylor & Maggs, Batley, for respondents.

[*Reported by A. Cordery and A. J. Spencer, Esqs., Barristers-at-Law.*]

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Aug. 10, 11. }

Local Government—Special Act—Local Authority—Land Acquired for One Purpose—Proposed User of Part for Another—Electric Lighting—Destruction of Refuse—Combined Scheme—Ultra Vires—Acquisition of Land by Agreement—Compulsory Powers—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 175—Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 10—Electric Lighting (Clauses) Act, 1899 (62 & 63 Vict. c. 19), schedule, s. 8.

It is ultra vires for a local authority who have obtained powers and acquired land for particular purposes under a special Act to use permanently the land so acquired, or any part thereof, for another purpose, although the same may be within powers given to them by some other Act.

It makes no difference whether the special Act confers power upon the local authority to acquire land by agreement only, or whether it also confers upon them compulsory powers of acquisition.

The Court granted an injunction restraining the defendants, who had acquired land for the purposes of their special Order under the Electric Lighting Acts, from using part of that land for the purposes of a refuse destructor connected in such a way with the electrical generating station that the refuse could be used instead of coal as fuel for the purpose of generating electrical energy.

Witness action.

The plaintiffs were the Attorney-General and the present trustees of the real estate devised by the will of the late Right Hon. Augusta, Baroness Llanover, and comprising freehold houses and building land in and near to the town of Pontypridd.

The defendants were the local authority for the urban district of Pontypridd.

In the year 1901 the defendants obtained a provisional order in the usual form under the provisions of the Electric Lighting Acts, 1882 and 1888, for supplying electric light to the urban district of Pontypridd. This order was confirmed on July 26, 1901, by the Electric Lighting Orders Confirmation (No. 6) Act, 1901.

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The defendants then began negotiations with the Llanover estate trustees for the purchase by agreement from them of a piece of land near Pontypridd, containing 1 acre 2,044 square yards, and in the correspondence which ensued between the clerk to the defendant council and the agent and solicitors to the Llanover estate trustees, the clerk always referred to a generating station for electric energy as being the purpose for which the defendant council required the land. On September 6, 1902, the Llanover trustees contracted to sell the land in question to the defendant council for the sum of 1,125*l.*, and on December 8, 1902, the sale was completed by the conveyance of the land to the council in fee-simple. The indenture of conveyance contained a simple recital of the agreement for sale, and did not impose any restriction or limitation upon the user of the land by the Council.

The defendants alleged, both in their defence and at the trial (at which they put in minutes of the council in support of their allegation), that in the early part of the year 1901 they, acting on the advice of their electrical engineer, determined for purposes of economy to adopt a scheme for generating electrical energy by means of heat derived from a refuse destructor to be erected in connection with their generating station, and that the land acquired from the Llanover trustees was acquired for the purposes of their scheme. After the acquisition of the land they proposed, in pursuance of this scheme, to erect a refuse destructor in connection with their generating station, utilising for that purpose a small portion of the land so acquired, not exceeding one-third of an acre in extent.

In the year 1902 the defendants applied to the Local Government Board for sanction to borrow the sum of 55,000*l.* for purposes of electric lighting, and the sum of 12,062*l.* for the erection of a refuse destructor. The Local Government Board thereupon held a local enquiry, and on March 13, 1903, wrote to the clerk of the defendant council asking under what authority, and for what purposes, the site was acquired, and under what statutory authority it was proposed to use the site for the erection of a destructor. In reply, the clerk,

on April 14, 1903, wrote that the land was primarily acquired for tramways and electric-lighting purposes, and that, having regard to the fact that it was proposed to work the destructor in conjunction with the generating station, the council did not think it was necessary to get the sanction of the Board to use a small portion of the land for destructor purposes.

Subsequently the Board sanctioned the borrowing by the defendant council of the sum of 49,000*l.* for the purpose of electric lighting, but, by a later letter of July 2, 1903, the Board refused their sanction to the proposed dust destructor on the ground that they were not empowered to sanction the use of the land for a purpose other than that for which it was acquired. The Board pointed out that in strictness the land, if not wanted for the original purpose, should be sold, and suggested that the difficulty might be removed by an arrangement with the original vendors for a transfer to them and re-sale by them to the defendant Council of the portion proposed to be used as a site for the refuse destructor, and the Board intimated that until the difficulty had been removed they would be unable to consider further the question of sanctioning a loan for the destructor.

The defendant council then approached the Llanover trustees with a view to a re-conveyance and re-sale of a small portion of the land as suggested by the Local Government Board. Correspondence ensued, and it was suggested, on behalf of the trustees, that they would not be willing to assist the council if the latter intended to use the land for the purposes of the destruction of refuse. Ultimately the trustees declined to entertain the application.

Thereupon the defendant council, on December 14, conveyed the site in question to a Mr. Davies as on a sale for 250*l.*, and he, the next day, reconveyed the site to the council for a like consideration. No money passed, but 250*l.* which the council alleged was the full and fair value of the site, was credited in their accounts to their electric-lighting undertaking, and debited to their account as sanitary authority.

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On January 12, 1904, the defendants commenced the erection of the proposed destructor on the site in question, the sanction of the Local Government Board, as the defendants alleged, being necessary only to a loan for the purposes thereof, and not to its erection.

On April 8, 1904, the present action was commenced by the Attorney-General and by the relation of the Llanover trustees for an injunction to restrain the defendants from erecting or permitting to remain erected on the land so purchased by the defendants as aforesaid, any building or works not required and intended for the purposes of or in connection with the defendants' electric-lighting undertaking, and from permanently using the said land or any part thereof for any purpose other than that for which it was originally acquired—namely, the production and supply of electricity.

Further, the relator plaintiffs alleged that the destruction of and dealing with refuse on any portion of the said land would cause a serious nuisance to, and materially diminish the value of, their property in the neighbourhood, and that the unauthorised use of the land by the defendants would inflict loss and damage to the Llanover estate, and they claimed an injunction to restrain the defendants from using the land, or any part thereof or any building thereon, in such a manner as to create a nuisance or cause damage to the Llanover estate.

The action now came on for trial upon the question of law involved in that part of the claim in which the Attorney-General was concerned.

Upjohn, K.C., and *Hornell*, for the plaintiffs.—The only power which the defendants had to acquire the land in question was under section 10 of the Electric Lighting Act, 1882,¹ and sec-

(1) Electric Lighting Act, 1882, s. 10: "The undertakers may, subject to and in accordance with the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any license, order, or special Act authorizing or affecting their undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any

tion 8 of the Schedule to the Electric Lighting (Clauses) Act, 1899,² and land so acquired must be used for the purposes of the Special Order. What is not for the time being acquired for those purposes must be sold. There has been no reported decision upon those sections, but provisions of a similar nature are contained in section 175 of the Public Health Act, 1875,³ and on that section there have been two decisions. In the earlier case—*Att.-Gen. v. Teddington Urban Council* [1897],⁴ where it appears that

patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply."

(2) Section 8 of the Schedule to the Electric Lighting (Clauses) Act, 1899, provides as follows:

"8. Where a local authority are the undertakers the following provisions shall have effect:—

"(1) Subject to the provisions of the Special Order and the principal Act the undertakers may acquire by purchase or on lease and use any lands for the purposes of the Special Order, and may also for those purposes use any other lands for the time being vested in or leased by them, but subject as to the last mentioned lands to the approval of the Local Government Board, and may dispose of any lands acquired by them under the provisions of this section which may not for the time being be required for the purposes of the Special Order: Provided that the amount of land so used by them shall not at any one time exceed in the whole five acres except with the consent of the Board of Trade."

(3) Public Health Act, 1875, s. 175: "Any local authority may for the purpose, and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district; they may also buy up any water mill dam or weir which interferes with the proper drainage of or the supply of water to their district."

"Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold at the best price that can be gotten for the same, and the proceeds of such sale shall be applied towards discharge, by means of a sinking fund or otherwise, of any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or if no such principal moneys are outstanding shall be carried to the account of such fund or rate."

(4) 67 L. J. Ch. 23; [1898] 1 Ch. 66.

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the land was acquired by agreement—Romer, J., held that land temporarily not wanted for the purposes for which it was acquired need not be sold under section 175, but must only be used for purposes justifiable as an interim innocent lawful user of the land, and not inconsistent with those for which the land was acquired. The defendants are proposing to use this land for purposes inconsistent with those for which they acquired it, and falling within the mischief contemplated in Romer, J.'s judgment. They are, in fact, in the position described by Rigby, L.J., in the later of the two cases—*Att.-Gen. v. Hamwell Urban Council* [1900]⁵—for even before they obtained their Order in 1901 they were contemplating the erection of a destructor on part of the land to be acquired. In that case the Court of Appeal held that land compulsorily acquired under section 176 of the Public Health Act, 1875, for a particular purpose cannot be permanently used for another purpose inconsistent with that for which it was acquired, and restrained the defendants from erecting an isolation hospital on land originally acquired for the disposal of sewage. The use of a piece of the land in this case for the purposes of a destructor is *ultra vires*. The Llanover trustees understood all along that the defendants were buying this land for their electric-lighting undertaking, and they would not voluntarily have sold it for refuse-destroying purposes. The defendants might have obtained compulsory powers, but then they would have had to pay a much higher price for it, and it is this enhanced compensation upon which the Court of Appeal lays stress in *Att.-Gen. v. Hamwell Urban Council*.⁵ Romer, J.'s judgment, however, did not in any way turn upon the question of compulsory acquisition, and is directly applicable. The plaintiffs are entitled to an injunction on the ground that the defendants are acting *ultra vires*.

Danckwerts, K.C., and *R. J. Parker*, for the defendants.—The defendants are not acting *ultra vires*. The borrowing powers of a local authority, incidence of expense,

restrictions, and mode of audit under the Public Health Act and the Electric Lighting Acts are similar. The expenses and loss, if any, under all the Acts fall on the same fund. In these respects, therefore, it makes no difference whether the defendants are acting under the one statute or the other. They can dispose of refuse under the Public Health Act, and therefore, under the powers of that Act and the Electric Lighting Acts, or one of them, they can use this land for the purpose of burning this refuse and running their generating station, the refuse being used instead of coal. *Quacunque via*, it is within the powers of the defendants, and it is a small matter under which Act they do it, as in either case the loss falls on the general district rate and general district fund. The distinction drawn between the electric lighting and the refuse destructor in the application to the Local Government Board was merely for purposes of account. The defendants, in fact, acquired the land for the combined purposes of refuse destructor, tramways, and electric lighting; and what the effect of that is with regard to their borrowing powers is not for this Court to consider, but is merely a question for the Local Government Board. The doctrine of *ultra vires* should not be construed so as to prohibit whatever may be fairly regarded as incidental to or consequential upon those acts which the Legislature has authorised—*per* Lord Selborne in *Att.-Gen. v. Great Eastern Railway* [1880].⁶ The defendants are under no statutory obligation to sell land not required for the purposes of their Order. Section 175 of the Public Health Act does impose such an obligation with regard to lands acquired, but not required for the purposes of that Act, but gives the Local Government Board power to direct otherwise, and that power must be interpreted reasonably—*Att.-Gen. v. Sunderland Corporation* [1876],⁷ where part of lands acquired for public pleasure grounds was allowed to be used as a site for a free library. The employment of the refuse to get up steam is reasonably incidental to the running of the generating

(6) 49 L. J. Ch. 545; 5 App. Cas. 473.

(7) 45 L. J. Ch. 839; 2 Ch. D. 634.

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station, and it is also a reasonable incident of utilising refuse profitably under the Public Health Act. There are two sets of powers enabling a combination to be effected, and the defendants intended all along to effect that combination, and they are not acting *ultra vires* in any way.

The cases cited on behalf of the plaintiffs are not applicable. They both were decided under a statute conferring compulsory powers of acquisition, and when those powers are present it does not matter that the land is in fact acquired voluntarily, because the compulsory powers are always held over the vendor *in terrorem*, and the principle remains the same in either event. Acts conferring compulsory powers contain also provisions obliging the purchasing body to sell so much of the land as is not required for the purposes for which it was acquired. The question has never arisen before under any statute which does not confer compulsory powers. Where there are no compulsory powers, different considerations arise. Those powers are not conferred by the Electric Lighting Acts, and consequently no obligation is imposed on the undertakers to sell land not required for their undertaking. The power of disposal is purely permissive—"may" dispose of. The Local Government Board may authorise land taken under the Public Health Act to be used for electric-lighting purposes, but the converse proposition is not required, because so long as the local authority act within their powers they can use land acquired under the Electric Lighting Acts (that is, land acquired voluntarily) for purposes under the Public Health Act. There is no statute and no decision applicable to this present case which says that they may not use the piece of land not required for the purposes of their Order for other purposes which are within their powers as a local authority. The power is much wider than a mere power to sell; it is a power to dispose of the land including, as the defendants contend, a power to utilise it for any purpose within their powers. There is no prohibition anywhere against that, and the provisions of section 175 of the Public Health Act ought not to be

read into the Electric Lighting Acts, to which the reason for their insertion in the earlier Act is not applicable, owing to the absence of compulsory powers. *Att.-Gen. v. Hamwell Urban Council*⁵ was only a decision on section 175.

Upjohn, K.C., replied.

FARWELL, J.—The proposition that counsel for the defendants wants me to affirm is, that where a local authority have acquired, under the provisions of the Electric Lighting Acts, land for the purpose of supplying electricity, they are at liberty to change their mind and use it for any other purpose for which they are by law authorised to use land. That is a proposition of very wide-reaching consequences, and it is entirely contrary, I think, to what has been understood with regard to the nature of the corporations which have power given to them in sections, so to speak, under different Acts of Parliament; and I am not disposed to be the first to apply that principle to the present case.

The defendants are called an urban district council, and they have power under the Electric Lighting Act, 1882, s. 10, for the purpose of supplying electricity, to acquire such lands by agreement, construct such works, acquire such licences for the use of patented processes, and so on, and do all such acts and things as may be necessary and incidental to such supply. Now that section gives power to acquire for the purpose of supplying electricity and nothing else, and that is the general Act applied to undertakers generally. Then there is section 8 of the Schedule to the Electric Lighting (Clauses) Act, 1899. [His Lordship read the section, and continued:] Now no doubt those two sections, read together, mean that the undertakers' powers of acquisition are limited to the special purpose, and their powers of user are also limited to the special purpose, because the sections appear to me to imply that if the lands are acquired for the purposes of the Order they must be so used, and if they are not so acquired for the purposes of the Order then they are not acquired under the Act, and are to be disposed of. I think "disposed of"

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there means sell out and out. I do not know that I need trouble with that in the present case, because I think it is admitted that the attempted disposition really adds nothing, and may be disregarded altogether. Under the Public Health Act, 1875, the defendant council have also power to acquire land for the purpose of a refuse destructor. To my mind these two objects and these two powers are perfectly distinct. It has been argued—and I am very much impressed with the ingenuity of the plan—that it is possible to use the heat generated by the refuse destructor for the purpose of supplying motive power to create the electricity; the scheme being to build a somewhat expensive and large and substantial building for the reception of the refuse of the town, which will then be destroyed by heat, and the gases will be led so as to add to the heat available for the production of electric power in the neighbouring electrical station. The defendants, as I understand it, have already erected a generating station for the supply of motive power, actuated by coal; and the scheme in question, if it is allowable, is to be used as an additional means of supplying that motive power. That appears to me, if I may say so, to be a very ingenious plan. The only question is whether it is possible to do it legally or not.

The first point is this: Was the land acquired under the Electric Lighting Acts or was it acquired under the Public Health Act? To my mind it is quite plain it was acquired under the Electric Lighting Acts for the purpose of electric lighting. The letters are clear on the subject. [His Lordship referred to the correspondence between the clerk to the defendant council and the agent or solicitors to the Llanover trustees, and continued:] On September 16, 1902, the agreement for sale was entered into, and the conveyance was dated December 3, 1902. Neither of those documents contains any restrictions upon the user of the land, but the vendors were told in these letters that the land was required for the generating station for the supply of electricity, and the notices proceeded on that basis. I should mention that there

are no compulsory powers in the Electric Lighting Acts—that is, the powers of the Lands Clauses Acts are not incorporated. After the conveyance the defendants applied to the Local Government Board, and they treated, as I think they were perfectly right in treating, the two matters as distinct. They asked permission to borrow 55,000*l.* for the purpose of their electric-lighting Act and 12,000*l.* odd for the purpose of their refuse destructor. A local enquiry was held, and they received a letter after the enquiry, on March 13, 1903, from the Local Government Board asking them what power they had to erect this refuse destructor, and they answered it on April 14, 1903: “I am directed that the site was primarily acquired for tramways and electric lighting purposes, although having regard to the fact that it is proposed to work the destructor in conjunction with the generating station, the council did not think it was necessary to get the sanction of the board to use a small portion of the land for destructor purposes.” To my mind it is clear that this suggestion that the refuse destructor is really a part of the generating station, if that be the contention, is a mere afterthought, and cannot be supported in fact. The two are really distinct. There was an ingenious way of using such heat as could be obtained from the refuse destructor, instead of letting it go to waste, but that, to my mind, does not make the refuse destructor part of the electric-generating system or make it the less a refuse destructor erected and to be justified only under the Public Health Act.

That being so, I have got the clean case of a local authority having power to carry on a refuse destructor, and having power to carry on electric lighting, and they now desire to use a portion of the land which is obviously acquired for electric lighting, in the middle of the piece of land which they have acquired from the relators, for the purpose of the refuse destructor. The question is whether that can be allowed or not. Counsel's proposition, as I have already stated, goes the whole length of affirming that, so long as the local authority have power to do this under any Act or in any way, it is

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immaterial that they acquired the land under a different Act for a different purpose, and he contends that they are authorised to use it for their other powers. In my opinion that cannot be supported. I think it would be a most dangerous precedent to create, and I think, moreover, that it is contrary to the decision of Mr. Justice Romer in the case of *Att.-Gen. v. Teddington Urban Council*.⁴ In that case there were no compulsory powers; and although it is quite true that if the Local Government Board had agreed—which, as I gather, they had not done—compulsory powers might have been brought into operation, the land was in fact purchased voluntarily, and there is nothing to shew that the local authority there ever could have got compulsory powers if they had pressed for them. Not a word was said in the argument or in the judgment to shew that the learned Judge paid any heed whatever to the question of compulsory powers or purchase by agreement, and the case, to my mind, is an authority against the contention in the present case. Further than that, there is a decision in the Court of Appeal in the case of *Att.-Gen. v. Hanwell Urban Council*⁵ which is distinguishable on the ground, no doubt, that the land acquired there was acquired under an Act which did contain compulsory powers. I think it would be hopeless to contend that when a local authority or other corporation use compulsory powers to take land for the special purpose mentioned in their Acts, they can possibly use this land so acquired for any other purpose. I think the reasoning of Lord Justice Rigby in that case applies to a case like the present, because, after all, this extent of land in a town is a very considerable amount, and I think it would be most dangerous to allow local authorities who have obtained powers for special purposes to use the land acquired for those particular purposes for another purpose altogether, although it may be within some other powers given to them under some other Act. Lord Justice Rigby in *Att.-Gen. v. Hanwell Urban Council*⁵ says: "What weighs most with me is this"—and before I read this I wish to say that I make no sort of imputation against the district

council here; if the Lord Justice uses the phrases that he has used under a sense of imputing any *mala fides*, I do not at all adopt it in that sense, I am using it simply on the question of *ultra vires*—"What weighs most with me is this (I do not suppose there has been anything not *bona fide* in the conduct of the defendants)—that if they are right there would be a great opening for manipulating these sections of the Act for unjustifiable purposes. A local authority might say, 'We are going to obtain land for a sewage farm; we had better take more than we really want in order that we may erect a hospital.' I do not for a moment suggest that anything of this kind was in the minds of the defendants;—but, if it is lawful to do what they propose doing, why should not such a scheme be carried out? The local authority might say 'Objection may be taken to the erection of a hospital, but we should be free to erect it when we have got the land and have obtained liberty from the Board to retain it instead of selling it. We could then apply it to any purpose for which we are authorised by statute to apply land.'" Now applying that to the present case, assume, as appears to have been the case, that the local authority had it in their mind to erect a refuse destructor on a portion of the land, they acquired the land for the purpose of electric lighting—I have already said that the refuse destructor in my opinion is not a portion of that—then, having the same, they say: "Why should we not, now that we have got the land, erect a refuse destructor upon it? We shall gain several advantages by it, one of which will be the use of the heat generated for the purpose of our electric-lighting system, instead of its waste." The answer to my mind is that given by Lord Justice Rigby: "The Act of Parliament has not authorised that"; and I think that these powers really must be treated as given separately, so that the powers are given in compartments, so to speak, and the local authority having obtained powers for one purpose cannot use the land so acquired for any other purpose without special leave—that is, if the Acts of Parliament have provided for such leave to be given. That is borne out in the pro-

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vision in section 8 of the Schedule to the Act of 1899, because there it does enable the undertakers, if a local authority, to use any other land vested in them for an electric-lighting purpose. It therefore negatives the generality of the defendants' counsel's proposition that so far it applies to all land; and I cannot myself see why it should be supposed to be possible for a local authority to use for electric-lighting purposes lands which they have acquired for other purposes only by leave, and yet that they should not require such leave for the converse case. I find nothing in the Act which justifies what they have done here; and although I confess to feeling some regret at having to cut short an ingenious scheme, I feel constrained to say that this is *ultra vires*, and to grant an injunction accordingly.

Solicitors—Freshfields, for plaintiffs; Sharpe, Parker, Pritchards, Barham & Lawford, agents for J. Colenso Jones, Pontypridd, for defendants.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

[IN THE COURT OF APPEAL.]

VAUGHAN WILLIAMS, L.J.	} MERCER v. DENNE.
STIRLING, L.J.	
COZENS-HARDY, L.J.	
1905.	
July 10, 11, 13, 14, 17, 18, 20, 21, 22, 24, 25, 26.	
Aug. 11.	

Custom—Fishermen of Parish—Private Land—Custom to Dry Nets—Variation in User—Validity—Time Immemorial—Impossibility of Custom—Onus of Proof—Recession of Sea—Accretion—Extent of Custom—Reputation—Evidence—Public Documents—Ancient Surveys and Reports—Maps and Plans—Admissibility—Prescription Act, 1832 (2 & 3 Will. 4. c. 71), s. 2.

A custom enjoyed from time immemorial, and continued without interruption, for all the inhabitants of a parish, being fishermen, to dry their nets on a particular piece of ground adjoining the sea, and the property of a private owner, at all times

necessary or proper for the purposes of the trade or business of a fisherman, is a valid custom; and the fact of the variation of the user owing to the fishermen taking advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner, does not make the custom invalid. The same customary right will extend to land added to the original piece of land by accretion owing to the recession of the sea.

The principles laid down in Dyce v. Hay (1 Macq. H.L. 305, 312) and Hull and Selby Railway, In re (8 L. J. Ex. 260; 5 M. & W. 327), applied.

Ancient documents such as surveys, estimates, and petitions of a private character, produced from the Record Office, which do not affect the King's property or revenues, are not public documents which are admissible as such according to the ruling of LORD BLACKBURN in Sturla v. Freccia (50 L. J. Ch. 86, 96; 5 App. Cas. 623, 643), or as evidence of reputation.

Depositions of deceased witnesses in support of proceedings by the Crown in the public interest are not admissible against strangers if it is not shewn that the deponents were persons to whom such knowledge of the subject-matter ought to be imputed as to make their statements evidence of reputation.

Confidential plans or reports made to the War Office are not admissible as evidence of reputation if they were not intended as permanent records affecting the property or revenue of the Crown or any grant by the Crown.

Evidence of particular facts cannot be admitted as evidence of reputation.

Written statements by a deceased person are not admissible as made in the course of duty unless it is shewn that it was the duty of the deceased person to do the particular thing and to record the fact of having done it contemporaneously.

Rowe v. Brenton (8 B. & C. 737) and Newcastle (Duke) v. Broxtowe Hundred (2 L. J. M.C. 47; 4 B. & Ad. 273) distinguished.

Appeal from decision of Farwell, J. (ante, p. 71; [1904] 2 Ch. 534).

The facts are stated at length in the report of the case in the Court below.

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The following statement is sufficient for the present purpose.

The plaintiffs sued on behalf of themselves and all other persons carrying on the trade or business of fishermen in the parish of Walmer, in the county of Kent, claiming a customary right for the purpose of the said trade or business to dry their nets on the beach ground of Walmer, and for that purpose to spread their nets upon the surface of the beach ground; and an injunction restraining the defendant from building on the beach ground so as in any manner to interfere with such right. The defendant was the owner of the soil of a piece of ground in the parish of Walmer, covered with shingle, situate near the sea, lying between the grounds of a house called Walmer Place on the north, the grounds of Walmer Castle on the south, the foreshore on the east, and a road called Wellington Road on the west, and containing about eleven acres. He had commenced operations with a view to developing this piece of ground as a building estate, and the action was brought in respect of this piece of ground. During the progress of the trial the parties obtained leave to amend their pleadings. The plaintiffs by their amended statement of claim alleged that the beach ground in question had always from time immemorial been unbuilt upon and open and uninclosed; also that from time immemorial, or alternatively for the full period of forty years next before the commencement of the action, or alternatively for the full period of twenty years next before that commencement, there had been, and of right ought to have been and still of right ought to be, an ancient and laudable custom within the parish of Walmer that all persons inhabitants of the parish carrying on the trade or business of fishermen, might use, have, and exercise, and that all such persons as aforesaid had from time immemorial, or alternatively for the said period of forty years, or alternatively for the said period of twenty years, used and of right had and exercised and still ought to use and of right to have and exercise, the right and privilege at all times necessary or proper for the purpose of the trade or

business of a fisherman to dry their nets upon the beach ground, and for that purpose to spread their nets upon the surface thereof, and they claimed an injunction accordingly. The defendant by his amended defence denied the alleged custom and right, and pleaded that if any fishermen ever dried their nets on the beach ground (which was not admitted) they did so occasionally and discontinuously and only at great and irregular intervals, and that the custom (if any) was uncertain, and the user (if any) was general, and not in any way limited to the inhabitants of Walmer, and that the alleged right was unreasonable and had never been exercised without the licence or consent of the landowner. He also alleged that in and prior to the year 1799, and for many years subsequent thereto, the beach-ground was below high-water mark and subject to the flux and reflux of the tide, and until comparatively recent years was wholly unsuitable and in fact incapable of being used for the purposes alleged by the plaintiffs, and that it was formed by gradual accretion and the receding of the sea, and was now above high-water mark and did not form any part of the seashore or foreshore, and that it formed part of the Leith estate, which he purchased from the owners in 1895; and he insisted on his right to build thereon.

Farwell, J., said that on the question of prescription he was bound by and would follow *Shuttleworth v. Le Fleming* [1865]¹ and *Mounsey v. Ismay* [1865],² and he accordingly held that the right asserted did not come within section 2 of the Prescription Act, 1832. With regard to the question raised by the defendant, he said the burden of proof was upon him.

Counsel for the defendant then tendered in evidence certain documents from the Record Office of dates between 1610 and 1634, which were a survey taken at the command of the Lord Warden of the Cinque Ports of the repairs necessary to be done to the castles of Walmer and Deal, notes of decay in and reparation required for Walmer Castle, petitions by the Captains of Walmer and Deal Castles to the Privy Council, or individual

(1) 34 L. J. C.P. 309; 19 C. B. (N.S.) 687.

(2) 34 L. J. Ex. 52; 3 H. & C. 486.

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members thereof, stating the damage caused to the castles by the sea, and estimates for the reparation of Sandowne, Deal, and Walmer Castles by Lieutenant-Colonel Paprill, his Majesty's Engineer for the fortification.

Farwell, J., declined to admit the documents in evidence (*ante*, pp. 75, 76; [1904] 2 Ch. 540, 541).

Counsel for the defendant then tendered an information by the Attorney-General in 1639 (*Att.-Gen. v. Hugeson and others*), and the depositions of witnesses taken in commission in support of it. The information was against persons who claimed to be entitled to the manor of Walmer, for allowing the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea. The depositions shewed that the sea at that time came close up to Walmer Castle.

Farwell, J., held that the depositions were not admissible in evidence (*ante*, pp. 76, 77; [1904] 2 Ch. 542, 543).

Counsel for the defendant then tendered various War Office plans and reports made in 1740, 1741, 1794, 1810, 1851, and 1852, and certain ancient maps and plans prepared by the direction of the Board of Ordnance in 1641, 1644, and 1647.

Farwell, J., refused to admit them in evidence (*ante*, pp. 77, 78; [1904] 2 Ch. 544).

Certain plans and reports made to the Board of Trade in 1867, tendered on behalf of the defendant, were rejected on the ground that they were confidential documents.

Two charts prepared—one by Spence in 1795, and the other by Bullock in 1844—were tendered on behalf of the defendant and admitted without objection (*ante*, p. 78; [1904] 2 Ch. 544).

Counsel for the defendant then tendered a copy of a map of the Downs, published in 1837, and made by Charles Labelye, engineer, late teacher of mathematics in the Royal Navy, assisted by several able pilots and by Mr. Phillips, master of the Royal Navy. The copy produced came from the Admiralty.

Farwell, J., held that the map was not admissible in evidence (*ante*, p. 78; [1904] 2 Ch. 545).

The facts as stated by Farwell, J., in his judgment were as follows: The piece of land in question was of little (if any) value except to the fishermen for drying their nets or to the defendant for building purposes—objects which were unfortunately inconsistent with one another. During the whole of living memory, extending over upwards of seventy years in the case of the plaintiffs' witnesses and by repute for many years before their birth, the fishermen of Walmer (that is, the inhabitants of the parish of Walmer who were fishermen) had used this piece of ground for the purposes of drying their nets. The practice had varied somewhat during the last seventy years. There are three fisheries practised at Walmer—the mackerel, the herring, and the sprat fisheries. The mackerel season is from May to July and in September and October, the herring fishery from October to Christmas, and the sprat fishery from November to March. Down to some thirty or thirty-five years ago herring nets and mackerel nets were cutched or tanned at the commencement of and in preparation for the fishery season, and were then spread out to dry on the piece of ground in question, and at the end of the season the boats were brought up close to this piece of land and the nets were taken directly to it and spread out on it, or, if the weather did not permit of that, the nets were landed nearer the town and were then brought in carts to this piece of ground and spread out to dry before being put away for the winter, and that practice still remained with regard to the mackerel nets. Down to the same period the sprat nets were not spread on this piece of ground at all. About thirty or thirty-five years ago the practice of oiling the herring nets instead of cutching them and of oiling the sprat nets came into use, and these nets were also spread on the same piece of ground to dry. The time required for drying after oiling is longer than was required for the earlier process, and sprat nets are now put on the land at a period during which no nets used to be put there so far as living memory goes. The fishermen had occasionally in former years dried their nets in different places along the

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beach, but the piece of ground in question was that which had always been used, and to the extent at times of covering its whole area, and had been known to the fishermen and their forefathers and spoken of amongst them as their own ground.

The beach in question was a ridge which from time immemorial had acted as a barrier against the sea for the protection of the land behind it, that land being on so low a level that but for the beach it must have been submerged, but it had never been so in historic times. The coast in that neighbourhood had for the last century, at any rate, been subject to fluctuations by way of increase by accretion and of decrease by demolition owing to the action of the winds, and the actual ascertainment with certainty of high-water mark at a given date was a matter of difficulty and time, and could not be effected by a mere survey. In 1795 high-water mark was approximately as at present. In 1844 the sea had advanced fifty or sixty yards, and a portion of the beach ground in question was below high-water mark, and so inappropriate for drying nets, but that portion of beach had since been regained.

Farwell, J., held that the custom asserted by the plaintiffs was a valid custom, and was not unreasonable; that the variation in user arising by reason of the varying exigencies of the fishing industry did not render the custom void for uncertainty; and that the custom extended over additional ground added to the original ground by accretion owing to the recession of the sea. He granted the injunction as asked.

The defendant appealed.

The Court, on the hearing of the appeal, called in the aid of Captain Langdon, from the Admiralty, as an assessor under section 56 of the Judicature Act, 1873, with reference to the interpretation of Spence's chart of 1795, the question being as to which line on the chart represented high-water mark.

Levett, K.C., Jenkins, K.C., and Gatey, for the appellant.—The main questions raised by this appeal are—first, whether there is any custom for the fishermen of

Walmer to spread and dry their nets on the beach above high-water mark; and secondly, whether the land added by accretion to the soil of the manor of the appellant's predecessors in title is subject to the rights claimed by the fishermen. There is also a further point as to exclusion by Farwell, J., of certain ancient documents as evidence.

To acquire an easement there must be a dominant tenement, and there is none here. The question is whether there is any custom which will prevent the appellant from building on the land over which the fishermen claim to have the right to spread their nets.

The authorities which lay down the principles that will guide the Court in considering the evidence are 7 *Viner's Abr.*, pp. 164, 178, tit. "Custom"; 2 *Bacon's Abr.*, pp. 564, 566, 575, 576; *Hammerton v. Honey* [1876],³ *Dyce v. Hay* [1852],⁴ and *Blundell v. Catterall* [1821].⁵ 7 *Viner's Abr.*, at p. 164, shows the difference between custom and prescription. We start with the definition there given as the basis upon which the evidence in the present case has to be considered. Locality is the essence of the custom; it cannot displace the common law, which, on the facts of the case, applies here.

There is no authority on the point as to drying nets; but in *Viner* are stated the reasons why it is considered a good custom. It is also referred to in the *Case of Tanistry* [1608].⁶ In 2 *Bacon's Abr.*, at p. 576, there is a statement, which is against our contention, that "General customs may be extended to new things, which are within the reason of those customs." That is the respondents' case here; but it is a proposition that cannot be supported.

[VAUGHAN WILLIAMS, L.J.—The authorities cited for that proposition are *London City v. Vanacker* [1699]⁷ and *Percival v. Crispe* [1682].⁸ The latter case does not appear to help one way or the other; but the other case is against you.]

(3) 24 W. R. 693.

(4) 1 Macq. H.L. 305.

(5) 5 B. & Ald. 268.

(6) Davis, 28.

(7) 12 Mod. 270, 271; 1 Ld. Raym. 496 499.

(8) T. Jones, 204.

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The alleged custom here is uncertain, and is void on that ground. The kind of nets used and the times at which they were spread have varied within the time of legal memory. Moreover, the alleged custom is such as to be destructive of the appellant's rights of property, at any rate for weeks at a time, and it is therefore unreasonable. In *Dyce v. Hay*⁴ it was laid down by Lord St. Leonards that "There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected." One very material consideration which nullifies nine-tenths of the evidence, and which appears to have been overlooked by Farwell, J., is that by section 11 of the White Herring Fisheries Act, 1771 (11 Geo. 3. c. 31), the statutory right to dry nets only goes to one hundred yards. The alleged customary right goes beyond this limit. The existence of the statutory right to dry nets has a material bearing upon the evidence.

Again, oiling the nets is not drying them. The sprat nets are oiled once, and that lasts several years. They are never "dried" in the strict sense. As to the herring nets, there may have been a right to dry them; but there is no evidence to warrant the finding of any custom. The fishermen would have had a right to dry their nets on this land under 11 & 12 Geo. 3. c. 31. Oiling nets is not within the custom as alleged; it is a kind of manufacturing process, and only began about forty years ago. It necessitates occupation of the beach for a longer time than the drying.

[*Levett, K.C.*, tendered in evidence the documents from the Record Office mentioned *ante*, p. 75, which were rejected by Farwell, J., and referred to *Sturla v. Freccia* [1880].⁹]

Upjohn, K.C., and *R. J. Parker*, for the respondents.—None of these documents are admissible. The first ground suggested is that they are admissible as coming within the doctrine of *Price v. Torrington (Lord)* [1703],¹⁰ as entries made by a deceased agent; but in order to

be admissible on this ground the entry must record a fact transacted by the agent in the ordinary course of business and contemporaneously recorded as a duty—*Doe d. Patteshall v. Turford* [1832],¹¹ *Chambers v. Bernasconi* [1834],¹² *Smith v. Blakey* [1867],¹³ *Evans v. Merthyr Tydfil Urban Council* [1898],¹⁴ *Davies v. Lowndes* [1843],¹⁵ and *Brain v. Preece* [1843].¹⁶ None of these documents answer these conditions. There is nothing to shew that they were made contemporaneously with a transaction which it was the duty of the deceased to record. The surveyor's duty was limited to surveying the property, and everything in the report might be mere hearsay.

[*STIRLING, L.J.*, referred to *Mellor v. Walmesley* [1905].¹⁷]

The entries there were made by the surveyor for the purposes of the survey on which he was professionally employed.

[*COZENS-HARDY, L.J.*, referred to *Phillipps v. Hudson* [1867].¹⁸]

Secondly, it is clear that they are not admissible as public documents made by a public officer within the rule stated by Lord Blackburn in *Sturla v. Freccia*.⁹

Thirdly, they are not admissible on the ground of public reputation. They contain no matter of public reputation. What was then high-water mark is a matter of fact not of reputation—*Phillipps v. Hudson*,¹⁸ *Evans v. Merthyr Tydfil Urban Council*,¹⁴ *Newcastle (Duke) v. Broxtowe Hundred* [1832],¹⁹ *Reg. v. Bliss* [1837],²⁰ *Fox v. Bearblock* [1881],²¹ and *Taylor on Evidence* (9th ed. 1895), pars. 608, 610, 617. Reputation is, no doubt, admissible to prove the existence of the custom, but not to prove a particular fact which may or may not be relevant. The question is, for what purposes is the evidence offered? Evidence to shew that at

(11) 1 L. J. K.B. 262; 3 B. & Ad. 890.

(12) 3 L. J. Ex. 373; 1 Cr. M. & R. 347.

(13) 36 L. J. Q.B. 156; L. R. 2 Q.B. 326.

(14) 68 L. J. Ch. 175; [1899] 1 Ch. 241.

(15) 12 L. J. C.P. 506; 6 Man. & G. 471;

7 Scott (N.S.) 141.

(16) 11 M. & W. 773.

(17) *Ante*, p. 475; [1905] 2 Ch. 164.

(18) 36 L. J. Ch. 301; L. R. 2 Ch. 243.

(19) 2 L. J. M.C. 47; 4 B. & Ad. 273.

(20) 7 L. J. Q.B. 4; 7 Ad. & E. 550.

(21) 50 L. J. Ch. 489; 17 Ch. D. 429.

(9) 50 L. J. Ch. 86, 96; 5 App. Cas. 623, 643.

(10) 1 Salk. 285; 2 Ld. Raym. 873.

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a given time the sea came up to a certain point is evidence of a fact, not matter of reputation.

Levett, K.C., in reply.—The argument is that the party seeking to establish the custom is entitled to use hearsay evidence, but that the party disputing the custom is not. That cannot be sustained—*Stephen's Digest of the Law of Evidence* (6th ed. 1894), art. 30, c. iv. p. 41. The plaintiffs must prove continuous user from Richard I, and how can they say that it is not relevant whether at the time of these repairs the sea was coming over the land or not?

[*VAUGHAN WILLIAMS, L.J.*, referred to *Plaxton v. Dare* [1829].²²]

The man who made the report was acting within his duty in referring the damage to the action of the sea. As to the depositions taken on the information of 1639, I ask the Court to find evidence of reputation in these documents.

The position of the high-water mark at the time is a matter of public importance and interest, and evidence as to it is admissible as evidence of reputation—*Thomas v. Jenkins* [1837].²³ A plan shewing high-water mark made by a man who is dead is of the same value as a statement made by a man now dead of what he knew. Hearsay evidence, no doubt, is as a rule not admissible; but it is sometimes admitted as secondary evidence, and if it is ever to be admitted this is a proper case for it. Hearsay evidence cannot be given of facts from which the fact sought to be proved may be inferred—*Reg. v. Bliss*²⁰; but the evidence here consists of declarations of facts within the knowledge of deceased persons, and so they are *prima facie* admissible, and the question is whether they are matters of general interest and importance. Statements of fact by deceased persons are admitted, because if the persons who made them had been alive they could have stated them of their own knowledge.

[He tendered the depositions taken in support of the information by the Attorney-General in 1639 mentioned *ante*, p. 76.]

(22) 9 L. J. (o.s.) K.B. 98; 10 B. & C. 17.

(23) 6 L. J. K.B. 163; 6 Ad. & E. 525.

Upjohn, K.C., and *R. J. Parker*, for the respondents.—This case is the converse of *Thomas v. Jenkins*.²³ Our contention is—First, that the issue on which this evidence is tendered is not one on which hearsay evidence can be tendered at all. Secondly, if that is not correct, the statements in these depositions are not admissible as evidence of reputation. They are not declarations by the deponents of what they knew or of what they had heard as to the reputation. They are statements of particular facts, which are not the direct facts in issue, but only collateral—facts from which possibly the matters in question may be argued or inferred; and they come within the ruling in *Ireland v. Powell* [1802],²⁴ cited in *Reg. v. Bliss*.²⁰ Thirdly, this proceeding by the Attorney-General against an adjoining owner, a trespasser, is entirely *res inter alios acta*, and that cannot be of any authority in this case. The fact that the evidence related to a matter of public interest does not make it evidence for ever against every one. The public interest is with the matter for which the evidence was tendered, not with the evidence itself. Fourthly, these declarations are quite irrelevant to the matter in issue here.

[*VAUGHAN WILLIAMS, L.J.*, referred to *Barracough v. Johnson* [1838].²⁵]

The depositions are not admissible on the ground of reputation. The issue here is whether the land was *terra firma* or under the sea at a certain date. That is a matter of fact, and reputation to be admissible must be of a right, not of a particular fact—*Outram v. Morewood* [1793],²⁶ *Morewood v. Wood* [1791].²⁷ *Nicholls v. Parker* [1805].²⁸ *Clothier v. Chapman* [1805].²⁹ *Weeks v. Sparks* [1813].³⁰ *Barracough v. Johnson*,²⁵ *Att.-Gen. v. Emerson* [1891].³¹ *Mossley v. Davies* [1822].³² *Cooke v. Banks* [1826].³³

(24) Peake Evid. (5th ed.), p. 16.

(25) 7 L. J. Q.B. 172, 173; 8 Ad. & E. 99, 104.

(26) 14 East, 330n.; 5 Term Rep. 123.

(27) 14 East, 327n.

(28) 14 East, 331n.

(29) 14 East, 331n.

(30) 1 M. & S. 679.

(31) 61 L. J. Q.B. 79; [1891] A.C. 649.

(32) 11 Price, 162, 180.

(33) 2 Car. & P. 478.

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Creise v. Barrett [1835],³⁴ *Ireland v. Powell*,³⁴ *Reg. v. Bliss*,³⁰ *Taylor on Evidence* (9th ed.), par. 617, p. 400, *Taylor v. Devey* [1837],³⁵ and *Pim v. Curell* [1840].³⁶

Further, looking at the issues in the information and the parties, these depositions would not be evidence in this case even if hearsay evidence were admissible on the point, because no person there was in the position of the plaintiffs here, or even of the appellant — *Freeman v. Philipps* [1816]³⁷ and *Taylor on Evidence* (9th ed.), par. 631, p. 410.

Further, the evidence is irrelevant because it relates to a spot four hundred yards away laterally from the spot in question, and it would be necessary for the appellant to prove that all the conditions are identical — *Thomas v. Jenkins*.²³

Levett, K.C., on the admissibility of the War Office plans and maps mentioned *ante*, p. 77.—The evidence is relevant, for it is a matter of common-sense on the map that if the land was covered by the sea in the one place, it must equally have been so in the other. At any rate, the evidence cannot be now excluded for what it is worth on the ground of irrelevancy. The broad objection taken against us is that the issue is not one on which hearsay evidence is admissible. But what is the issue? The issue is whether the local law of Walmer gives to the plaintiffs the right they claim. Local law can only be proved by inference, and the actual state of affairs at any time is material. Evidence of reputation is admissible, either affirmatively to prove the custom or negatively to disprove it; but there is this distinction—that while affirmative facts are only so many items in support of the custom, one negative fact may be sufficient to wholly or partially disprove it. The objection that the information was *res inter alios acta* does not prevent the documents from being admissible as hearsay evidence of the state of things at that time.

(34) 4 L. J. Ex. 297; 1 Cr. M. & R. 919.

(35) 7 L. J. M.C. 11; 7 Ad. & E. 409.

(36) 6 M. & W. 234, 266.

(37) 4 M. & S. 486.

Upjohn, K.C., and *R. J. Parker*, for the respondents.—The maps are inadmissible on the grounds stated by Farwell, J., in the Court below.

[VAUGHAN WILLIAMS, L.J., referred to *Rowe v. Brenton* [1828].³⁸]

To be admissible they must be shewn to be public documents. They must be made by a public officer in authority—*Evans v. Taylor* [1838].³⁹

[COZENS-HARDY, L.J., referred to the report of *Rowe v. Brenton*³⁸ by George Concanen.]

The caption of seisin in *Rowe v. Brenton*³⁸ was made by letters patent of the Crown.

Levett, K.C., replied.

VAUGHAN WILLIAMS, L.J.—This is a case which turns largely upon the admissibility in evidence of certain documents either as public documents or as evidence of reputation.

In addition to the questions as to the admissibility of these documents, there is also the question as to whether land added by accretion where the sea has gradually receded takes the character of and becomes subject to the same customs as the land to which it is added.

The documents as to which the questions as to admissibility of evidence were raised were documents which it was sought to put in evidence as part of the proof that the land, in respect of which the custom of fishermen to dry their nets was claimed, had been within the legal memory covered by the flux and reflux of the tide, which is inconsistent with the custom having existed from time immemorial.

Now the first documents with which Mr. Justice Farwell deals in the report of his judgment were ancient documents all produced from the Record Office.

Mr. Justice Farwell begins his judgment by citing the ruling of Lord Blackburn in *Sturla v. Freccia*⁹: "I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be

(38) 8 B. & C. 737.

(39) 7 L. J. Q.B. 73; 7 Ad. & E. 617.

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the case with the bishop acting under the writs issued by the Crown. That may be said to be *quasi-judicial*. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards." It is to be observed that the document, the admissibility of which either as a public document or as coming within the doctrine of *Higham v. Ridgway* [1808]⁴⁰ was negatived by the House of Lords in the case in which Lord Blackburn enunciated the ruling above cited, was a report of a committee made to the Genoese Government with reference to the qualifications of a candidate Mangini for the appointment as agent for that Government, and the object of tendering that report in evidence was to prove the age and birthplace of Mangini. This report was not a report in any way affecting the property or the revenue of the Crown. It was not intended in any sense to be a public record; it was intended to serve a temporary purpose—that is to say, to enable the Government to judge of the qualifications of Mangini: it certainly was not made for the use of the public, and that the public should be able to refer to it; and although it may be that the ruling of Lord Blackburn covers the case of a record relating to alienation of Crown property or a conveyance to the Crown of property, or other records directly affecting the revenue of the Crown, I do not think that Lord Blackburn had such cases present to his mind.

The case of *Rowe v. Brenton*³⁸ seems to deal somewhat with this point. In that case there was admitted in evidence a caption of seisin put in in support of the case of the defendant, who claimed the ore in question in the action as lessee under the Crown in right of the Duchy of Cornwall. The caption of seisin was produced from the King's Remembrancer's Office, which was proved to be the proper depository for the Minister's accounts of the King and the Duke of Cornwall. The document purported to be a caption of seisin to the use of the Duke of Cornwall

(40) 10 East, 109; 2 Sm. L.C. (11th ed.), 327.

by James de Wodestocke and William de Monden, assigned by the letters patent of the duke "to do the same" on Monday, May 12, 11 Edw. 3. 1338. It was objected that it was not a public document executed under any public authority, but a mere account of something done under a letter of attorney from the Duke of Cornwall, who was merely the highest in the kingdom, and that the public had no interest in his acts nor any with respect to the revenues of the dukedom, and that consequently this instrument could not be used for the purpose of affecting the rights of third persons. Lord Tenterden, accepting the proposition that this instrument could not have been put in evidence if it had been a mere private document, says: "In general, that is true. But with regard to the Duchy of Cornwall, the case is very different; for when there is no Duke of Cornwall, the possessions granted to him revert to the Crown. The Crown representing the public, has an interest in everything relating to the Duchy of Cornwall and its revenues; and it is immaterial whether any act affecting them is done by the King when there is no Duke of Cornwall, or by the Duke of Cornwall when there is one. The instrument in question is, therefore, a document affecting the interests of the public, and must be received." There is a much fuller report of this case by Mr. Concanen, barrister-at-law, and I think that it may be that it appears from that report that, although De Wodestocke and De Monden were commissioners, acting on behalf of the duke, assigned to make the caption in question, and that the caption must have been made in the presence of the conventional or assessional tenants, because they are stated to have made delivery,—yet there does not appear to have been anything in the nature of an inquisition in the presence of the tenants, or that anything happened to justify the conclusion that the commissioners were performing a judicial or *quasi-judicial* duty. The document would seem from Concanen's report to have been admitted because it was a register in the King's exchequer accounts affecting the King's title as against the free tenants, and affecting the King's title by stating the

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services and privileges of the free tenants, and that the King can only make title or give title by matter of record—see *Chitty on Prerogative*, p. 389, where it is stated: "It is a clear rule, that, as well for the protection of the King as the security of the subject, and on account of the high consideration entertained by the law towards his Majesty, no freehold interest, franchise, or liberty, &c., can be transferred from the Crown but by matter of record." In the case of *Evans v. Taylor*³⁹ the case of *Roue v. Brenton*³⁸ was much discussed, especially that part of it which related to the admissibility of a survey made on an extent taken conformally to the statute *Extenta Manerii* (4 Edw. 1. stat. 1), and the Court held that the survey tendered in *Evans v. Taylor*³⁹ was not admissible, because, being a survey for the purpose of defining boundaries of manors, the authority to make it could not be based on the statute, which gives no power to define such boundaries, and no authority to make the survey was proved in that case except under the statute.

I have thought it right to make these observations upon the scope of the judgment of Lord Blackburn in *Sturla v. Freccia*⁹ because I think Mr. Justice Farwell in his judgment carries the ruling of Lord Blackburn rather farther than Lord Blackburn intended. But I do not think that, even on the assumption, which I am inclined to think is the right one, that records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King's title are admissible as against all the world whenever there comes in question in any action a matter directly affected by such record, the documents 1 to 7 dealt with in the judgment of Mr. Justice Farwell are any of them admissible in evidence in this case. None of those documents are records affecting the King's property or revenues. The documents were not intended as such. Each of them was to serve a temporary purpose, and in no way affected Crown property, Crown revenues, or Crown grants, when the respective purposes were served. I agree therefore with Mr. Justice Farwell that none of these documents are admissible

as public documents. I also agree with him that none of them are admissible as coming within the doctrine in *Price v. Torrington (Lord)*,¹⁰ as explained in *Doe d. Patteshall v. Turford*¹¹ and *Smith v. Blakey*,¹³ which makes it a necessary condition of the admissibility in evidence of the entry of the deceased agent that the entry should be of a transaction effected or done by the person making the entry, and that the entry should be made contemporaneously with these transactions thus affected or done, which I suppose means that the entry must be proved to be the last step in a continuous chain of duty, and that it is made in the usual course and routine of duty. These conditions are not present with regard to any of these documents. There is nothing to shew that any of them were made contemporaneously with the doing or effecting of a transaction which it was the duty of the deceased person to record. There is no evidence what the instructions were, or of the relation of these instructions to the document sought to be put in evidence or of the source of the knowledge or information on which the contents of the report or estimate were based. All this may have been mere hearsay as regards the person making the report. These reports are nothing like the field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed, which we held to be admissible in *Mellor v. Walmesley*.¹⁷

The next question which was dealt with by Mr. Justice Farwell was the question of the admissibility of certain depositions. Those depositions were made in the course of the prosecution of an information by the Attorney-General in 1639 against certain persons who claimed to be entitled to the manor of Walmer for causing, or suffering, the destruction of a bank between the sea and Walmer Castle, whereby the King had been put to great expense in protecting the castle from the sea, and the depositions in support thereof shewed that the sea then came up close to that castle. I observe that in that information there was also a question raised as to the title of the Crown; and if it had been that that

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matter had been dealt with in the interlocutory order which was made on this information, reasons might have been urged for admitting this document in evidence which cannot be urged now, because the judgment in question omits all reference to any question of title. Now the question is whether these depositions are admissible. Of course, the parties to the present action of *Mercer v. Denne* are in no sense the successors of any party to that information, and therefore, if these depositions are admissible, they can only be admissible as against strangers to that proceeding if, as Mr. Justice Farwell says, they relate to some subject-matter where reputation would be evidence.

Speaking for myself, I do not think that the admissibility of these depositions is to be determined by the subject-matter of the present action. In my judgment the Nottingham Castle case (*Newcastle (Duke) v. Broxtowe Hundred*¹⁹) and the case of *Thomas v. Jenkins*²³ both go far to shew that in the case of evidence of reputation it is sufficient, if a question arises which is directly affected by the document sought to be put in, if the subject-matter of the reputation is one in which the public are interested. Sometimes the word "public" means the public at large; sometimes it means a section of the public like the tenants of a manor, or like the conventional free tenants in the district of Cornwall mentioned in the case of *Rowe v. Brenton*.³⁸ Therefore, if it had been shewn that these depositions had been made by persons to whom it was right to impute knowledge of these matters without any special proof, I should have thought that the depositions might have been put in evidence, not as depositions, but as something which was written by the deponents in reference to some subject-matter which was of public interest. Therefore, to my mind, what one has to ask oneself is—first, was the subject-matter which was dealt with in that information one of public interest? Otherwise in my judgment this document could not be made evidence of reputation against persons who are not parties to the information. And the second question is, were the deponents persons to whom we ought to impute such know-

ledge of the subject-matter as to make these statements evidence of reputation? In *Newcastle (Duke) v. Broxtowe Hundred*¹⁹ the documents which were allowed to be put in evidence were documents which, it was said, shewed that Nottingham Castle was within the hundred of Broxtowe. What was said of the documents sought to be put in, which were orders of the magistrates as to matters over which they had no jurisdiction—that is to say, no judicial jurisdiction—was that they were orders made by the Justices of the peace assembled in session, who, although they were not proved to be residents in the county or hundred, must, from the nature and character of their office alone, be presumed to have sufficient information on the subject to which these documents related. I ask myself the question whether these persons were persons to whom knowledge ought to be imputed in this way so as to make their statements in their depositions admissible in evidence? I do not think that they were, and, under those circumstances, I do not think that these depositions were admissible in evidence. It is not necessary, as I take that view, that I should deal with any other question affecting the admissibility of the depositions.

Now the next documents with which Mr. Justice Farwell deals are War Office plans, and he deals with those as follows: "The War Office plans are clearly within my previous decision—they are not public documents. So far as they can be treated as evidence at all, they are evidence of particular facts and not of reputation." I agree, although not perhaps exactly on the grounds put forward by Mr. Justice Farwell, that these War Office plans are not records. They are not records which were intended as permanent records affecting the property of the Crown, or revenue of the Crown, or any grant by the Crown.

Then it was said that Mr. Justice Farwell thought that, so far as these plans are evidence at all, they are evidence of particular facts, and not of reputation. I agree. I think, with reference to these maps, they are not admissible in evidence. Then the next matter which Mr. Justice

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Farwell deals with is on page 545 of the *Law Reports* (p. 78 of the *Law Journal Reports*). That is a document which, if I remember rightly, we need not trouble much about, because I think it was admitted ultimately that it was on a very small scale. That being so, I think I have dealt with all the cases of admissibility of documents, and I am of opinion that the judgment of Mr. Justice Farwell ought to be affirmed.

STIRLING, L.J.—I am of the same opinion, and have really very little to add, agreeing, as I do substantially, with Mr. Justice Farwell; I shall, however, having regard to the very elaborate argument we have heard, say a few words with reference to each class of these documents which have been sought to be put in evidence. I begin with the first dealt with by Mr. Justice Farwell—namely, the group of documents which consisted of reports and letters and other documents made with reference to the repairs at Walmer Castle. The first is a survey dated May 10, 1610, and purports to be for the repairs at Walmer Castle made necessary by the encroachments of the sea. It does not appear by whom that survey was taken, nor is there any evidence of the instructions given for that survey except what appears from the document. Now it is said that that ought to be admitted as a public document. Mr. Justice Farwell decided that it could not be admitted, as it did not fall within the definition of a public document given by Lord Blackburn in the case of *Sturla v. Freccia*.⁹ To that it was answered that that definition was not exhaustive, and that there were cases of public documents that did not fall within that definition; and in particular we were referred to the case of *Rowe v. Brenton*,³⁸ in which a document called the caption of seisin was held admissible. Now what appears from the report of that case is this: that Edward 3 in the eleventh year of his reign by charter created his son Edward Duke of Cornwall and granted to him seventeen manors which were there specified. There was produced an account from the King's Remembrancer's Office of the revenues of the

Crown property, and that account contained no entries with reference to the manors so granted after May in the eleventh year of Edward 3. The document in question purported to be a caption of seisin "to the use of the Duke of Cornwall by James de Wodestocke and William de Monden assigned by the letters patent of the duke to do the same on Monday, May 12, 11 Edward 3rd." And the question arose whether that was admissible. In the view I take of it that was a document of great importance. At the time when these transactions took place, and in the then state of the case, one subject could not, by a mere grant in writing, transfer real estate to another subject, and it was necessary that the grant should be followed, in the case of real estate, by delivery of seisin; that is to say, that there should be a public transfer of the possession of the real estate which was the subject of the grant. That being the state of the law between subjects, the Crown was guarded by still greater precautions, and it is laid down in that very case of *Rowe v. Brenton*³⁸ that the King could not alienate the possessions of the Crown otherwise than by matter of record. That is laid down by Mr. Justice Bayley at p. 757 of the report, and is in accordance with all the older authorities. Now, what was this document? It appears to me it was the official record of what took place when seisin was taken on behalf of the Duke of Cornwall by James de Wodestocke and William de Monden, and in that sense it was the proper record of the completion of the conveyance to the Duke of Cornwall necessary and required by the law at that time. It was shewn that it came from the proper office, and was the official record of the completion of the transaction between the King and the Duke of Cornwall. It seems to me that if the persons who were appointed to receive the seisin had been appointed by the King, it would fall almost within the terms of Lord Blackburn's definition, where he says, "the principle upon which it goes" (that is, the decision in *Irish Society v. Derry (Bishop)* [1846] 41) "is, that it should be a public inquiry, (41) 12 Cl. & F. 641.

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a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer." Really what the Court decided in that case seems to me to have been this—that the fact that these Commissioners who were appointed for the purpose of the seisin were appointed by letters patent of the duke, and not by letters patent from the Crown, made no substantial difference to the nature of the document. But, however this may be, that authority is not in point in the present case, for it is quite clear it is not every document that comes from the possession of the Crown, or from a public office, that is admissible in evidence as a public document. That is made quite clear by the case of *Evans v. Taylor*,³⁹ where the document that was produced from the office of the Duchy of Lancaster was of the time of Elizabeth, "and purported to be a survey of the manor, taken by I. W. deputy of the Surveyor-General of the Duchy, by authority of letters of deputation to I. W., by the oaths and presentment of such of the tenants of the manor whose names were subscribed." The purpose for which it was sought to be admitted was with reference to the boundary of a particular manor, and it was sought to be admitted both on the ground that it was a public document, and that it was evidence of reputation. The Court held that it could not be admitted as a public document, because, assuming it was made in discharge of a duty imposed by the statute of Edward 1, that statute gave no power to define the boundaries of manors, and therefore it was not admissible with reference to a matter which went beyond the statute; and it was also held that it was not admissible as evidence of reputation in the absence of

any evidence as to the authority by which it was made. In the present case we have no such evidence. The only statement is, as I have already pointed out, that which appears at the head of the survey. On that ground, it seems to me, it is not admissible as a public document.

The next ground on which it was sought to have it admitted was as evidence of reputation. Now, the action is one that relates to the existence of a custom for the fishermen at Walmer to dry their nets on a particular plot of land, and the nature of the action is such certainly that evidence of reputation would be admissible. But what is the purpose for which the evidence is sought to be admitted in the present case? The evidence does not relate to the reputed custom at all. It does not even relate to the plot of land over which the custom is said to be exercisable. It relates to the state of the foreshore adjoining the castle of Walmer and the castle of Deal in the early part of the seventeenth century. The object is to establish that at that period the sea flowed twice a day over the *locus in quo*—that is to say, the spot over which the custom is said to be exercisable; and it is sought to make it evidence in this way—that by establishing where the sea flowed at that time at Walmer Castle and at Deal Castle, between which the *locus in quo* lies, it will be shewn that that plot of land was at that time subject to the flux and reflux of the sea, and therefore the custom must have arisen at a subsequent date, and consequently does not satisfy the requirements of the law as to the period of time when it began. Now it seems to me that that is not a matter of reputation. It is laid down in all the cases that evidence ought not to be allowed, where reputation is admissible, of particular facts. One case in which that is laid down is *Reg. v. Bliss*.²⁰ There the question was whether a particular road which was admitted to exist was public or private, and "evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he

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planted it to shew where the boundary of the road was when he was a boy. Held, that such declaration was not evidence, either as shewing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest." The learned Judges all say that evidence of particular acts cannot be admitted under reputation. Mr. Justice Patteson says, "It was agreed here that the alleged road was a road of some sort; the evidence was not necessary as to that; and the reputation which it was attempted to introduce was of a particular fact." Then Mr. Justice Coleridge says: "Then it stands that Ramplin" (he was the person whose acts and sayings were sought to be introduced) "said he planted the tree for a certain purpose; namely, to shew the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible." It seems to me that the evidence sought to be introduced here falls under the same class, and is not admissible under the head of reputation.

Lastly, it was said that the document was admissible on the ground on which entries in books were admitted in the case of *Price v. Torrington* (Lord).¹⁰ That doctrine has very considerable limitations, and that is pointed out by Mr. Justice Blackburn in giving judgment in *Smith v. Blakey*.¹³ The question arose as to a letter. The head-note is: "It was the duty of a confidential clerk, who managed a branch business of the plaintiffs, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—Held, that this letter was not admissible in evidence against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act and make a record of it." Lord Blackburn (then

Mr. Justice Blackburn) says: "Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker's principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. A strong instance of the distinction is the case of *Chambers v. Bernasconi*¹² in the Exchequer Chamber. The reason of the distinction is not at first sight very obvious; but I think all the cases shew that it is an essential fact to render such an entry admissible, that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it." Then after referring to some cases, amongst which is *Doe d. Patteshall v. Turford*,¹¹ he says, "In the last case" (that is *Doe d. Patteshall v. Turford*¹¹), "Parke, J., points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record. It at once follows that the present statement was not admissible, and ought not to have been received." Then Mr. Justice Lush says, "when an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it." This survey does not appear to me to fall within the rules as thus laid down, and in this respect the case is entirely distinguishable from the recent case of *Mellor*

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v. *Walmesley*,¹⁷ in which this Court admitted entries made by the surveyor at the time in his field book in reference to a matter he was under an obligation to carry out.

I have confined my remarks to the specific document that stands first in the list of documents of this kind, but they apply equally to the others of that class.

Besides documents of this class, there were others which are a little different. The second class of documents are depositions in the suit of *Att.-Gen. v. Hugeson and others*, which related to acts said to have been done by the defendants in that suit between the Castle of Walmer and the sea, whereby the sea had encroached on the property of the Crown. This action was never brought to a final hearing. The only thing, so far as we know, was that an interlocutory order was made, not disposing of the action, but giving the Attorney-General liberty to file a further information if he thought fit. That does not appear to have been done; but what is most material for the purpose of the present action, if it be admissible, would be the statements of the witnesses in their sworn depositions in answer to interrogatories with reference to the same class of thing—namely, the flux and reflux of the sea in the neighbourhood of Walmer Castle at the time when the suit was going on. It seems to me (and I need not repeat what I have already said in the earlier part of my judgment) that these statements could only be admitted as evidence of reputation; and, again, the matters to which they relate, I think, for the reasons already given with reference to the survey, are not matters of reputation, but evidence with regard to particular facts which are intended to be used, not for the purpose of establishing the custom, or of destroying it, but from which, by way of inference, the custom is to be negatived. I think, therefore, on that ground they are inadmissible.

Then, lastly, there are certain plans, which come from the War Office, of these two castles—Walmer Castle and Deal Castle. Again, they are sought to be introduced on the ground that they are public documents, and also as evidence of

reputation. I think they are not admissible as evidence. For these reasons I think Mr. Justice Farwell's decision on this part of the case ought to be affirmed.

COZENS-HARDY, L.J.—I agree with Mr. Justice Farwell on all points decided by him as to the admissibility of documents, and I really am not sure that I am justified in taking up any more time in dealing with this matter; but there are two remarks I should like to make. A great deal of discussion has taken place about *Roue v. Brenton*³⁸ and the caption of seisin, and the reasons on which that document was admitted in evidence. The matter, as it seems to me, is made reasonably clear by the full report of the published case by Mr. Concanen. The Attorney-General (Sir Charles Wetherell) said (at p. 109 of *Concanen*): "If this is not evidence, half the rolls in the Court of Exchequer should be burnt: it comes out of the proper repository for such evidence; and it is kept as a public record to show, what it was that the Crown granted to the Duke of Cornwall; and what, on the ceaser of the Duke's Estate, would revert back again to the Crown: it is inalienable property. *Mr. Solicitor-General (Sir N. C. Tindal)*—And your Lordships observe, in addition to that, that the very grant of Edward III. directs this seisin to be given. *Lord Tenderden, C.J.*—It appears to me that the objection fails entirely. *Mr. Brougham*,—If my learned friends make it a foundation that the Crown has a fee, we deny that it appears in the Prince's case, that the fee-simple of the Duchy of Cornwall is in the Duke. *Bayley, J.*—It would stand thus: the Crown had the fee before the grant of that charter. Then, in the Court of Exchequer, you have an account of the revenues of the Crown; and if the Crown alienate any part of those revenues, there is an account kept in the Exchequer of what it was that the Crown alienated: as I understand this document, this gives an account of what it was that the Crown alienated to the Duke of Cornwall. *Mr. Brougham*,—Yes, and with great submission, if that had been done by public authority, it would no doubt have been evidence; for the country is bound

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by what is done by the Crown, acting for the country, but this is a private account of the Duke. *Lord Tenterden, C.J.*—The Duke makes a letter of attorney, under which the seisin is taken. *Bayley, J.*—The Crown has a duplicate entered in its own office, which shows what it was that the Duke had taken possession of." That really made that caption of seisin in the nature of, if it was not actually, a record, within the principle applicable to that class of documents. That seems to me not to make *Rowe v. Brenton*³⁸ a decision in any way justifying the admissibility of any kind of survey or document that may be found in the War Office belonging at some former time to some department of the Government.

The only other point is with reference to the depositions in the suit by the Attorney-General. I think the judgment of Baron Parke in *Pim v. Currell*³⁹ is a clear and ample authority for the view taken by my Lord and Lord Justice Stirling on that point.

July 21.—*Levett, K.C., Jenkins, K.C., and Gatey*, for the appellant.—The preliminary points have now been disposed of, and the question remains whether the plaintiffs have proved any custom, and, if so, over what land the custom has been proved to prevail. They have really proved no custom at all; but, allowing that they have, it would only be in respect of one particular spot, and it would not extend to nets that had been oiled. This is waste land within the meaning of the White Herring Fisheries Act, 1771; and having regard to section 11 of that Act the plaintiffs have not proved any custom of drying nets there. The section is not a conclusive answer to the action; but if the spreading of the nets had begun under that section it would negative the inference of immemorial custom. If any custom has been proved at all, it has only been proved as regards one small piece of ground, and not in respect of oiled nets. Oiled nets cannot be put to dry one on the top of the other, so it would take more space to dry oiled nets than tanned nets. That is material on the question of the reasonableness of the custom. The de-

fendant, on the evidence, cannot dispute the finding of fact of Farwell, J., that "The beach in question is a ridge, which from time immemorial has acted as a barrier against the sea for the protection of the land behind it. That land is on so low a level that but for the beach it must have been submerged, but it has never been so during historic times." He does not admit that there is any evidence of fluctuations in the coast. The plans shew that about a hundred years ago the high-water mark was what is now the asphalt path.

The law of accretion, if the matter is to be dealt with on that footing, has come down from Roman times—*Justinian's Institutes*, lib. ii. tit. 1, par. 20 and 21. It is said that accreted land becomes subject to the same laws and customs as the original land, but the doctrine of accretion or alluvion is a doctrine purely of real property law, and has nothing whatever to do with the law of custom. It is summed up in *Att.-Gen. v. Chambers* [1859].⁴² Custom is defined by Jessel, M.R., in *Hammerton v. Honey*,³ and the definition there is supported by the definition in *Bacon's Abr.* (7th ed.), vol. ii. p. 564. It does not help the plaintiffs. Every custom ought to be certain, and ought to be construed strictly—*Bacon's Abr.*, vol. ii. pp. 573 and 575. A right such as that claimed here, even if it existed in respect of one part of the beach, cannot be carried on so as to be exercisable in respect of some other part—*Carlisle Corporation v. Graham* [1869].⁴³

It is not contended that the custom is bad because the class to take advantage of it has increased—*Foster v. Wright* [1878]⁴⁴; but the custom as pleaded is too wide. The evidence is consistent with a more restricted custom only, and the Court will choose the least onerous custom.

Upjohn, K.C., and R. J. Parker, for the respondents.—The White Herring Fisheries Act, 1771, was passed to regulate the white herring fishery only.

[VAUGHAN WILLIAMS, L.J.—You need not trouble as to that Act. We think the user of the fishermen obviously

(42) 4 De G. & J. 55, 67, 68.

(43) 38 L. J. Ex. 226; L. R. 4 Ex. 361.

(44) 49 L. J. C.P. 97; 4 C.P. D. 438.

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extended beyond what was sanctioned by that Act.]

The custom extends to a particular class of land; the question of accretion is immaterial. There is no evidence that high-water mark in the year 1189 was not where it is now.

The evidence of usage, unless qualified, gives rise to a presumption of the existence of the custom over the whole period of legal memory. Evidence that the sea has flowed over the margin of the land is not enough to defeat the right. If a custom is once established, non-user for any time is unimportant. Only an Act of Parliament could get rid of the rights acquired. Jessel, M.R., in *Hammerton v. Honey*³ deals with the effect of partial disuser.

[VAUGHAN WILLIAMS, L.J.—Interruption after the right is established and failure to prove necessary continuity sufficient to establish the right are different things. The Master of the Rolls was dealing with the former.]

The right would continue, though it could not be exercised in possession till the sea receded again. The law is stated in *Simpson v. Wells* [1872],⁴⁵ *Co. Lit.* 114 b, *Fitch v. Rawling* [1795],⁴⁶ and 1 *Blackstone's Comm.* (8th ed.), vol. i. p. 77.

The appellant does not really dispute that such a custom as alleged is possible, subject to the qualification that it must be over a defined area. There are here all the elements of a valid and reasonable custom as recognised in the law of England since the reign of Edward 4. There is a particular class of persons and a defined area over which a kind of easement is exercised, not a mere *profit à prendre*. It is clear that the custom extended to the upper part of the defendant's land. There is uncontradicted evidence as to that, and the only custom consistent with the evidence is that found by Farwell, J. Even if oiling is not within the custom, it does not affect the custom as established. *Fitch v. Rawling*⁴⁶ shews that if evidence establishes a valid custom, that custom will not be prejudiced by some modern

usurpation which is not justified. But oiling is in fact covered by the custom. The custom is good, because it is for the benefit of the public to encourage fishing. In the cases in which customs of recreation have been established, the customs have always been in general terms. Cricket and football, which are authorised under customs of recreation, were once forbidden as unlawful games—17 Edw. 4. c. 3. Oiling and "cutching" have the same object—namely, the protection of the nets from sea water. What is true of servitudes is true also of claims by custom. The category of lawful customs must alter and expand with changes of circumstances—*Dyce v. Hay*⁴ and *Abbot v. Weekly* [1665].⁴⁷ If the new practice comes within the custom, it does not matter that it imposes a greater burthen—*Pain v. Patrick* [1690].⁴⁸

[VAUGHAN WILLIAMS, L.J., referred to *Bell v. Wardell* [1740].⁴⁹]

That case is dealt with in *Hall v. Nottingham* [1875].⁵⁰

Any argument based on excess of user or increase of burthen is inapplicable to the present case. There are two classes of cases where that doctrine has been applied—first, where the particular user is not justified by the terms of the grant; and secondly, where a dominant tenement is altered so as to throw an increased burthen on the servient tenement. There is no dominant tenement here, and there is no analogy between the alteration of a dominant tenement and the alteration in the practice of the fishermen. The alteration in the practices following the process of oiling the nets is within the reason of the custom. The effect on the servient tenement is not unreasonable in the sense of being destructive of the inheritance or of depriving the owner of the use of his property; and these are the true tests of unreasonableness.

There are two other grounds on which we rely—first, the doctrine of accretion; and secondly, the Prescription Act, 1832 (2 & 3 Will. 4. c. 71), s. 2. The doctrine

(47) 1 Lev. 176.

(48) 3 Mod. 289.

(49) Willes, 202.

(50) 45 L. J. Ex. 50; 1 Ex. D. 1.

(45) 41 L. J. M.C. 105; L. R. 7 Q.B. 214.

(46) 2 H. Bl. 393.

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of accretion is to treat the land as if the *alluvium* or increase had never in fact taken place—*Hull and Selby Railway, In re* [1839],⁵¹ *Att.-Gen. v. Chambers*,⁵² *Foster v. Wright*,⁵³ and *Hindson v. Ashby* [1896].⁵⁴

The added land is considered to be the old land, and to be subject to all the same rights—*Rez v. Yarborough* (Lord) [1824]⁵⁵ and *Gifford v. Yarborough* (Lord) [1828].⁵⁴ And there is no distinction for this purpose between a prescriptive and a customary right—*Gateward's Case* [1607]⁵⁵ and *Blackstone's Comm.* (8th ed.), vol. i. pp. 76, 77.

It is said that the application of the doctrine might make the custom unreasonable. The answer is that that event has not happened, and the mere possibility of unreasonableness is not enough—*Tyson v. Smith* [1838].⁵⁶

As to the Prescription Act, Farwell, J., decided against us on this point on the authority of *Mounsey v. Imay*² and *Shuttleworth v. Le Fleming*¹; but those cases were practically overruled by *Dalton v. Angus* [1881],⁵⁷ which shews that section 2 of the Act extends to all easements, and is not limited to those *eiusdem generis* with rights of way or water, which was the *ratio decidendi* of those two authorities; and see *Simpson v. Godmanchester Corporation* [1897]⁵⁸ and *Lemaitre v. Davis* [1881].⁵⁹

There is all the more reason for applying the Prescription Act to a customary easement because the common-law doctrine of a lost grant is not available to support such a right. If the Prescription Act applies the custom will, on that ground alone, embrace all the land accreted more than twenty years before action brought, and also cover the dry-

ing of the nets after oiling, the practice being more than twenty years old.

Levett, K.C., in reply.—The word "easement" in section 2 of the Prescription Act means a legal easement in the strict sense, and to constitute a legal easement there must be a dominant as well as a servient tenement—*Rangeley v. Midland Railway* [1868]⁶⁰ and *Carson's Real Property Statutes* (10th ed. 1902), p. 5.

No doubt has ever been cast upon *Mounsey v. Imay*² or *Shuttleworth v. Le Fleming*,¹ and the decisions must still be regarded as good law. In *Dalton v. Angus*⁵⁷ Lord Selborne does say that the operation of section 2 of the Prescription Act ought not to be confined to rights of way and rights of water, but *Mounsey v. Imay*² and *Shuttleworth v. Le Fleming*¹ were not referred to, and they are an authority for holding that there cannot be an easement unless there is a dominant tenement. The point was not really raised in *Dalton v. Angus*.⁵⁷ The different kinds of servitudes are specified in *Justinian's Institutes*, lib. ii. tit. 3, par. 1 and 2—that is, rural and urban—and they are stated to be rights acquired in respect of some immovable property belonging to the person who acquires it; and there is a statement to the same effect in *Gale on Easements* (7th ed.), p. 11n. That goes beyond anything said by Lord St. Leonards in *Dyce v. Hay*.⁴

We do not dispute the right to dry nets on the beach at the end of the season after use in the sea, but the custom claimed is not to dry nets, but to expose them when cutched or oiled. That would prevent any other user of the land and would be unreasonable, so the custom would be bad. The plaintiffs have endeavoured to prove too large a custom. They cannot take advantage of a small part which may be capable of proof and drop the rest—*Hammerton v. Honey*.³ This is said to be only a development of the custom; but there is no authority to shew that a burden imposed on land in the time of Richard I can be increased so as to extend to land which was not in existence at that date. They

(51) 8 L. J. Ex. 260, 262; 5 M. & W. 327, 333.

(52) 65 L. J. Ch. 515; [1896] 2 Ch. 1.

(53) 2 L. J. (O.S.) K.B. 196; 3 B. & C. 91. Aff. in H.L. [1828], 2 Bligh (N.S.) 147; 1 Dow & Cl. 178.

(54) 5 Bing. 163.

(55) 6 Co. Rep. 59 b; Cro. Jac. 152, *sub nom. Smith v. Gatewood*.

(56) 9 Ad. & E. 406.

(57) 50 L. J. Q.B. 689; 6 App. Cas. 740.

(58) 66 L. J. Ch. 770; [1897] A.C. 696.

(59) 51 L. J. Ch. 173; 19 Ch. D. 281.

(60) 37 L. J. Ch. 313; L. R. 3 Ch. 306.

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cannot saddle the defendant's part of the shore with so large a custom.

[**VAUGHAN WILLIAMS, L.J.** — The custom seems to have been one which prevailed on the coast of Kent—see Mr. Justice Buller in *Fitch v. Rawling*.⁴⁶]

The custom of accretion was really a local custom in maritime counties—see Best, C.J., in *Giffard v. Yarborough* (*Lord*).⁵⁴

This land has accreted during the last sixty years, and a custom cannot be alleged for that period only. The custom, therefore, if proved at all, is only proved over a part of the land. Customs vary in different places—*Co. Lit.*, s. 165, 110b; but there must be some limit. They must be reasonable, and that depends on circumstances. It might have been reasonable to have a right to dry nets on a certain portion of the beach, but there cannot be a custom to do so over what is a shifting area. If there is a right of way on one side of the foreshore and the sea recedes, it does not follow that the right extends over the whole area.

Cur. adv. vult.

Aug. 11.—**VAUGHAN WILLIAMS, L.J.**, read his judgment as follows: This is a difficult case. Most cases with regard to validity of custom are difficult of decision. The fact is that reason recoils from the proposition that legal memory goes back to an arbitrary date at the beginning of the reign of Richard I, A.D. 1189, and if one finds proof of uninterrupted modern usage there is a natural inclination to presume the previous existence of the custom right back to 1189, even though the facts may be such as to force upon reason the conclusion that the modern usage could not in fact have been adopted for more than a few generations. Judges, therefore, presume everything possible which would give a custom a legal origin, and find in favour of a manifestly modern custom as being an extension which falls within the reason of so much of the modern usage as may well have existed throughout legal memory.

I think that in the present case it is very difficult in reason to arrive at the conclusion at which Mr. Justice Farwell

seems to have arrived—namely, that the drying of nets after cutting or oiling can be treated as a mere expansion, with the changes which take place in the circumstances of mankind, of the ancient custom of drying nets wet with sea water when taken out of the fishing boats on their return to the shore after fishing. Nor do I think that the validity of the latter custom, established by so many *dicta* in the books and old cases, is in any sense conclusive of the reasonableness or validity of a custom to dry after cutting or oiling nets in preparation for the user of them in sea fishing. It may be perfectly reasonable in favour of commerce and navigation to invade private property forming part of the beach, because it is so convenient to dry the nets, wet and heavy with sea water, on the nearest part of the beach suitable for such a purpose, since it is difficult to see how in many parts of the coast, where cliffs or other causes make the inland difficult of access, sea fishing by nets could be carried on otherwise. But it by no means follows that it is reasonable in favour of commerce and navigation to bring from the land behind the beach nets which have been cutched or oiled at some inland spot and dry them on a part of the beach which is private property. The drying, at all events after oiling, burdens the land with the nets for a much longer period than the drying of the nets after being wetted with sea fishing does. But this difficulty arises: If the Court treats the drying of the nets after oiling as a usage or custom to be tested as to reasonableness or unreasonableness, or whether or not it is contrary to the public good, or injurious or prejudicial to the many, the Court will clearly be dealing with a modern usage arising within living memory. I am not at all sure that the proper inference to draw from the evidence and from the user of the word “cutching” (derived from “cutch,” an astringent plant of great astringent power, imported in great quantities from the Malay Archipelago, which, as far as the evidence goes, seems to be still used to prepare and preserve the nets for fishing) is not that the process of cutching did not begin in the eighteenth or nineteenth century. But perhaps the

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Court may assume without evidence that some process of tanning nets before using them for sea-fishing has prevailed ever since the date of legal memory. Of course, if these customs are to be treated otherwise than as the expansion of the old custom, the custom relied on by the plaintiffs could not be supported. But I have persuaded myself that the Court may regard the custom (as Lord Justice Cozens-Hardy says in his judgment) as a custom for fishermen "to dry nets at all times necessary or proper for the purposes of the trade or business of a fisherman," and the modern usage of drying after cutting or oiling as a development of an ancient custom to do all the drying necessary or proper for the trade or business of a fisherman on the beach, and may so regard the custom, notwithstanding the increase of the burden to the land resulting from the modern user.

As to the contentions of the defendant based on the recession of the sea and usage of a part of the beach, now free of sea but formerly covered by sea water, not raising a custom in respect of the land gained by the gradual and, as it proceeded, imperceptible recession of the sea, I think those contentions fail entirely, for the reasons given in the judgments of my brothers, which I have had the advantage of reading. But I wish to add this—that I think that there is evidence in this case to shew that the practice of drying nets has really in time gone by extended to any convenient places on the seashore, and not only to the eleven acres of land in question, although of late years the shingle beach, of which the eleven acres consists, has afforded the most convenient spot for drying after oiling and cutting, and has therefore come to be freer of weeds and vegetable growth than other parts where the beach adjacent to Walmer happens to be shingly. Moreover, it seems to me that the right of drying nets must have always been exercised on the shingly ground which happened for the time being to be nearest to the foreshore and yet generally free from overflowing by the sea at high tides. If this view were taken of the evidence the result would be that the drying would, by following the receding sea, always take place

on the part of the beach convenient for drying nets next to the sea. This part of the beach, although covered by the sea in times gone by, would, on the principles which the Court has recognised in respect of land gained by accretion, be subject to the custom in favour of drying nets, and the area subject to the custom would always be adjacent to the sea. Take the beach which is now nearest to the old Cinque Port of Rye, which is now miles away from the port, though the sea formerly was immediately adjacent, it would be difficult to my mind to avoid the conclusion that the drying area must in such a case follow the sea. The custom began at the boundary between beach and sea. As the sea imperceptibly retires the law does not recognise any alteration in the land owned, or that there are new boundaries further away from the centre of the close, and, on the same principle, the area of drying would always be adjacent to the boundary for the time being between the beach and the sea. Such a custom would obviously be more reasonable than that which we are supporting. But neither the plaintiffs nor the defendant put forward at the trial or since this view of the custom. On the contrary, when I suggested it during the argument, both sides rejected it. This being so, I do not think it ought to be taken into consideration in this case.

The result is, that I agree with the rest of the Court that this appeal should be dismissed, with costs.

STIRLING, L.J., read the following judgment: In this case the plaintiffs, on behalf of themselves and all other persons carrying on the trade of fishermen in the parish of Walmer, claim a customary right to dry their nets over a piece of ground (called the "beach ground"), which is covered with shingle, and is situate near the sea, and lies between the grounds of a house known as Walmer Place on the north, the grounds of Walmer Castle on the south, a public road called Wellington Road on the west, and the foreshore on the east, and containing at the present time about eleven acres. The evidence of living witnesses shews that for a period extending over seventy years,

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and by reputation for many years earlier, the inhabitants of Walmer who are fishermen have used so much of this piece of land as was not for the time being covered by the sea for the purpose of drying their nets in the following way: Down to a period of from twenty-five to thirty-five years ago, immediately before the commencement of the mackerel and herring fisheries respectively, the nets intended for use in those fisheries were tanned or cutched and brought to the beach ground and there dried; and at the close of each of these seasons the same nets were again brought there and dried before being put away until next required. From twenty-five to thirty-five years ago the practice of tanning or cutching nets was discontinued, and in lieu thereof the nets were oiled, and the oiled nets were taken to the beach ground and dried there in the same way as the cutched or tanned nets had previously been. As I read the evidence, sprat nets were never taken there at all until the introduction of oiling; but from that period the sprat nets, being oiled, have been taken there and dried. This user has extended over the whole eleven acres, except where they were for the time being covered by the sea.

It was admitted in this Court (and, in my opinion, rightly) that a custom for fishermen to dry nets, which had become wetted by use in fishing, on a particular piece of land was good; but it was said that a custom to dry nets which had not been wetted by the sea, but only in the process of tanning, cutching, or oiling preparatory to use for fishing, was bad; and that, as the evidence shewed that the alleged custom extended to such drying no less than to drying at the end of the several fishing seasons, the alleged custom was bad *in toto*. Now the ground on which the custom to dry nets in the strict sense has been upheld is that it is in favour of commerce and navigation—*Bacon's Abridgment*, vol. ii. p. 566—and see what is said by Lord Chief Justice Tindal in *Tyson v. Smith*.⁵⁶ The tanning, cutching, or oiling of nets belonging to fishermen tends to preserve the nets and make them useful for a longer period, and the subsequent drying of nets seems to me to fall within the reasons thus assigned

for the custom. It is laid down by Chief Justice Holt in *London City v. Vanacker*¹ that general customs may be extended to new things which are within the reason of those customs. There is not, in my opinion, evidence from which it ought to be inferred that the practice of tanning or cutching has arisen within the time of legal memory. But it was said that, so far as related to the drying after oiling, the user extended over a period of from twenty-five to thirty-five years only; and, moreover, that this user was more burdensome than the old user for drying after tanning or cutching. I think, however, that the law as laid down by Lord St. Leonards in *Dyce v. Hay*,⁴ cited by Mr. Justice Farwell, applies, and that those entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner. The evidence does not convince me that an unreasonable burden has been cast on the owner. The practice has been in existence for twenty-five years at least, without any objection being raised until the land recently passed into the hands of the defendant, although, during the greater part of that time, the property belonged to one who seems to have stood on his rights, and objected to anything which went beyond the custom as stated.

It is next said that a considerable portion of the "beach ground" consists of an accretion during the last fifty or sixty years, and that the custom cannot extend to that part. Custom, it is argued, is a local law, which must have existed from time immemorial—that is, from the beginning of the reign of Richard I—and cannot be applicable to land which can be shewn to have emerged from the sea in modern times. In *Re v. Yarborough (Lord)*⁵³ it was established that lands formed by alluvion—that is gradual and imperceptible deposit, on the shore of the sea—belonged, not to the Crown as owner of the foreshore, but to the owner of the demesne lands of a manor, which were formerly bounded by the sea, as parcel of those demesne lands. Every manor must have existed prior to the

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statute *Quia Emptores*; but it was not suggested that the operation of the rule was excluded by reason of the accretions having taken place in modern times. The reason of that rule is stated by Baron Alderson in *Hull and Selby Railway, In re*,⁴¹ to be "that which cannot be perceived in its progress is taken to be as if it never had existed at all." This was approved by Lord Chelmsford in *Att.-Gen. v. Chambers*,⁴² and has been applied in the present case by Mr. Justice Farwell, who held that this accretion is to be treated as though it had occurred in 1189. It was insisted, however, that the doctrine of accretion is a rule of property law, and has nothing to do with custom, which is truly described as a local law. No authority was cited in support of this contention, and I am unable to agree with it. The local law points out the particular piece of land on which the right is to be exercised; and then the rule of the common law steps in and says that, where imperceptible accretion has occurred, the piece of land is to be treated as having been as it is from the commencement of legal memory. Lastly, it was urged that other lands in the neighbourhood of Walmer were subject to the same custom; and that the whole burden was being thrown on the defendant's land. The evidence does not appear to me to shew with certainty that there are other lands subject to the custom; but, even if it were otherwise, all that the defendant would have to complain of would be an excessive use of his land, and this would not deprive the plaintiffs of the right to a reasonable use of the beach.

I am therefore unable to differ from Mr. Justice Farwell, and I think that the appeal ought to be dismissed.

COZENS-HARDY, L.J., read his judgment.—This is an appeal from a judgment of Mr. Justice Farwell, establishing the right of the fishermen of Walmer to dry their nets on some land known as the "beach ground," the property of the defendant. I might content myself with saying that I agree, not only with the judgment, but also with the reasoning upon which that judgment is based. The

only exception or qualification I should make is, that, after the advice we have received from the officer sent by the Admiralty to assist us, I do not interpret Spence's chart of 1795 in the manner which, upon the expert evidence at the trial, Mr. Justice Farwell adopted. This, however, is not really of importance. The scale is so small that no safe inference can be drawn as to the precise line of high water at the spot in question in 1795. And, even if the sea has been steadily receding from 1795 to the present time, the result will not be affected, as pointed out by Mr. Justice Farwell when dealing with the law of accretion. Having regard, however, to the elaborate arguments addressed to us, and to the great importance of the case, I think it right to state in my own words, and as briefly as may be, why I think the appeal should be dismissed.

The right asserted is based upon a custom extending beyond legal memory. Such a custom is often spoken of as a local law. Counsel for the appellant did not dispute, and in fact admitted, that a custom for the fishermen of a particular locality to dry their nets on the land of a stranger may be supported in law, though there is no actual decision to that effect. But, having regard to the numerous *dicta* referred to by Mr. Justice Farwell, I feel no doubt that his decision on this point was correct. The persons, if any, entitled to the customary right are sufficiently ascertained—namely, the fishermen of Walmer. The real contest has raged over two points—namely (a) over what land does the customary right extend, and (b) what is the extent of the right pleaded and how far its existence is justified by the evidence.

(a) It is contended that the "local law" can only affect a definite close, which must have been available for the exercise of the customary right in the reign of Richard I, and that the evidence shews that a considerable part of the "beach ground," now eleven acres in extent, was at that time covered by the sea, and therefore could not have been used for drying nets. In my opinion this contention ought not to prevail. It appears certain, from the evidence of geologists

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and from the discovery of Roman remains immediately to the west of the "beach ground," that at least the western part of the "beach ground" existed in and long prior to the reign of Richard 1 in substantially the same condition as at present. Within living memory the sea has gradually receded on this part of the coast, but there is nothing improbable in the suggestion that the reverse process may have gone on since the reign of Richard 1, with the result that the line of high water is now practically the same as at that date, in which case the point under discussion would not arise. Assuming, however, that the sea has gradually and continuously receded, I think the land which has been added by accretion to the defendant's land must be subject to the customary right. The principle stated by Baron Alderson in *Hull and Selby Railway, In re*,⁵¹ that "that which cannot be perceived in its progress is taken to be as if it had never existed at all"—a principle which is applied between two private owners and between the Crown and a private owner—should be applied here. In the view of the law this is the same close as that affected by the local law in the time of Richard 1. It is urged that this extension of area renders the custom uncertain and, if the sea should still further recede, unreasonable. But I cannot assent to the argument. It must not be forgotten that the persons claiming under the custom are bound to exercise their rights reasonably and with due regard to the interest of the owner of the soil.

(b) It remains to consider what is the custom pleaded, and how far it is supported by evidence. The custom pleaded is for the fishermen of Walmer at all times necessary or proper for the purposes of the trade or business of a fisherman to dry their nets upon the "beach ground," and for that purpose to spread those nets upon the surface thereof. The evidence proves that, so far as living memory goes, and by reputation prior to living memory, the "beach ground" has been used—first, for drying nets after fishing when wet with sea water, the nets being either taken from boats immediately in front of the "beach ground" or brought in carts from

some more convenient landing place; and secondly, for drying nets which have been "cutched" in order to render them more fit for use, the nets being brought in carts from the place where the cutching process has been performed, and taken away when dry, so as to be ready for the fishing season. I think it probable that the *dicta* which recognise the validity of a custom to dry nets had reference only to drying nets after they have been used for fishing, and not to drying nets in preparation for fishing, though I do not feel certain of this. But every argument used to support the former seems to me equally valid to support the latter. It is equally "in favour of fishing and navigation." "Cutching" is merely another name for, and is equivalent to, tanning. What are the precise ingredients put into the catch pot is nowhere explained. I see no ground for inferring that it is a comparatively modern process because "cutch" is a material used for tanning and imported from the Malay Archipelago. There is nothing to lead me to doubt that tanning nets in preparation for fishing is an ancient process, and, if so, it cannot be seriously urged that the fishermen are bound to use only tanning materials known in the reign of Richard 1, and that by substituting "cutch"—if in truth they have substituted it—they have lost their right. Or, to put the proposition in another and perhaps more accurate way, I think the proved usage of cutching nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing.

This brings me to the third branch of the usage proved. About thirty or thirty-five years ago it was found desirable to oil herring nets instead of cutching them. This change was probably due to the use of cotton, instead of flax or hemp, as the material from which herring nets are made. Since that date cutching has been applied only to mackerel nets. In my view this falls within the same principle. It is nothing more than the application of a new and improved method of securing the former result. It is consistent with and supported by the older usage. I have not overlooked the argument that oiling imposes a greater burden

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on the land, as the nets take longer to dry. But, unless I am prepared to confine the fishermen to the precise methods adopted *tempore* Richard 1, I cannot yield to this argument. The illustration given by Mr. Justice Farwell of the game of cricket, which was justified in *Fitch v. Rawling*,⁴⁶ although cricket was not known in the reign of Richard 1, is much in point. It follows that, in my opinion, the custom as pleaded is sufficiently established by the evidence—namely, a custom to dry nets at all times necessary or proper (whether before or after the fishing season) for the purposes of the trade or business of a fisherman.

If I had not taken the view of the evidence which I have indicated, I should have desired time to consider whether section 2 of the Prescription Act, 1832, does not apply. Mr. Justice Farwell necessarily held himself bound by *Shuttleworth v. Le Fleming*¹ and *Mounsey v. Ismay*.² In those cases the Court of Common Pleas and the Court of Exchequer held that the Prescription Act applies only to easements strictly so called, where there is a dominant tenement and a servient tenement, and does not apply to a customary right claimed by inhabitants of a particular district, although the word "custom" is found in the section. Those cases are open to review in this Court, but I do not think it necessary on the present occasion to express any opinion upon the important point there decided.

Appeal dismissed.

Solicitors—Hare & Co., agents for F. W. Hardman, Deal, for plaintiffs; Mowll & Mowll, agents for Mowll & Mowll, Dover, for defendant.

[Reported by A. J. Spencer and A. J. Hall, Esqs., Barristers-at-Law.

[IN THE COURT OF APPEAL.

VAUGHAN WILLIAMS, L.J.	} MORTIMER, In re; GRAY v. GRAY.
STIRLING, L.J.	
COZENS-HARDY, L.J.	
1905.	
Aug. 8, 9, 11.	

Will — Construction — Cy-près — Real Property—Limitation of Estates for Life to Unborn Persons—Remoteness.

Testator, who died in 1871, devised real estate to the use of G. for life, with remainder to the use of his first and other sons successively for life, and after the death of each such son to the use of the sons of that son successively according to seniority in tail male, with remainder to the use of all and every the daughters of each of the sons of G. as tenants in common in tail with cross-remainders in tail between such daughters if more than one, with remainder, after the determination of all the aforesaid uses, to the use of all and every the daughters of G. as tenants in common in tail, with cross-remainders in tail between them if more than one; and there was an ultimate remainder to the use of G., his heirs and assigns. G. died in 1903 without ever having had any issue. It was contended that though the limitations after the life estate of G. were bad as being too remote, the ultimate limitation to G., his heirs and assigns, might be supported under the doctrine of cy-près by substituting for the limitations in the will limitations to the use of G.'s sons successively in tail male, with remainder, if on the determination of those estates tail male there should be a failure of the issue of the sons of G. other than daughters or issue of daughters, to the use of G.'s sons successively in tail general, with remainder to the daughters of G. as tenants in common in tail general with cross-remainders between them, with remainder to G. in fee-simple:—Held, that the Court could not insert such a contingent limitation as suggested, as that would be a large extension of the doctrine of cy-près, and would be, in effect, making a new will for the testator. The ultimate remainder therefore failed, and the estate on the death of G. without issue devolved on the heir-at-law of the testator.

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Seaward v. Willock (5 East, 198) and Monypenny v. Dering (17 L. J. Ex. 81; 16 M. & W. 418; 22 L. J. Ch. 313; 2 De G. M. & G. 145) followed.

Nicholl v. Nicholl (2 W. Bl. 1159) observed upon.

Appeal from decision of Farwell, J.

The testator, John Mortimer, who died on September 20, 1871, by his will dated August 3, 1871, so far as material, devised his Pippingford Park estate, in the county of Sussex, "to the use of Frederick Gray . . . and his assigns during his life without impeachment of waste, and after his decease to the use of the first and every other son of the said Frederick Gray successively according to seniority, and to his respective assigns for his life without impeachment of waste, and from and immediately after the decease of each such son respectively to the use of the first and every other son of that son successively according to seniority in tail male so that each elder of the sons of the said Frederick Gray and his first and other sons shall take before each younger of such sons and his first and other sons; and after the determination of all the said uses to the use of all and every the daughters of each of the sons of the said Frederick Gray as tenants in common in tail with cross remainders in tail between or among such daughters if more than one; and if all such daughters but one shall die without issue, or if there shall be only one such daughter the whole to be to the use of such one daughter in tail, my meaning being that the daughters of the several sons of the said Frederick Gray shall not take concurrently, but that the daughters of each elder of such sons shall be entitled before the daughters of all the younger of the said sons; and after the determination of all the aforesaid uses to the use of all and every the daughters of the said Frederick Gray as tenants in common in tail with cross remainders in tail between or among such daughters if more than one; and if all such daughters but one shall die without issue, or if there shall be only one such daughter the whole to be to the use of such one daughter in tail; and after the determina-

tion of all the aforesaid uses to the use of the said Frederick Gray his heirs and assigns for ever."

Frederick Gray survived the testator, and died on November 18, 1903, without having had any issue. He made a will whereby he appointed executors and devised and bequeathed his real and personal estate as therein mentioned. The trustees of the testator's will took out a summons for the determination of the question (*inter alia*) whether upon the death of Frederick Gray without having had any issue the ultimate limitation of the Pippingford Park estate to the said Frederick Gray, his heirs and assigns, took effect, or whether the same estate then devolved on the heir-at-law of the testator at his death.

It was not disputed that the limitations of the will after the life estate of Frederick Gray were bad as infringing the rule which prohibits a limitation to the unborn child of an unborn devisee for life, but the executors of Frederick Gray contended that the Court could under the doctrine of *cy-près* vary the limitations so as to give effect to the general intention of the testator, and enable the ultimate remainder to Frederick Gray in fee to take effect. For this purpose it was proposed to substitute the following limitations after the life estate of Frederick Gray in the place of those in the will—to the use of Frederick Gray's sons successively in tail male; if on the determination of the estates in tail male thereinbefore limited there should be a failure of the issue of the sons of Frederick Gray other than daughters or issue of daughters, then to the use of Frederick Gray's sons successively in tail general; with remainder to the daughters of Frederick Gray as tenants in common in tail general, with cross-remainders between them; with remainder to Frederick Gray in fee-simple.

Farwell, J., held that the doctrine of *cy-près* was not applicable. It was settled that the doctrine, which he regarded as a rule of construction, could not be applied so as to give the estate to a class of persons for whom the testator had not intended to provide, and the Court had never gone to the length of inserting such

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a limitation as was suggested. The estate, therefore, on the death of Frederick Gray without issue, devolved on the heir-at-law of the testator Mortimer.

The executors of Frederick Gray appealed.

Haldane, K.C., and *R. J. Parker*, for the appellants.—We admit that it is settled by authorities which are binding on this Court that, if the previous limitations are void for remoteness, the ultimate remainder to F. Gray (through whom the appellants claim) is also void. The only question on this appeal, therefore, is whether the previous limitations are themselves void or can be moulded under the *cy-près* doctrine in such a way that the limitations can all stand, in which case the ultimate remainder now takes effect. The ordinary instance of the application of the *cy-près* doctrine is where there is a limitation to A for life, with remainder to A's unborn son for life, with remainder to the issue of such unborn son, which, read literally, is bad for perpetuity and for infringing the rule which forbids a limitation to the unborn son of an unborn person. The Court in such a case, with a view to give effect to the general intention that the property shall descend through all A's issue, have disregarded the particular intention expressed by the testator as to the way in which this should take effect, and have read the gift as a limitation to A for life with remainder to his unborn son in tail. The rule is applied to executed as well as executory gifts, and is a rule in Courts of law as well as of equity. It is said that there are two qualifications to the doctrine: first, that no person ought to be excluded whom the testator has expressly included; and secondly, that no person ought to be included whom the testator has expressly excluded; and *Farwell, J.*, considered that he would be going beyond any decided case if he applied the doctrine to the present limitations. Our contention is that the inclusion of an additional person does not prevent the application of the rule. The *cy-près* rule, like the rule in *Shelley's Case* [1580],¹ is one that gives effect to the

paramount intention—*Bowen v. Lewis* [1884],² and *Jesson v. Wright* [1820].³ [*COZENS-HARDY, L.J.*, referred to *Pearke v. Moseley* [1880].⁴]

In construing a class gift the Court no doubt construes the will first, and then applies the rule against perpetuity; but in the *cy-près* rule a different principle prevails, and the Court adopts the general intention in order to get rid of the perpetuity. The paramount intention of the testator here was to provide successively for all the issue of F. Gray other than the female issue of grandsons. That intention will be given effect to if the actual limitations are moulded in the way in which the appellants suggest.

The authorities which deal with the subject are *Humberston v. Humberston* [1716],⁵ *Nicholl v. Nicholl* [1777],⁶ *Pitt v. Jackson* [1786],⁷ *Smith v. Camelford (Lord)* [1795],⁸ *Hampton v. Holman* [1877],⁹ *Monypenny v. Dering* [1847],¹⁰ *Rising, In re; Rising v. Rising* [1904],¹¹ and *Richardson, In re; Parry v. Holmes* [1903].¹²

[*VAUGHAN WILLIAMS, L.J.*, referred to *Hale v. Pew* [1858],¹³ *Bristow v. Wards* [1794],¹⁴ and *Hopkins v. Hopkins* [1738].¹⁵]

The question really comes to be a conveyancing point. The limitations suggested are good in law, and they meet the difficulty here. They bring in either by purchase or descent all the persons named as purchasers in the will without at the same time bringing in the particular class which it is assumed that the testator intended to exclude. The only difference is that a contingent remainder is given instead of a vested remainder. It cannot be that the parties are not to

(2) 54 L. J. Q.B. 55; 9 App. Cas. 890.

(3) 2 Bligh, 1.

(4) 50 L. J. Ch. 57; 5 App. Cas. 714.

(5) 2 Vern. 738; 1 P. Wms. 332.

(6) 2 W. Bl. 1159.

(7) 2 Bro. C.C. 51.

(8) 2 Ves. 698.

(9) 46 L. J. Ch. 248; 5 Ch. D. 183.

(10) 17 L. J. Ex. 81; 16 M. & W. 418; before *Wigram, V.C.* [1850], 20 L. J. Ch. 153; 7 Hare, 568. On app. [1862], 22 L. J. Ch. 313; 2 De G. M. & G. 145.

(11) 73 L. J. Ch. 455; [1904] 1 Ch. 533.

(12) 73 L. J. Ch. 153; [1904] 1 Ch. 332.

(13) 25 Beav. 335.

(14) 2 Ves. 336.

(15) 1 Atk. 581.

(1) 1 Co. Rep. 93b.

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take at all because they cannot take *modo et forma* as the testator intended—it being clear that the testator did intend to benefit them. The question is whether, in constructing the series of limitations which have to be constructed to carry out the *cy-près* doctrine, the Court is at liberty to do that which any conveyancer would do, or whether it is to be tied down to certain particular limitations for which there are precedents. There is no reason whatever why a contingent remainder should not be inserted. In *Monypenny v. Dering*¹⁰ a contingent remainder could not have been introduced. The limitation suggested is justified by the principle of *Nicholl v. Nicholl*.⁶ It has been said that that case and *Pitt v. Jackson*⁷ are open to objection, but Lord St. Leonards, in *Monypenny v. Dering*,¹⁶ did not assent to that. He seemed to think that the Judges in those cases only gave the estates to persons whom, on the whole view of the will of the testator, the testator shewed that he intended to take. The cases were accepted by Wigram, V.C. In the present case there is an intention shewn to provide for all the issue of Frederick Gray.

Vanderplank v. King [1843]¹⁷ was only a case where the doctrine, which was called a doctrine of construction, was applied according to the general intention. There is nothing in that case which throws any light on any other case.

Butcher, K.C., and *A. J. Spencer*, for persons claiming under the heir-at-law of the testator Mortimer.—The doctrine of *cy-près* is a well-ascertained doctrine. It is a rule of construction, and cannot be used for the purpose of making a new will for the testator—*Brudenell v. Elwes* [1802],¹⁸ *Seaward v. Willock* [1804],¹⁹ and *Richardson, In re; Parry v. Holmes*.¹² *Humberston v. Humberston*⁵ was a case of an executory trust. In this case it is not an executory trust, but a legal devise, and the utmost that the Court can do is to apply the doctrine for the purpose of construing the will. The doctrine is this:

(16) 22 L. J. Ch., at p. 317; 2 De G. M. & G., at p. 175.

(17) 12 L. J. Ch. 497; 3 Hare, 1.

(18) 1 East, 442; 7 Ves. 382.

(19) 5 East, 198.

where an estate is devised to an unborn person for life, with remainder to the issue of that unborn person, the Court reads the devise as a devise of an estate tail to the unborn person—*Gray's Rule against Perpetuities*, s. 643, (ed. 1886) p. 386; 2 *Fearne on Contingent Remainders*, rule 264, ss. 534, 535, and *Hampton v. Holman*.⁹ The only cases that have gone beyond that are *Pitt v. Jackson*⁷ and *Nicholl v. Nicholl*.⁶ The decision in *Pitt v. Jackson*⁷ may be justified on the special circumstances of the case, and it may be explained as a case of an executory trust—see *Stackpoole v. Stackpoole* [1843]²⁰; but the decision in *Nicholl v. Nicholl*⁶ was, it is submitted, bad law—*Monypenny v. Dering*,²¹ 1 *Jarman on Wills* (5th ed.), p. 269, note c. In applying the doctrine two things must be considered—first, that a class of persons must not be included that the testator did not intend to include; and secondly, that a class which he has included must not be excluded. According to the appellants' view, by giving estates in tail general to the sons of Frederick Gray persons would be included who were not contemplated by the testator—namely, daughters of a son's son; and this would prevent the application of the doctrine—see *Monypenny v. Dering*.²²

Upjohn, K.C., and *Wurtzburg*, for other persons interested in the real estate of Frederick Gray.—The *cy-près* doctrine has been stated too widely on behalf of the appellants—as if the Court could act as if it had instructions for a new will. The doctrine is stated by Rolfe, B., in *Monypenny v. Dering*.²³ Cases of executory trust, such as *Humberston v. Humberston*,⁵ must be put on one side. There were legal devises here. In construing a will the Court cannot put in a contingent instead of a vested limitation.

Jenkins, K.C., and *F. H. L. Errington*, for the trustees of the will of the testator Mortimer, referred to *Monypenny v. Dering*.²²

(20) 4 Dr. & W. 320, 350.

(21) 17 L. J. Ex., at p. 89; 16 M. & W., at p. 436.

(22) 22 L. J. Ch., at p. 317; 2 De G. M. & G., at p. 174.

(23) 17 L. J. Ex., at p. 85; 16 M. & W., at p. 428.

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Haldane, K.C., replied.

Cur. adv. vult.

Aug. 11.—VAUGHAN WILLIAMS, L.J., read the following judgment: This is an appeal from the decision of Mr. Justice Farwell, refusing to apply the *cy-près* doctrine in the case of the will of a Mr. Mortimer, the limitations in whose will, after the life estate of Frederick Gray, who under the will took as first tenant for life, were bad inasmuch as they infringed the rule against perpetuities. I think that the judgment of Mr. Justice Farwell was right, and ought to be affirmed.

It was urged that it was possible under the doctrine of *cy-près* to give effect to the general intention of the testator in such a way as to enable the ultimate remainder "to the use of the said Frederick Gray, his heirs and assigns for ever," to take effect.

[His Lordship referred to the will of the testator John Mortimer, and continued:] Now, as in this case the simple insertion of an ordinary estate tail would introduce a class of persons whom the testator manifestly deliberately omitted—namely, daughters of the sons of a son, it was proposed to get over the difficulty by a contingent limitation, which has been called Mr. Parker's limitation because he drafted it, it being conceded by counsel that a vested limitation would not effect the object.

In the first place, this is not a case of an executory trust. In such a case the Court, treating the will as instructions for the settlement of a trust deed, will insert limitations which would not be permissible in the case of a devise of successive legal estates. Except in the case of executory trusts, the *cy-près* doctrine can only be applied by substituting an estate tail for a life estate, and thus enabling the general intention of the testator that his issue male or issue general, as the case may be, shall all take in succession to be effected by the children taking according to the law of descent, and not as purchasers. If this were done here, the class omitted by the testator would be introduced as beneficiaries, and hence the ingenious contingent limitation

to avoid the breach of the admitted rule that a devise will not be construed *cy-près* when such a construction might have the effect of passing the estate to persons to whom no interest is given under the will, which, as pointed out by Lord St. Leonards in *Monypenny v. Dering*²² cannot be done. To allow this contingent limitation to be inserted, and to allow it for the purpose of preserving the ultimate limitation, I agree with Mr. Justice Farwell, would be a clear extension of the doctrine of *cy-près*, which doctrine, it has frequently been laid down, ought not to be extended. It is admitted that no instance could be found in the books in which such a limitation had been introduced for the application of the *cy-près* doctrine. But it was contended that the principle established by *Nicholl v. Nicholl*⁶ would justify the substitution of such a contingent limitation. I can only say that in my opinion *Nicholl v. Nicholl*⁶ is not a case on which such an extension ought to be based. Not only is the report of the case very difficult to understand, but also it is plain that Lord St. Leonards, who, to a certain extent, defended the case against the criticisms of the Court of Exchequer in *Monypenny v. Dering*,²¹ manifestly assumed a state of facts which the reports of the judgment in *Nicholl v. Nicholl*⁶ do not warrant.

I think this appeal should be dismissed.

STIRLING, L.J. — I am of the same opinion. I agree with Mr. Justice Farwell that the application of the doctrine of *cy-près* is one which ought not to be extended. In the year 1802, in the case of *Brudenell v. Elwes*,¹⁸ Lord Eldon, referring to previous decisions, says, "those cases have at least gone, as Lord Kenyon observes,²⁴ to the utmost verge of the law; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step farther." So far as I know, since that judgment was given no Judge has gone a single step further than the previous decisions warranted. We have here to deal, not with the case of an executory trust, but with the case of legal limitations, and as to such a case Lord

(24) 1 East, at p. 451.

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Ellenborough, in the year 1804, in *Seaward v. Willock*,¹⁹ makes these observations: "Can we then make another will for the testator giving to his devisees different estates than those he meant to give to them, because the estates he intended cannot by the rules of law take effect? This I conceive would be assuming a power which does not belong to us, of turning a legal devise into an executory trust."

Now, in the present case, if the will were simply followed, and the rule of *cy-près* applied in the ordinary way by turning estates for life into estates of inheritance in tail, those estates would be vested remainders. The result of that application of the rule of *cy-près* would be that persons whom the testator never intended to provide for would be included in the limitations, and that would be contrary to the rule laid down by Lord St. Leonards, in a case of great authority—namely, *Monypenny v. Dering*.¹⁰ With a view to avoid the infringement of that rule, it has been suggested that a certain portion of these estates should be made subject to a contingency. That, as it appears to me, is altering the estates which the testator intended to give, and falls within the condemnation expressed by Lord Ellenborough in *Seaward v. Willock*.¹⁹

For these short reasons I am not prepared to depart from the judgment of Mr. Justice Farwell.

COZENS-HARDY, L.J., read his judgment.—In my opinion this appeal fails. We are asked to extend a very exceptional doctrine to a new case, and I do not feel justified in doing this. This is not an executory trust, in which greater latitude is allowed, the words used being regarded as instructions for an accurate settlement to be framed by a skilled conveyancer.

This is a case of legal devises which have only to be construed, bearing in mind that the *cy-près* doctrine is itself a rule of construction. In such a case the authorities enable us to treat, and indeed bind us to treat, a devise to an unborn person for life with remainder to the first and other sons of that unborn person in

tail as giving an estate tail to that unborn person. Beyond this the authorities do not go. They do not lend any sanction to the idea that you may make a new will for the testator if by means of the insertion of contingent limitations or clauses of defeasance, or other subtle devices, you can steer clear of the rocks of the rule against perpetuities, and give legal effect to the testator's intention without including any person he intended to exclude, or excluding any person he intended to include. *Seaward v. Willock*¹⁹ negatives any such idea. Mr. Parker has suggested a contingent remainder which, if inserted in its proper place, would, it is contended, be free from objection. I am not quite certain that it would attain the desired result, though I assume, for the purposes of my judgment, it would. To allow this insertion would be an unwarrantable enlargement of the *cy-près* doctrine, and would be really making a new will. At this period of the legal year it would not be right to discuss at length the cases which have been commented upon in argument. Suffice it to say that *Nicholl v. Nicholl*⁶ does not lay down any principle which can guide the Court in this or in any other case. No reasons are given for the decision, and if, as seems probable, it turned upon a forced construction of the particular will, it in no way assists the appellants. Otherwise, it is inconsistent with subsequent and reasoned authorities. As to *Pitt v. Jackson*,⁷ in the first place it was an executory trust, and in the next place it went, as Lord Eldon afterwards said, to the verge of the law. *Monypenny v. Dering*,¹⁰ in its various stages through the Courts, really seems to me fully to justify Mr. Justice Farwell's judgment, and to oblige us to dismiss this appeal.

Appeal dismissed.

Solicitors—Wade & Lyall, for appellants; Johnson, Weatherall & Sturt, agents for Langham & Swift, Eastbourne; Peacock & Goddard; A. F. & R. W. Tweedie, for respondents.

[Reported by A. J. Hall, Esq.,
Barrister-at-Law.]

SWINFEN EADY, J. { WESTERN SUBURBAN
1905. AND NOTTING HILL
Aug. 4. PERMANENT BENEFIT
BUILDING SOCIETY
v. RUCKLIDGE.

Practice — Writ — Defendant out of Jurisdiction—Order for Substituted Service at Places Abroad and within the Jurisdiction — Regularity — Rules of Supreme Court, Order IX. rule 2.

In ordering substituted service of a writ on a person out of the jurisdiction the kind of service ordered need not be restricted to service out of the jurisdiction, but may be extended to include substituted service within the jurisdiction.

Motion to discharge an order for the issue, and service out of the jurisdiction, of a concurrent writ of summons in the above-mentioned action in the following circumstances :

On December 7, 1904, the plaintiff society issued a writ against the defendant, a former officer of the society, for a declaration of liability in respect of former dealings with certain property in which the plaintiff society was interested, and for an account and alternative relief.

On March 13, 1905, Farwell, J., at chambers, made an order for substituted service of the writ. On May 11, upon a motion to discharge this order on the ground that the defendant was not at the time of the issue of the writ and had not at any time thereafter been resident within the jurisdiction, the defendant's daughter attended and was cross-examined upon her affidavit, wherein she had stated that her father left England and went abroad for the benefit of his health in October, 1904, and that to the best of her knowledge and belief he had not since then been in this country. It appeared from her evidence on cross-examination that the defendant was travelling about the Continent, and had been in France, and at Ghent, and intended to go to Liège. Farwell, J., feeling himself bound by the decision of the Court of Appeal in *Wilding v. Bean* [1890],¹ discharged the order.

On June 5, 1905, Swinfen Eady, J., at chambers, made an order that the plaintiffs be at liberty to issue a concurrent writ of summons in the action and serve the same out of the jurisdiction upon the defendant at Calais or elsewhere in the Republic of France, or at Ghent, or Liège, or elsewhere in the kingdom of Belgium, and that service of the said writ of summons by sending a copy thereof, together with a copy of that order, through the post prepaid, in an envelope addressed to the defendant at each of the places following—namely, “(1) 12 Rucklidge Avenue, Harlesden, Middlesex; (2) Althorpe, Anerley, Surrey; (3) care of Messrs. Tarry, Sherlock & King, solicitors, Serjeants’ Inn, Fleet Street, E.C.; (4) Poste Restante Ghent, Belgium; and (5) Poste Restante Liège, Belgium”—should be deemed good service of the writ, and that the time for entering an appearance should be twelve days after service. The first-named two addresses were those of houses at which the defendant's daughter was occasionally to be found. The concurrent writ for service out of the jurisdiction was duly issued and served pursuant to the order.

Counsel now moved to discharge this last-mentioned order and to set aside the service of the writ for irregularity on the ground that the defendant was not at the time of the issue of the original writ in the action and had not at any time since been within the jurisdiction, and was not at the time of the issue of the concurrent writ in the action and had not at any time since been resident at Ghent, or Liège, or in the kingdom of Belgium, out of the jurisdiction of the Court.

J. G. Wood, for the motion.—The question is whether a writ for substituted service out of the jurisdiction and at places within the jurisdiction is bad. Where a writ is issued for service out of the jurisdiction, it cannot be served within the jurisdiction. An order for substituted service ought not to be granted where the defendant is out and remains out of the jurisdiction—*Fry v. Moore* [1889]²; and if on the face of the

(1) 60 L. J. Q.B. 10; [1891] 1 Q.B. 100.

(2) 58 L. J. Q.B. 882; 23 Q.B. D. 395.

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writ it appears that the defendant is out of the jurisdiction, it is irregular for an order to be made for substituted service of that writ in this country. It does not follow that this writ ever came to the knowledge of the defendant, and the object of substituted service is that the writ should come to the knowledge of the defendant within a reasonable time.

Eve, K.C., and *Austen-Cartmell*, for the plaintiff society.—Both the order and service were regular and ought not to be set aside—*Ford v. Shephard* [1885]³ and *Annual Practice*, 1905, p. 59.

SWINFEN EADY, J., after stating the facts as above set out and referring to the evidence of the daughter of the defendant, came to the conclusion that the defendant had wholly failed to support his case on the facts; and his Lordship continued as follows: Then as to the point of law. It was contended that no order could be made for the substituted service of a writ for service abroad by leaving a copy of the writ at places in England. There is an authority directly contrary to that contention—*Ford v. Shephard*,³ decided by Mr. Justice Day and the late Master of the Rolls. In that case not even a concurrent writ had been issued. The headnote is as follows: "Where a writ has been issued for service out of the jurisdiction, and the defendant is abroad, a judge, if the attendant circumstances warrant substitution, may properly order a copy of such writ to be served within the jurisdiction, although it is not in the form used for service within the jurisdiction."

In my opinion the established practice is that when leave is given to serve a writ abroad, and substituted service of that writ may be effected, that substituted service may be, and frequently is, ordered to be effected not only abroad but also in England. It is stated on page 59 of the *Annual Practice* for 1905 that, "In ordering substituted service on a person out of the jurisdiction, the kind of service ordered is not restricted to service out of the jurisdiction, but may be by substitution effected within the jurisdiction." In my judgment that statement is entirely

(3) 34 W. R. 63.

in accordance with the practice. Then the passage in the *Annual Practice* continues: "Where leave has been obtained to serve a writ abroad, and it is shown that the defendant resides in some remote part of India, or other Colony or foreign country, and that personal service would either be very difficult or very costly, the following procedure is sometimes adopted: The plaintiff sends notice of the issue of the writ to the defendant by *special* registered letter, and produces and verifies the official intimation that the letter has been received by the defendant. Upon this evidence orders have on several occasions been made by the Judge in Chambers in K.B.D. for substituted service of the writ by sending the same to the defendant by registered post." In the present case every effort has been made to ensure that this writ should come to the knowledge of the defendant. It was sent addressed to him at Poste Restante Ghent, Poste Restante Liège, 12 Rucklidge Avenue, Harlesden, and Althorpe, Anerley, and it was sent so as to ensure reaching him. It was also sent to Messrs. Tarry, Sherlock & King, his present solicitors, so that if they are in communication with him and have received his instructions to make this motion, they have doubtless informed him of this writ.

This is an attempt to evade personal service of the writ, and brings this case within Order IX. rule 2. It appears to me that the defendant has been able to evade prompt service of this writ, and, in my opinion, the best order has been made, and in the circumstances I refuse this motion with costs.

Solicitors—Tarry, Sherlock & King, for defendant; Graham Gordon, for plaintiff society.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

WARRINGTON, J. } PEDLAR v. ROAD BLOCK
1905. } GOLD MINES
July 28. } OF INDIA, LIM.

Company—Memorandum of Association
—Primary Object—Wide General Powers
—Construction—Ultra Vires.

A company was formed—first, to acquire and take over as a going concern the undertaking of another gold-mining company; and secondly, to acquire gold mines, mining and other rights, and land, auriferous, metalliferous, or otherwise, or any interests in the same, in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, &c. The memorandum of association also gave the company wide general powers. The property acquired under the first object was not workable at a profit, and the directors now sought to purchase other mining properties in Bombay. A general meeting of the company was called, and a resolution was passed approving of the draft agreement, and authorising the directors to enter into it and carry it into effect. On a motion by a shareholder for an injunction to restrain the company from entering into the agreement on the ground that it was ultra vires,—Held, that the main object of the company was gold mining in "Mysore and elsewhere," and that the proposed agreement to purchase other mining properties was within the objects stated in the memorandum of association, and injunction refused.

Stephens v. Mysore Reefs (Kangundy) Mining Co. (71 L. J. Ch. 295; [1902] 1 Ch. 745) discussed and distinguished.

Motion by a shareholder in the Road Block Gold Mines of India, Lim., for an interim injunction to restrain the company from entering into an agreement giving the company an option to purchase certain mining property in the Bombay Presidency on the ground that the agreement was *ultra vires* the company.

The company was incorporated under the Companies Acts on July 15, 1903, under the name of the Road Block Gold Mines of India, Lim., with a capital of 180,000*l.*, divided into 180,000 shares of 1*l.* each. The objects for which the company was established were specified in

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clause 3 of the memorandum of association, which was divided into twenty-five paragraphs.

The following sub-clauses were referred to in the argument:

"(1) To acquire and take over as a going concern the undertaking of the Road Block Gold Mining Company of India Limited (incorporated in 1900) and all or any of the assets and liabilities of that company, and with a view thereto to enter into and carry into effect with or without modification the agreement referred to in article 3 of the articles of association of this company."

"(2) To acquire Gold Mines, mining and other rights and land, auriferous, metalliferous or otherwise or any interests in the same respectively in Mysore and elsewhere, and to work, exercise, develop and turn to account the said mines, rights and land or interests therein respectively."

"(8) To purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on any business which the company is authorised to carry on, or possessed of property suitable for the purposes of the company."

"(11) To enter into partnership or into any arrangements for sharing profits, union of interests, joint adventure, reciprocal concessions or co-operation with any person or company carrying on or engaged in, or about to carry on or engage in any business or transaction which the company is authorised to carry on or engage in, or any business or transaction capable of being conducted directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in or securities of, and to subsidise or otherwise assist any such company, and to sell, hold, reissue, with or without guarantee, or otherwise deal with such shares or securities."

"(12) Generally to purchase, take on lease, or in exchange, hire or otherwise acquire any real or personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects or capable of being profitably dealt with in connection with any of the company's

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property or rights for the time being, and in particular any easements, ships, barges, rolling stock and stock-in-trade."

"(14) To sell the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of this company."

"(15) To promote any company or companies for the purpose of acquiring all or any of the property, rights, and liabilities of this company, and for any other purpose which may seem directly or indirectly calculated to benefit this company, and to underwrite or subscribe for or procure to be underwritten or subscribed for all or any part of the share or debenture capital of any such company."

"(24) To sell, improve, manage, develop, exchange and enfranchise, lease, mortgage, dispose of, turn to account, or otherwise deal with all or any part of the property or rights of the company."

"(25) To do all such other things as are incidental or conducive to the attainment of the above objects, and so that the word 'company' in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere, and so that the objects specified in each paragraph of this clause shall, except when otherwise expressed in such paragraph, be in nowise limited or restricted by reference to or reference from the terms of any other paragraph or the name of the company."

After spending considerable sums of money on the exploration and examination of the Road Block property, the directors came to the conclusion that it was not worth spending any more money upon, and they accordingly entered into an agreement, which received the sanction of a meeting of the company, for the acquisition of another property, not in Mysore, but just over the border in the Presidency of Bombay. That agreement was made between the Sangli Gold Mines, Lim., thereafter called the vendors, of the one part, and the Road Block Gold Mines of India, Lim., thereafter called the pur-

chasers, of the other part. After reciting the title of the vendors to the property in question, the agreement provided that "The purchasers shall subject as hereinafter provided during a period of two years from the — day of — enter upon the Yelisirur properties and take all necessary steps for prospecting and testing the same and they shall expend during such period of years with a view to proving the value of the Yelisirur properties a sum of not less than 5,000*l*. The purchasers shall also pay to the vendors upon the execution hereof the sum of 50*l*. For the consideration aforesaid the vendors agree that they will not for the said period of two years"—that is the limited period—"sell or agree to sell or offer for sale the Yelisirur properties or any part thereof to any person or persons or company or companies other than the purchasers or their nominees. But if within the said period of two years the purchasers shall give notice in writing to the vendors by registered post addressed to them at their registered offices to sell and that they the purchasers will purchase or procure to be purchased the Yelisirur properties thereupon the sale and purchase thereof shall proceed and be carried out on the terms and conditions hereinafter specified and a valid and complete contract for sale and purchase of the Yelisirur properties upon the said terms and conditions shall be deemed to be existing and on foot between the said parties hereto—that is to say . . ." Clause 4 provided for the proper assurance of the property as the purchasers should in writing direct. Clause 5 provided that part of the consideration should be the sum of 1,250*l*. cash. The clause as to the residue of the consideration was as follows: "The purchasers shall either (1) Increase their share capital and procure the same to be subscribed and taken up in such a manner and to such an extent as shall be necessary to give them a subscribed capital sufficient when paid up to provide a cash working capital of 45,000*l*. over and above anything payable to the vendors under this agreement and issue to the vendors or their nominees as fully paid 15 per cent. of the nominal share capital of the purchasers after the same shall have been so increased as aforesaid, or (2) Form or

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procure to be formed a new company limited by shares having a subscribed share capital sufficient when paid up to provide a cash working capital of 45,000*l.* over and above anything payable by such new company for the properties purchased by them and enter into an agreement for the resale of the Yelaisirur to such new company and procure 15 per cent. of the nominal share capital of such new company to be issued as fully paid to the vendors or their nominees."

On July 25, 1906, a second ordinary general meeting of the company was held, and a resolution was passed approving of the draft agreement and authorising the directors to enter into it and carry it into effect.

A question having arisen as to the power of the directors to acquire this new property, having regard to the decision in *Stephens v. Mysore Reefs (Kangundy) Mining Co.* [1902],¹ where the memorandum of association was very similar to the present one, this action, which was a friendly one, was started by the plaintiff on July 26, 1905.

Rowden, K.C., and *S. Dickinson*, for the plaintiff.—This company was formed to acquire and take over as a going concern the undertaking of the Road Block Gold Mining Co. of India, Lim. (incorporated in 1900). The wider powers conferred by the other sub-sections are subsidiary to that. The company has no power to acquire other gold mines elsewhere, even with the consent of the shareholders—*Haven Gold-Mining Co., In re* [1882],² and *German Date Coffee Co., In re* [1882].³ This case is exactly similar to *Stephens v. Mysore Reefs (Kangundy) Mining Co., Lim.*,¹ where the directors were restrained from acquiring a gold mine in another place. This company ought to be restrained.

[They also referred to *Crown Bank, In re* [1890].⁴]

Eve, K.C., and *Frank L. Wright*, for the defendants.—It is necessary to consider the true meaning of the memoran-

dum. The object of this company is gold mining generally, in "Mysore and elsewhere." The subsidiary clauses must be construed by reference to the primary clause. The substratum of this company is not gone, as was held in *German Date Coffee Co., In re*.³ This case is different from *Stephens v. Mysore Reefs (Kangundy) Mining Co., Lim.*,¹ for there the proposal was to carry on financial operations in West Africa. It is not necessary to rely upon clause 25, because what this company wishes to do is within its main object—namely, gold mining generally. The motion is misconceived, and ought to be refused.

Rowden, K.C., replied.

WARRINGTON, J., after stating the facts as set out above, continued: Now, what is the true effect of that agreement? It seems to me to be clearly this—First, an option is given to the company, to be converted at the company's will into an absolute contract, to purchase this property, but with a further option to the company that if it thinks fit it may direct that the property, instead of being conveyed to itself, shall be conveyed to the purchasing company; but it is to be borne in mind that the second option is merely for the sale to a company to be promoted by the present company. It does not involve the present company in any financial liability to any such new company, or in any liability to subscribe for the shares of that new company. That is important, as will appear hereafter. The question is, Is that agreement *ultra vires* this company? Now, first, what is the true way of construing a memorandum of association containing wide words such as this memorandum contains? There one is guided by the judgments of the Court of Appeal in *German Date Coffee Co., In re*,³ and I think the best statement of the rule of construction to be adopted is that contained in the judgment of Lord Justice Lindley; the other judgments contain the same principle in the result, but Lord Justice Lindley starts his judgment by stating what he thinks is the true principle to be observed. Now, before I read that passage, it is

(1) 71 L. J. Ch. 295; [1902] 1 Ch. 745.

(2) 51 L. J. Ch. 242; 20 Ch. D. 151.

(3) 51 L. J. Ch. 564; 20 Ch. D. 169.

(4) 59 L. J. Ch. 739; 44 Ch. D. 634.

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desirable to see what was the memorandum of association that the Court was there construing, and what was the purpose which the company was intending to carry out, and which in the result was said not to be within their powers. The memorandum of association in that case contained eight clauses, and eight only. The first of those clauses provided that the object of the company was: "To acquire and purchase, and to use, exercise, and vend certain inventions for manufacturing from dates a substitute for coffee, for which a patent has or will be granted by the Empire of Germany." Then clauses 2 to 7 contain provisions which refer in clear terms to those particular inventions and no others. Then clause 8 was this: "To import all descriptions of produce for the purposes of food, and the exporting of the same, and the selling and disposing thereof respectively, and to acquire by purchase or to lease or hire any land and buildings, steam-engines &c. either in connection with the above-mentioned purposes or otherwise, for the purposes of the company or any company in the formation of which the company may have an interest." Now, of course, that clause, read by itself, was as wide as words could be. It would enable the company (which was called the German Date Coffee Co.), if read literally, to carry on any business whatever connected with the importation of produce for the purposes of food. That was the memorandum which the Court had to construe. The facts were that the patents they were formed to acquire had not been granted. That object, therefore, expressed in the first seven paragraphs, had failed altogether. But they proposed to acquire another patent in another country for the same or a similar invention. The way in which the matter came before the Court was upon a winding-up petition, it being alleged that the substratum of the company had gone. Now I come to Lord Justice Lindley's judgment. He says: "The first question we have to consider is, What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of

association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this company, which, by the bye, is called the German Date Coffee Company, Limited, was to manufacture a substitute for coffee in Germany under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money."

Now, applying that principle to the present case, and for the moment treating it as uncovered by any authority except that case, for what ought I to say this company was formed? It is called the Road Block Gold Mines of India, Lim. That by itself, of course, tells one nothing except that it is formed for gold mining, and that in order to distinguish that company from other gold-mining companies it is called the "Road Block." Then we find a little further light is thrown upon it by the first sub-clause of clause 3, which is: "To acquire and take over as a going concern the undertaking of the Road Block Gold Mining Company of India, Limited." That, no doubt, is the original first object, and that for which it was first incorporated, and now we know why that particular name was selected for the company among other gold-mining companies. But that is not all. The next clause goes on to provide that it may acquire gold mines and other things, which I need not enumerate, in Mysore and elsewhere. For my present purpose I need read no more of these clauses in the memorandum, because they certainly do not conflict with the construction which I am about to put upon those first

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two clauses. In my opinion, looking at this, and treating it as entirely unfettered by authority, I should have said that the object of this company was gold mining, not gold mining in a particular mine and in no other, but gold mining generally. Otherwise I cannot imagine what force is to be given to the words "and elsewhere" in sub-clause 2 of clause 3, because it seems to me if you were to say that the object of the company is gold mining only in the Road Block Gold Mines, and other gold mining incidental to the working of the Road Block Mines, you reduce clause 3 to an absurdity. To say that you are to work the Road Block Mines and to acquire gold mines elsewhere than in Mysore as incidental to the working of the Road Block Gold Mines seems to me to be ridiculous. I must therefore, I think, treat this as a company formed for the purpose of gold mining not only in Mysore, but elsewhere where the company may think it right to acquire a gold mine. But the object of the company is gold mining. Then, starting with that, is the present agreement an agreement for gold mining, that which a company formed for the purpose of gold mining might properly enter into? I have stated the nature of the agreement. It is enough to say that, so far as that agreement provides for the working and purchasing of the gold mine referred to in it, it is an agreement which might properly be entered into by a gold-mining company. It comes within the very objects for which a gold-mining company is established. But the agreement is not confined to the purposes of simply purchasing a gold mine which the company is to work; and so far as it departs from that purpose one has to see whether the other minor purposes of the agreement are authorised by the memorandum of association. Now, there one has to go a little further, and you find that the company, besides taking power as a gold-mining company (still confining it to its object as a gold-mining company), is not confined merely to purchasing property which it will work itself, but it has power to promote companies for the purpose of acquiring any of the properties, rights, and liabilities of the company—that is to say, if it was incon-

venient to work the whole of the Road Block property it might promote a company for the purpose of acquiring that part of the Road Block property which it did not choose to work itself. If so, what is proposed by this agreement would come within that clause. By the agreement the company acquired the right on certain terms to have conveyed to itself or its nominees the property mentioned in that agreement. Instead of taking it itself, if it acts under the second alternative in clause 6 of the agreement, it may promote a company to acquire those rights which the company has under the agreement. Starting, then, again on the assumption that it is a company for gold mining, and for no other purposes except such as are incidental to gold mining and authorised by the terms of the memorandum, I should come to the conclusion, if unfettered by authority, that this agreement was within the terms of the memorandum. I say nothing about sub-clause 25—I would rather not, because that contains very wide words which it is unnecessary to rely upon for the purposes of this case, and as to the effect of which I think it is not wise to express any opinion unless one is obliged to. I therefore put sub-clause 25 out of the question altogether, and say nothing about it.

But now am I at liberty to act on the view I have stated? A very similar point came before Mr. Justice Swinfen Eady in the case of *Stephens v. Mysore Reefs (Kangundy) Mining Co., Lim.*¹ The memorandum was to all intents and purposes the same as the present. The proposal which he held to be *ultra vires* was, as I shall shew directly, not the same, but I think very different; and one must regard the view which the learned Judge expressed of the memorandum as being to some extent based upon and influenced by the nature of the question which he had to decide. It was not necessary for him to decide whether the primary object of that company was gold mining or mining in a particular mine, because whether the construction was that its object was gold mining generally or mining in a particular mine, I think the agreement in that case did not come

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within the objects. Now, looked at in that light, I think I am able to distinguish that case. Of course, in a question of construction, in my view, no Judge is bound by the decision of another Judge. He is obliged to express his view of the meaning of the document which he has to construe, and in expressing that view, in my opinion, he is not bound by the view of somebody else. I remember hearing Sir George Jessel say that he should not regard himself as bound by the decision of a previous Judge on the construction of the identical document and the identical passage of the document which he had to construe. Now, what Mr. Justice Swinfen Eady said in that case was this: "In my opinion, the right way to construe the memorandum of association is to take the first paragraph of clause 3, as stating the principal or primary object for which the company is formed, i.e. 'to acquire and take over as a going concern the undertaking of the Mysore Reefs (Kangundy) Ltd.' Then the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object. It is right to give a liberal construction to these subsidiary paragraphs to enable the main object of the company to be carried out. But it is not right to accept a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever. I think I am precluded from so wide a construction, not only by the general principles of construction, but by the several authorities cited by counsel for the plaintiff, and particularly by Lord Justice Lindley's judgment in the case of the *German Date Coffee Co., In re.*" Then he cites that passage from Lord Justice Lindley's judgment which I have already read. Then he says: "Construing then this memorandum fairly and reasonably, as it ought to be construed, I am of opinion that the proposed scheme is not authorized by the memorandum." Then he proceeds to deal with sub-clause 25, with which, as I say, I do not propose to deal. In the first place, the learned Judge there does not refer to sub-clause 2 of the memorandum, and I think for the reason which will be obvious when I come directly to see what it was the

company were proposing to do. As I have already said, it was not necessary for him to say whether that company was for gold mining generally or whether it was for the carrying on of a particular mine. What the company there was proposing to do was this: The original mine, as in this case, had failed. That mine was in Mysore, as indicated by the name of the company. The company proposed to obtain an option over a mine in West Africa, but not with a view, under any circumstances, of purchasing it themselves. They were to obtain the option, and, if they thought it worth while, then a subsidiary company would be formed with a capital of 75,000*l.*, the purchase price to be 25,000*l.*, payable entirely in shares, leaving a working capital of 50,000*l.*, of which 30,000*l.* would be subscribed by this company and 20,000*l.* in shares would be held in reserve. The company therefore were there to embark, as was argued by the plaintiffs in putting their case before the Court, in a financial speculation pure and simple. They were to subscribe to this company, but they were not to acquire the property over which they were to have an option; they were merely to embark the money of the shareholders in subscribing to another company formed for the purpose of acquiring this gold mine.

Now, again going back to Mr. Justice Swinfen Eady's judgment, if I may say so, I heartily concur with his statement that it is not right to accept a construction which would virtually enable a company to carry on any business or undertaking of any kind whatever, and I have not said a word, and I do not propose to say a word, which could in any way lead to the belief that I depart in the least from the principle so laid down; but where I do venture to differ with the greatest respect from one expression in his judgment is where he states the effect of the remaining sub-paragraphs of clause 3. He says: "the remaining paragraphs of clause 3 must be read as conferring on the company full and ample powers for carrying out that main object." Now I venture to think that he had, because it was unnecessary for him in that case, passed over the effect of sub-

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clause 2, and had, because it was not necessary for him to go further, expressed a view that the main object of the company—in fact really the only object of the company—was to acquire the particular mines. Now it seems to me that in the present case, where I have to consider what is the real object of the company, I am bound to see whether I am obliged to confine it to that which is expressed in the first sub-clause or whether I can go further; and for that reason I think I am justified, without relying upon the principle which I have already mentioned that no Judge is bound in the matter of construction by the decision of a previous Judge, in saying that even, if that were not the true principle upon which I must go, I am justified in saying that I am not bound by the decision of Mr. Justice Swinfen Eady on his expression of opinion on the construction of the memorandum contained in his judgment. With the decision in that case I have nothing to do, and I do not say a word, as it would not be respectful for me to do so, except that if this case came within it I should follow it; but I think that, so far as the construction of this memorandum is concerned, I am able to distinguish the judgment of Mr. Justice Swinfen Eady in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Lim.*¹ I think here the real object of the company was gold mining; the agreement which they entered into is as to gold mining; the rest of the agreement is incidental to that, and falls within the incidental clauses of the memorandum. On these grounds I think the plaintiffs' case fails.

Solicitors—Petch & Co.; Francis & Johnson.

[Reported by W. A. G. Woods, Esq.,
Barrister-at-Law.

FARWELL, J. } CATHERINE HUNT'S
1905. } SETTLED ESTATES, *In re*;
Aug. 10, 11. } *BULTEEL v. LAWDESHAYNE*.

Settled Land—Capital Money—Tenant for Life—Investment—Selection—Fiduciary Position—Discretion—Improper Investment—Interference by Court—Bona Fides—Leaseholds—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. vii.; s. 22, sub-s. 2; s. 53.

In the selection of investments for capital moneys under the Settled Land Acts, the tenant for life is in the position of an ordinary trustee who has a discretionary power, and it is not enough for the selected investment merely to fall within the description of investments authorised by those Acts, it must in other respects also be a proper and suitable investment, and one which a trustee would be justified in accepting.

Whether the tenant for life in selecting such investments has acted bona fide or not, the Court will, in the interest of the remaindermen, interfere to prevent improper or unsuitable investment, and in such a case the trustees of the settlement are not bound to comply with the direction of the tenant for life, but are justified in obtaining the direction of the Court.

Eight leasehold houses of the artisan class, held for a term of ninety-two years unexpired, at ground rents amounting to 50l. per annum, and which were described by the surveyor employed by the trustees as "badly planned, badly built, badly drained," and as likely to be "increasingly expensive to maintain in repair and keep occupied," held not to be a proper investment for capital money.

Adjourned summons and witness action.

The summons was taken out by the trustees for the purposes of the Settled Land Act of the settlement created by the will of the late Catherine Hunt, who died on June 28, 1869, for the direction of the Court in the circumstances herein-after mentioned. The respondents to the summons were the tenant for life under the settlement, and the assignee of his life estate. The plaintiffs in the action were the remaindermen under the settlement, and the defendants were the tenant for

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life, the assignee of his life estate, and the trustees of the settlement for the purposes of the Settled Land Act.

The material facts were as follows :

On April 6, 1904, the tenant for life and his assignee entered into a contract for the purchase of certain leasehold premises, Nos. 21 to 35 (odd numbers) Gowan Road, Willesden Green, for the sum of 2,650*l.*, and in May, 1904, served the trustees with a notice directing them out of capital moneys in their hands (the proceeds of sale of freehold land originally comprised in the settlement), to purchase the said leasehold premises at that price. They also furnished the trustees with the report dated February 18, 1904, of Mr. Hewish, the surveyor employed by them, in which, after referring to the previous reports in 1899 and 1900 of another surveyor estimating the rentals at 35*l.* per house, or in the aggregate at 284*l.*, and the value of the property at 3,315*l.*, he said : " Experience from actual lettings however has proved that these houses do not command more than 30*l.* per annum and there are several other houses in the same road of similar type advertised to let at yearly rents of 28*l.* and 30*l.* I therefore consider that 30*l.* per annum per house is a reasonable rent and a fair basis upon which to value the property held as I am informed for an unexpired term of about 90 years at ground rents amounting in all to 50*l.* per annum. The road not being open at both ends is in some respects a disadvantage to the property. Under these circumstances I am of opinion your client would not be justified in giving so much as 350*l.* per house or 2,800*l.* in all, and after careful consideration I advise that he should not offer more than 2,600*l.*, a sum which in my estimation represents the value of the property. Assuming, however, that 2,600*l.* would not be accepted, and having in view the fact that the houses are so to speak all in one parcel, I consider your client might safely advance upon his offer by 50*l.*, but beyond two thousand six hundred and fifty pounds (2,650*l.*) for the whole property the investment would not, in my opinion, prove a remunerative one."

The trustees, not being satisfied about the value of the property, instructed

Messrs. Farebrother, Ellis & Co. to survey the property and advise them as to the propriety of the purchase thereof for the sum of 2,650*l.* Mr. Galsworthy, one of the partners in the firm, surveyed the property, and in his report dated June 13, 1904, after stating that the property consisted of eight houses of the artisan class, built about six years previously, containing severally six or seven rooms, kitchen, and scullery, situate in a *coul de sac* off the High Road, Willesden Green, and held for a term of ninety-nine years from Lady Day, 1898, at ground rents amounting to 50*l.* per annum, continued as follows : " We understand that five of the houses are let on monthly tenancies at rentals amounting to 148*l.* including the house occupied by the resident agent : another is partially occupied by a tenant who is under notice to quit, and the remaining two are unoccupied. These three are estimated by the agent to produce 90*l.* making a total rental of 238*l.* per annum, tenants paying rates and taxes. We have ascertained that the property was sold at the Mart in 1900 for 2,375*l.* The actual and estimated rents were then put at 287*l.* per annum or 49*l.* in excess of the present actual and estimated rentals, but having regard to the number of empty houses in the road at the present time and difficulty in letting, it is quite evident to us that a lower rent than 238*l.* must be anticipated in the future. Moreover, the property is badly planned, badly built, badly drained and one which will be increasingly expensive to maintain in repair and keep occupied. The drains on being tested at four of the houses proved to be altogether unsound. With regard to value, we are of opinion that the utmost that should be given for this property at the present time for trust purposes is fourteen hundred pounds (1,400*l.*) but we strongly advise Trustees not to buy it at any price, as even at this figure unless it is continually looked after under the most careful management there is no doubt that it will rapidly deteriorate and if it has to be realised the Trustees would not get back the capital invested."

The trustees thereupon took out the above-mentioned summons for the direction of the Court, under section 44 of

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the Settled Land Act, 1882, upon the questions whether the sum of 2,650*l.* capital moneys might properly be invested as proposed; whether the applicants ought to comply with the above-mentioned direction of the tenant for life and his assignee; and, in the event of the purchase being made, how and out of what fund the property ought to be kept in repair, and whether any part of the rents and profits should be set aside as a sinking fund.

The remaindermen subsequently commenced the above-mentioned action, claiming a declaration that the direction given by the tenant for life and his assignee was not a proper and *bona fide* exercise by the tenant for life of the discretion vested in him by the Settled Land Act; an injunction to restrain the trustees from applying capital moneys in pursuance of the direction; and an injunction restraining the tenant for life from exercising, and his assignee from procuring to be exercised, the powers of a tenant for life under the Settled Land Acts in breach of trust and without regard to the interests of the plaintiffs under the said settlement.

The summons and action now came on for hearing together.

In the summons—

Upjohn, K.C., and *Rolt*, for the trustees.—This proposed investment falls within the latter of the provisions of sub-section 7 of section 21 of the Settled Land Act, 1882, and, had it been made, the trustees might have relied on section 22, sub-section 2, and section 42 of the Act for protection against liability, but in the face of their own surveyor's report they could not consider it a proper investment, and, that being so, they are justified in applying to the Court for directions under section 44—*Hatten v. Russell* [1888].¹ In *Coleridge's (Lord) Settlement, In re* [1895],² Chitty, J., decided that the trustees could not interfere with the real and honest exercise of his discretion by the tenant for life, and said that the tenant for life was in the position of an ordinary trustee. In the

opinion of the trustees the tenant for life is not, in the circumstances, properly discharging his fiduciary duties under section 53 of the Act, and has not been properly advised, as was the case in *Hotham, In re; Hotham v. Doughty* [1902].³ This is a proper case for the Court to control the exercise of this power by the tenant for life. The Court has already controlled the discretion given to trustees by the Act with regard to the expenditure of capital moneys on improvements—*Keck's Settlement, In re* [1904].⁴

[They also referred to *Cleveland's (Duke) Settled Estates, In re* [1902].⁵]

R. J. Parker, for the tenant for life.—The exercise by the tenant for life of the absolute discretion given to him by the Act cannot be controlled either by the Court or the trustees. The question is, Has he exercised his discretion? If he has, and the investment chosen is within those authorised by the Act, the Court cannot interfere—*Coleridge's (Lord) Settlement, In re*,² and *Hotham, In re*.³ According to the later of those two decisions, the trustees are only concerned to ask whether the tenant for life has been properly advised.

[*FARWELL, J.*, referred to *Whiteley, In re; Whiteley v. Learoyd* [1886].⁶]

That was the case of an ordinary discretionary trust, but the discretion given to a tenant for life by the Act is wider.

[*Upjohn, K.C.*, referred to the judgments in *Hampden v. Buckinghamshire (Earl)* [1893].⁷]

The Court is being asked to object to the nature of this property, and to exclude property let on monthly tenancies from the investments authorised by the Act.

In the action, which merely involved a question of fact—

Upjohn, K.C., and *Jolly*, for the plaintiffs.

(3) 71 L. J. Ch. 789; [1902] 2 Ch. 575.

(4) 73 L. J. Ch. 262; [1904] 2 Ch. 22.

(5) 71 L. J. Ch. 763; [1902] 2 Ch. 350.

(6) 55 L. J. Ch. 864; 33 Ch. D. 347. In *H.L. sub nom. Learoyd v. Whiteley*, 57 L. J. Ch. 390; 12 App. Cas. 727.

(7) 62 L. J. Ch. 643; [1893] 2 Ch. 531.

(1) 57 L. J. Ch. 425; 38 Ch. D. 334.

(2) [1895] 2 Ch. 704.

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Butcher, K.C., R. J. Parker, and A. F. Peterson, for the assignee of the tenant for life's estate.

R. J. Parker, for the tenant for life.

Rolt, for the trustees.

FARWELL, J.—The question in the summons raises a short point of law which I will dispose of first. The tenant for life desires to have invested capital moneys representing part of the proceeds of sale of the property originally settled. He is minded to invest in leasehold land, which comes within the power given by the Act. As I follow the argument put forward by counsel for the tenant for life, his contention is that if the property chosen is leasehold land held for the right number of years unexpired, and has been selected by the tenant for life, then, provided there has been no *mala fides* on his part, the Court cannot interfere with him in any case. I dissent altogether from that proposition. By virtue of the provisions of section 53, the tenant for life in exercising his statutory powers is to be deemed to be in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement, and his liability follows from his position as trustee; he is in neither a better nor a worse position than any ordinary trustee who has a discretionary power to invest in leaseholds. It is not enough, granted *bona fides*, for him to say "This is leasehold land held for sixty years or more unexpired, and I have chosen it." In *Whiteley, In re*,⁶ Lord Justice Cotton says in his judgment: "However, we must consider whether this is, or is not, within the power to invest on real security. I am of opinion it is real security, and if the Vice-Chancellor based his decision against the trustees on the view that this was not real security, that is to say, not a security within the power granted to the trustees, I am obliged to differ from him." Then the Lord Justice goes on to describe the nature of the property, and says the land is not the less a real security because it has a brickfield upon it, and continues: "It is still real security, but although it is real security it does not follow that the trustees are free from liability in respect

of loss incurred by lending on that security. It must be considered whether it was proper for the trustees, having regard, not only to the rules laid down by the Court, but to the special circumstances of the case, to invest the sum which they did on that security."

In this case the proposed investment is, in my opinion, properly described in Mr. Galsworthy's report. I place no reliance on the evidence as to the value of the property produced on behalf of the tenant for life, whose surveyor, moreover, admitted that he had never investigated the drains. [His Lordship read portions of Mr. Galsworthy's report, and continued:] It is as wrong for trustees to invest in property to which that description applies, although it is leasehold land held for more than sixty years unexpired, as it was for the trustees in *Whiteley, In re*,⁶ to invest upon the security of a brickfield, although it was a real security within the words of their power. A tenant for life is in the same position as a trustee, and is not justified in accepting a security which is not suitable. In *Hampden v. Buckinghamshire (Earl)*,⁷ Lord Justice Lindley, in delivering the judgment of the Court of Appeal, says, "assuming a tenant for life to be acting *bona fide* and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere." I certainly shall consider it my duty to interfere in such a case until I am corrected by a higher tribunal.

But it is said that I am bound by authority, and two cases were relied on—*Coleridge's (Lord) Settlement, In re*,² and *Hotham, In re*.³ In the former case the question arose in an entirely different way. The tenant for life desired an investment in certain debentures which were within the power given by the particular settlement. The trustees objected. The whole question was whether the discretion was to be exercised by the tenant for life or the trustees. Mr.

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Justice Chitty says, "The investments which the tenant for life has directed are all within the scope of the settlement power; but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select." He then examined the sections of the Act, and came to the conclusion that the trustees had no power to interfere with the discretion of the tenant for life: "The only limitations imposed on him are those to be found in the Act itself—notably in the 21st and 53rd sections." He then read the 53rd section, and continued: "Supposing that this case had not fallen within the Act, and that the trustees had, in the exercise of their ordinary discretion, selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life in the exercise of his statutory power cannot be controlled by the trustees or by the Court, so long as he really and honestly exercises his discretion." That is to say, the tenant for life is exactly in same position as an ordinary trustee.

Hotham, In re,³ went a step further. There Mr. Justice Cozens-Hardy distinguished *Coleridge's (Lord) Settlement, In re*,³ and decided that in the case of a mortgage trustees had to be satisfied as to the value of and title to a security. The Court of Appeal varied the order by declaring that the trustees were not bound to obey the direction of the tenant for life as to investment upon a mortgage unless and until they were satisfied that the direction was given upon a proper investigation as to title and report as to value. The question was really one between the solicitors of the tenant for life and those of the trustees, by whom the discretion as to title and value was to be exercised. But the decision shews that, whoever had the discretion, they were liable to the ordinary rules governing trustees in exercising it. There is nothing in either case opposed to the conclusion at which I have arrived in this case.

[His Lordship then dealt with the evidence in the action, and held that, even

if the tenant for life had acted *bona fide*, the property was not a proper one to be purchased, and the trustees were not bound to comply with the direction of the tenant for life. On the evidence, however, his Lordship found that the tenant for life had been guilty of fraudulent collusion with the assignee and his solicitor, who were interested in the sale. The order on the summons contained a declaration to the above effect, and ordered that the trustees should be at liberty to pay their own costs out of the capital moneys, and pay the balance into Court.

In the action no order was made except that the defendants, other than the trustees, should pay the costs.]

Solicitors—Morgan & Upjohn, for trustees and remaindermen; H. C. Knight, for other parties.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.

FARWELL, J. }
1905. } SMITH v. KERR (No. 2).
Feb. 7.

Charity—Inn of Chancery—Proceeds of Sale—Settlement of Scheme—Dependency of Inn of Court—Clifford's Inn—Inner Temple—Proceedings—Intervention of Inn of Court.

Upon the application of the Honourable Society of the Inner Temple to intervene and attend all proceedings connected with the settlement of a scheme relating to the trust fund which had arisen from the sale of Clifford's Inn, on the ground that Clifford's Inn was a dependency of the Inner Temple and had been under the control of that society in all educational matters for several centuries,—Held, that, on the evidence before the Court, the Inner Temple had no paramount right to be regarded as persons in the position of trustees of the fund, with power to administer it as they thought fit; and further that no useful purpose would be served by the Court exercising its discretion in favour of the Inner Temple and granting the application.

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Adjourned summons.

This was an application in the above-mentioned action of *Smith v. Kerr* (reported 69 L. J. Ch. 755; [1900] 2 Ch. 511), in which Cozens-Hardy, J., on June 19, 1900, made a declaration that the property known as Clifford's Inn, Fleet Street, in the City of London, was subject to a trust for charitable purposes. This decision was affirmed on appeal (reported 71 L. J. Ch. 369; [1902] 1 Ch. 774).

By an order in the action dated December 8, 1902, it was ordered (*inter alia*) that the said property be sold and that the proceeds of sale and income thereof (subject to certain payments thereout, including payments to the plaintiffs and defendants in the action) be appropriated for charitable purposes according to a scheme to be settled by the Court on the application of the Attorney-General, the plaintiffs and defendants to the action thereby consenting to have the amount which was to be devoted to the said charitable trust ascertained as therein mentioned. In pursuance of this order Clifford's Inn was subsequently sold.

By an order dated April 3, 1903, made in the matter of New Inn and in this matter, it was ordered that the proceedings relating to the scheme as to New Inn and Clifford's Inn should stand over until further order.

On March 29, 1904, this summons was taken out by the Hon. Sir William Grantham, one of the Judges of the King's Bench Division, and Sir Harry Bodkin Poland, K.C., trustees respectively of the Honourable Society of the Inner Temple, on behalf of themselves and the other trustees and masters of the bench of the said society, that, notwithstanding the order of April 3, 1903, they might be at liberty to intervene in this action and attend on all proceedings under the judgment in this action for settlement of a scheme relating to the trust fund which had arisen from the sale of Clifford's Inn.

The affidavit of Sir Henry Waldemar Lawrence, Bart., sub-treasurer of the Honourable Society of the Inner Temple, in support of the application, after stating

the above facts and submitting that the evidence on the trial of the action before Cozens-Hardy, J. (to which evidence the applicants craved leave to refer), shewed such a close and intimate connection between the Inner Temple and Clifford's Inn and the existence of such control of the Inner Temple over Clifford's Inn in all educational matters as to give the Inner Temple a special and peculiar right to intervene in proceedings for the settlement of any scheme as to the Clifford's Inn funds, stated as follows:

"9. The Inns of Court and the Inns of Chancery as stated by Lord Justice Mathew in this case [1902] 1 Ch. 782, had their beginning in an Ordinance and Commission issued by King Edward 1 in 1290. Under the said Commission they were established to provide for the legal education of students. The Inns of Chancery were affiliated with the Inns of Court.

"10. From time to time orders were made by the Crown with the advice of the Privy Council and Judges *e.g.* in 1557, 3 & 4 Ph. & Mary; 1574, 16 Eliz.; 1596, 38 Eliz.; 1614, 12 Jac. 1; and 1664, 16 Car. 2, for the better government of the Inns of Court and Chancery. It was expressly declared in the Order of 1574 that the reformation and order of the Inns of Chancery were referred to the consideration of the Benchers of the Houses of Court whereunto they belong.

"11. The Inns of Chancery known as Clement's Inn Clifford's Inn and Lyon's Inn were stated in a record of the Inner Temple dated in 1561 to have been united and annexed to the Inner Temple from time then immemorial.

"12. The Records of the Inns of Court show that from early times their Benchers exercised control in the management of the Inns of Chancery belonging to their Society and Appeals were made to the Benchers from time to time by the members of the Inns of Chancery upon matters of government. The Benchers also made the regulations for the conduct of the legal studies of the members of the Inns of Chancery.

"13. In 1677, upon an appeal from the decision of the Benchers of the Inner Temple on a dispute between the members

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of Clifford's Inn as to the election of their principal, the Judges declared that the government of that society was to be regulated by the Benchers of the Inner Temple.

"14. In support of the foregoing statements I would refer not only to the records of the Inner Temple but also to the published records of Lincoln's Inn and Gray's Inn. Such records shew the relationship of the Inns of Court to the Inns of Chancery thereto belonging in matters of management of their general affairs and the control of legal education.

"15. In further illustration of the close connection between the Inns of Court and their respective Inns of Chancery, I would refer to the Land Tax Acts commencing in 1692 (4 Wm. & M. ch. 1). This Act appointed as Commissioners for Taxes for each of the four Inns of Court and the Inns of Chancery thereto belonging a certain number of the Benchers of the Inn of Court, and similar provisions were enacted yearly from 1697 for 100 years until 1797 when the Land Tax was made perpetual.

"16. The same Commissioners were also appointed to act for the collection of the House and Window Taxes and to the present day Clifford's Inn is attached to the Inner Temple for the collection of Income Tax and Inhabited House Duty.

"17. The facts that Clifford's Inn was a dependency of the Inner Temple and that such Society was under the control of the Inner Temple in all educational matters and also in matters of discipline are confirmed and carried much further by the records of the Inner Temple, and in support of this I would refer to the documents printed in the Calendar of the Inner Temple Records edited by Mr. F. A. Inderwick, K.C., vol. 1, vol. 2, and vol. 3, and particularly to the several documents enumerated in the schedule to this affidavit and which it is submitted carry the case of the applicants much further even than the evidence before Mr. Justice Cozens-Hardy and establish fully such a right of control and such a material right of the Inner Temple in the due application of the said trust funds as to warrant the intervention now applied for."

The schedule to the above affidavit contained a list of Orders of Parliament, Bench Table Orders, and other orders and documents, from which counsel read extracts at the hearing.

Upjohn, K.C., and F. H. Colt, for the applicants.—The nature of the relationship between the Inner Temple and Clifford's Inn appears from the judgments of Cozens-Hardy, J., and the Court of Appeal in this case, and from the "Inner Temple Records." Legal education was a considerable factor in that relationship, and whenever a Reader for Clifford's Inn was required, the Inner Temple named three of their members, one of whom was ultimately chosen by Clifford's Inn. Readers ceased to be appointed somewhere about the middle of the nineteenth century, the reason being that by that period the Inns of Chancery had become practically obsolete as seats of learning, and students for the Bar were admitted direct into the Inns of Court. The Records shew clearly that the Inner Temple was in fact the governing body of Clifford's Inn in the matter of legal education, and whether the Inner Temple are entitled to be appointed as the administrators of the fund or not, as the applicants submit they are, the Court, at any rate, ought not in the exercise of its discretion to refuse them leave to attend further proceedings connected with the scheme and to advise thereon, especially as, now that the plaintiffs and defendants to the action have been paid out, there is no one before the Court to criticise any scheme the Attorney-General may think fit to bring in, or to assist the Court in settling such a scheme in accordance with the trusts declared by the original founder. The applicants ask the Court to say that this is a case in which the rights and duties of the Inner Temple are such that they should at least have leave to attend further proceedings in this matter.

The Attorney-General (Sir R. B. Finlay, K.C.) and R. J. Parker, for the respondents.—The Inner Temple are not entitled to intervene. Since about 1845 the Inner Temple have not taken any interest in Clifford's Inn or appointed

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Readers, and have not taken any part in this litigation until this late stage. On whichever ground the applicants base their application, whether as a matter of strict right or as an appeal to the discretion of the Court, they have no right to be heard on any further proceedings connected with this scheme.

F. H. Colt replied.

FARWELL, J.—This is an application by the trustees on behalf of the Honourable Society of the Inner Temple that they may be at liberty to intervene in the action and attend on all proceedings under the judgment for the settlement of a scheme. Mr. Justice Cozens-Hardy and the Court of Appeal have declared that the proceeds of the sale of Clifford's Inn are the subject of a charitable trust for educational purposes, and by the Order of December 8, 1902, the Attorney-General was directed to bring in a scheme. The Inner Temple were no parties to that litigation, nor did they in any way intervene or attempt to intervene. They now apply to the Court to allow them to come in, as persons having some peculiar interest in the fund, to attend the settlement of the scheme.

I do not think it is necessary for me really to go into the history of the matter, because it has been so fully discussed by Mr. Justice Cozens-Hardy and the Court of Appeal, and the extracts that I have had read to me this morning in no way tend to throw any doubt upon the results stated by the Judge in that case. I take what Mr. Justice Cozens-Hardy said in his judgment as correctly representing the state of things. There is no doubt that the original foundation was in order that Clifford's Inn might become a place for legal education. It was affiliated in some sort of sense to the Inner Temple. So far as one can trace, that affiliation only resulted in the appointment from time to time of Readers, which, I think, took the form of submitting to Clifford's Inn the names of divers persons whom they proposed should be appointed Readers, and Clifford's Inn selecting such as they thought best. This Reader then gave lectures, and moots were also held. That was a recognised form of legal education

down to the beginning of the nineteenth century. Mr. Justice Cozens-Hardy thus sums up the evidence: "The Readers thus appointed gave readings and took part in moots more or less regularly until about the middle of this century"—that is, the nineteenth century—"since which date there has been no attempt at legal education at Clifford's Inn." If and so far as it was the duty of the Inner Temple to see to the maintenance of legal education in Clifford's Inn, regarding Clifford's Inn as a school belonging to the Inner Temple, they certainly for more than half a century have neglected that duty. I do not say they were wrong. I do not put it that it is neglect in the sense of a reproach, because other forms of legal education arose, and they were possibly well advised in thinking that the forms of legal education under the original trust deed were no longer adapted to modern uses; but, be the matter how it may, they have intervened in no sort of way, as far as I can discover, for between fifty and sixty years. Before that, their efforts for some time certainly were intermittent, and in no modern instance has there been any real supervision or effectual control. I think they regarded these appointments to Readerships as matters that were for their own benefit rather than matters concerning the education of students. The result is that I find it impossible to say that they have any paramount right to be regarded as persons in the position of trustees of the fund, with power to administer it as they think fit. Their right is described by Mr. Justice Cozens-Hardy in these words—they were "subject in some vague sense to the Inner Temple, and to the jurisdiction of the Judges." The sense in which they were subject is not at all easy to ascertain. Be that as it may, I am clear that they were not subject in any such sense as to make it possible for me to allow the claim that the funds in this case should be handed over to the Inner Temple as the trustees of a new scheme. It appears to me also that there would be no useful purpose served in acceding to it on the ground that this is an appeal to the Court to exercise judicial discretion. It is a well-settled practice of late years that the

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Attorney-General brings in his scheme. He is always, according to my experience, ready to listen to any suggestion made by persons who have any real interest in the matter, and the Courts have set their face against the waste of charitable funds, and the taking up of judicial time, by allowing other persons to attend the settlement of a scheme by the Attorney-General. Certainly, in this particular case, regarding it as a matter of judicial discretion, I can see no ground whatever for saying that the Inner Temple stand on any better footing than any other of the Inns of Court. The general trust is for legal education. The subject of legal education is one of public interest and public importance, and the Attorney-General is attempting to settle a scheme with that view. To allow any one of the Inns of Courts to intervene would be certainly undesirable, and to some extent the precedent set by Mr. Justice Swinfen Eady (when sitting in chambers) in the matter of the Law Society,¹ although I do not say it is on all-fours, has some bearing, because I find on this very deed that attorneys and solicitors were persons entitled to this legal education quite

(1) Unreported.

as much as the students of the Inn. The general result is that I do not think it would serve any useful purpose for me to grant this application. I think it might only increase the costs, and would be of no assistance in expediting matters and in getting over difficulties if, in the exercise of my discretion, I were to allow any such right as is put forward. On that ground, therefore, I refuse it; and on the other ground also I refuse it, as I have already intimated. The application must be dismissed, with costs.

[The Attorney-General then brought forward his *interim* scheme for the payment of one-half the income to the Law Society and one-half to the Council of Legal Education, subject to the consent of the four Inns of Court, and his Lordship made the order.]

Solicitors—Burton, Yeates & Hart, for applicants; Solicitor to the Treasury, for respondents.

[Reported by R. J. A. Morrison, Esq.,
Barrister-at-Law.]

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A testator by his will gave his wife, so long as she should remain his widow, an annuity of 500*l.*, and declared that the same should be a first charge on certain freehold land at Greenwich not specifically devised by the testator, and after giving certain legacies devised and bequeathed all his real and personal estate not otherwise disposed of to trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to stand possessed of the residue upon certain trusts:—*Held*, on the construction of the will, that the annuity was not a rentcharge, but a mere personal legacy payable like the other legacies out of the mixed residue of real and personal estate, but with a special charge if necessary on the land at Greenwich, and that consequently the estate duty was payable out of such residue as a testamentary expense. *Ib.*

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gradually receded and left uncovered a considerable amount of land on the west side of the property as delineated on the plan. The question was as to the property in and rights over this piece of land:—*Held*, that "seashore" in the conveyance meant that portion of land adjacent to the sea which was ordinarily and *prima facie* vested in the Crown with its special rights and obligations; and declaration made that the plaintiffs as owners of the land conveyed in 1864 were entitled to free access and egress to and from the sea from and to their premises. *Held*, by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., that the defendants were estopped from saying that any part of the land on the western boundary of the land conveyed as described on the plan was anything else than seashore. *Held* also, by VAUGHAN WILLIAMS, L.J., that the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the land and the house which the evidence shewed it was contemplated by all parties should be built thereon, as land and a house facing on the sea and having the seashore as a boundary. *Held*, by ROMER, L.J., that, as between the grantor and the grantees, the foreshore at the date of the conveyance was fixed as coming up to the western boundary of the land described in the conveyance, and the land in dispute must be held to be an accretion subsequent to the deeds, and accordingly land which had become the property of the plaintiffs. *Mellor v. Walmesley*, (C.A.) 475.

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The minor canons of Ochester Cathedral were entitled, independently of the dean and chapter, to the income of certain lands, the legal estate of which was not vested in the dean and chapter. The dean and chapter, however, were indirectly interested in this trust, in so far as every increase in the income of the trust relieved them, *pro tanto*, in their statutory duty of maintaining the income of the minor canons at a certain level:—*Held*, that this trust was not covered by the exemption in section 62 of the Charitable Trusts Act, 1853, and that it was necessary, accordingly, for the dean and chapter, under section 17, to obtain the cer-

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Bequest of Annuity for Support of National Schools—Trust Deed—Gift over if Funds Necessary for Carrying on Schools should be Raised under Powers of any Act of Parliament—Perpetuity.—A testatrix, who died in 1900, by will dated in 1891 bequeathed to her trustees a sum sufficient when invested to produce a yearly sum of 20*l.*, and she directed them to pay such yearly sum to the treasurer for the time being of certain National schools so long as they should be carried on under the conditions contained in a deed of trust dated in 1873 and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect but should be null and void in certain events—*inter alia*, if the funds necessary for carrying on the school should be raised under powers for that purpose contained in any then present or future Act of Parliament, and that upon the happening of such event the payment of the yearly sum should cease, and the fund purchased should fall into her residuary estate. By the deed of 1873 it was declared that the schools should be conducted according to the principles and designs of the National Society. Subject to certain superintendence by the principal officiating minister of the parish, the control and management of the schools and premises and the funds and endowments thereof were vested in and exercised by a committee consisting of such minister and certain other persons being communicants:—*Held*, first, that on the coming into operation of the Education Act, 1902, the schools ceased to be any longer carried on under the conditions contained in the trust

deed of 1873; and secondly, that, as regarded the gift over, there was no infringement of the rule against perpetuities, for the Court was entitled to look at the will in order to ascertain whether the event had happened on which the yearly sum was to cease and determine; that on the coming into operation of the Act of 1902 the event contemplated by the testatrix had happened; and that therefore the fund producing the yearly sum fell into the residue. *Randell, In re; Randell v. Dixon* (57 L. J. Ch. 899; 38 Ch. D. 213), followed. *Blunt's Trusts, In re; Wigan v. Clinch*, 33.

Charitable Gift—Society of Friends—Burial Grounds Provided for Members—Bequest to Keep in Order such Grounds—Advancement of Religion.—A gift of money for the purpose of providing or of keeping in good order a burial-ground, although that burial-ground may not be a parish churchyard, and although it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may be supported as a good charitable gift as being one for the advancement of religion. A bequest, therefore, of money for the purpose of keeping in good order certain burial-grounds provided for the Society of Friends, and in particular the grave of the testator's late wife, which was in one of the grounds, is a good charitable gift. The direction as to the grave of the testator's wife only imposes a special obligation ancillary to the repair of the graveyards, and does not create a separate trust. *Income Tax Commissioners v. Pemsel* (61 L. J. Q.B. 265; [1891] A.C. 531) applied. *Vaughan, In re; Vaughan v. Thomas* (33 Ch. D. 187), considered and explained. *Manser, In re; Att.-Gen. v. Lucas*, 95.

—Impossible Condition.]—See **CONDITION**.

Conditional Gift—Perpetuity.—An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain; while, on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent. *Swain, In re; Monckton v. Hands*, (O.A.) 354.

Where, subject to a prior life interest, a testator's residuary real and personal estate is by the will devoted to charity as from the testator's death, a direction to postpone the payment of the charitable gift until the formation of a reserve fund, directed without any limit of time to be accumulated out of income as an increment to the charitable fund, is not a condition precedent to the charitable gift coming

into effect so as to render the gift void as a perpetuity. *Martin v. Maugham* (18 L. J. Ch. 392; 14 Sim. 230) and *Chamberlayne v. Brockett* (42 L. J. Ch. 368; L. R. 8 Ch. 206) followed and applied. *Id.*

Gift for "charitable, educational, or other institutions of the town of K"—Validity.]—Testator by his will bequeathed a fund "upon trust for such charitable, educational, or other institutions of the town of K., and also for such other general purposes for the benefit of the town of K., or any of the inhabitants thereof, as my trustees shall in their absolute uncontrolled discretion think fit." And he desired, without in any way binding his trustees thereto, that the following institutions should be carefully considered by them in such distribution—namely, first, the K. Memorial Hospital; secondly, the K. Grammar School; and thirdly, the K. Public Free Library:—*Held*, that the benefits conferred by the gift were limited to general and public purposes of the town of K. and the persons dwelling in that town, and that the whole of the gift was a valid charitable gift. *Dolan v. Macdermot* (L. R. 5 Eq. 60; L. R. 3 Ch. 676) followed. *Allen, In re*; *Hargreaves v. Taylor*, 593.

Gift for Repair of Churchyard—Validity—Mortmain—Act of Parliament—Implied Repeal.]—The gift by a testatrix of "any little money left" for the repair of a churchyard is a valid charitable bequest of her residue under the Mortmain and Charitable Uses Act, 1891, and is not limited to the sum of 500l. by virtue of the Gifts for Churches Act, 1803. *Douglas, In re*; *Douglas v. Simpson*, 196.

Inn of Chancery—Proceeds of Sale—Settlement of Scheme—Dependency of Inn of Court—Clifford's Inn—Inner Temple—Proceedings—Intervention of Inn of Court.]—Upon the application of the Honourable Society of the Inner Temple to intervene and attend all proceedings connected with the settlement of a scheme relating to the trust fund which had arisen from the sale of Clifford's Inn, on the ground that Clifford's Inn was a dependency of the Inner Temple and had been under the control of that society in all educational matters for several centuries,—*Held*, that, on the evidence before the Court, the Inner Temple had no paramount right to be regarded as persons in the position of trustees of the fund, with power to administer it as they thought fit, and further that no useful purpose would be served by the Court exercising its discretion in favour of the Inner Temple and granting the application. *Smith v. Kerr* (No. 2), 763.

Registration under Companies Acts—Land Registry—Restriction—"Endowment"—Disposition of Property—Consent of Charity Commissioners.]—Under its memorandum of association a charitable society incorporated

under the Companies Acts, 1862 to 1890, had full power to purchase, lease, and acquire real or personal property, erect and maintain buildings, and sell, exchange, or deal with all its property. Appeals were from time to time made for donations to special objects of the charity, including one for the completion of new headquarters of the society. A large sum was obtained, and leasehold premises acquired. Upon an application to register the society as proprietor of these leaseholds under the Land Transfer Acts, 1875 and 1897,—*Held*, that there was no such "endowment" within the meaning of the Charitable Trusts Act, 1853, s. 66, as rendered the society amenable to the jurisdiction of the Charity Commissioners. The subscribers to the headquarters must be taken to have known that their contributions, although primarily applicable to this particular object, were given for the general purposes of the society, and there was no intention to take the money out of the control of the managing body. The society could therefore deal with its property within the powers of the memorandum of association, and it was entitled to be registered in respect of the leaseholds without any restriction to the effect that no disposition of the land was to be registered without the consent of the Charity Commissioners. *Church Army, In re*, 624.

Decision of the COURT OF APPEAL in *Clergy Orphan Corporation, In re* (64 L. J. Ch. 66; [1894] 3 Ch. 145), as to the definition of "endowment," adopted, but held inapplicable. *Id.*

COMMONS.—See COPYHOLDS.

COMPANY.

I. MEMORANDUM, ARTICLES, AND FORMATION.

Memorandum of Association—Contract—Power to Sell for Shares—Reconstruction—Sale for Partly Paid Shares.]—Under a clause in a memorandum of association stating one of the objects of the company to be "to sell the undertaking of the company . . . for a consideration consisting in whole or in part of . . . shares . . . of any other company . . .,"—*Held*, that the company could sell for partly paid shares. *City and County Investment Co., In re* (49 L. J. Ch. 195; 13 Ch. D. 475), applied. *Mason v. Motor Traction Co.*, 273.

A sale as above was part of a scheme of reconstruction under which it was proposed to distribute the partly paid shares among the (fully paid) shareholders of the selling company. *Quere*, whether the distribution would be *ultra vires*. *Id.*

—Primary Object—Wide General Powers—Construction—Ultra Vires.]—A company was

formed—first, to acquire and take over as a going concern the undertaking of another gold-mining company; and secondly, to acquire gold mines, mining and other rights, and land, auriferous, metalliferous, or otherwise, or any interests in the same, in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, &c. The memorandum of association also gave the company wide general powers. The property acquired under the first object was not workable at a profit, and the directors now sought to purchase other mining properties in Bombay. A general meeting of the company was called, and a resolution was passed approving of the draft agreement, and authorising the directors to enter into it and carry it into effect. On a motion by a shareholder for an injunction to restrain the company from entering into the agreement on the ground that it was *ultra vires*,—*Held*, that the main object of the company was gold mining in “Mysore and elsewhere,” and that the proposed agreement to purchase other mining properties was within the objects stated in the memorandum of association, and injunction refused. *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (71 L. J. Ch. 295; [1902] 1 Ch. 745) discussed and distinguished. *Pedlar v. Road Block Gold Mines of India, Ltd.*, 753.

Articles of Association—Special Resolution—Two Meetings Convened by One and the Same Notice—Special Regulation of Company.]—A provision in the articles of association of a limited company—that whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting—is not *ultra vires* or inconsistent with the letter or the spirit of section 51 of the Companies Act, 1862; and a notice given in conformity with this provision would be a valid notice, and the second meeting summoned by it would be duly summoned. *Alexander v. Simpson* (59 L. J. Ch. 137; 43 Ch. D. 139) distinguished. *North of England Steamship Co., In re*, (C.A.) 404.

—Power to “lend money”—Loan to Servant of Company.]—The articles of a company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company:—*Held*, that this authorised the making of a loan to a servant trusted by the company. *Rainford v. James Keith & Blackman Co.*, (C.A.) 531.

—Explaining Memorandum by Articles.]—Articles of association can be read for the purpose of explaining the memorandum in respect of a matter which need not appear in the latter—for example, the borrowing of money

by a railway company—but not for the purpose of shewing that borrowing means the granting of perpetual annuities, for that is not borrowing, nor is it a purpose subsidiary to the general objects of such a company. *Southern Brazilian Rio Grande do Sul Railway, In re*, 392.

II. PROMOTERS AND DIRECTORS.

Prospectus—Material Contract—Omission—Duty of Director—Liability.]—Where a director has issued a prospectus knowing that there might be contracts material to be stated under section 38 of the Companies Act, 1867, and taken no trouble to ascertain the facts, but left the matter to the company's solicitor, his responsibility under that section is not avoided by the fact that he may truthfully say that when he approved the prospectus he had in fact forgotten the existence of a particular contract which was material to be stated. It is not necessary for the plaintiff to shew that the directors' attention was deliberately and consciously directed to a particular contract which he then omitted to mention. *Treohmann v. Calthorpe*; *De la Cour v. Clinton*; *Tait v. MacLeay*, (C.A.) 43.

The duties and responsibilities of a director under section 38 considered, and the ruling of COCKBURN, J., in *Twyross v. Grant* (46 L. J. C.P. 636; 2 C.P. D. 469), explained. *Id.*

—Material Contract—Omission to Disclose—Inducement to take Shares—Onus of Proof—Liability of Directors.]—In an action against directors of a company for breach of the statutory obligation imposed by section 38 of the Companies Act, 1867, to disclose in the prospectus particulars of contracts, the plaintiff must satisfy the Court that he has been damaged by the omission to disclose. The mere fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract had been disclosed. In order that the plaintiff may succeed the Court must be satisfied that if the omitted contract had been disclosed the plaintiff would not have applied for the shares. Judgment of COLLINS, M.R., in *Broome v. Speak* (72 L. J. Ch. 251, 256; [1903] 1 Ch. 586, 620), considered. *Nash v. Calthorpe*, (C.A.) 493.

Per ROMER, L.J.—The plaintiff in such a case must shew that if the contract had been disclosed he might not have applied for the shares. It is not necessary for him to prove that he certainly would not have applied. *Id.*

III. DEBENTURES.

Floating Charge—Jeopardy—Receiver—Equitable Mortgage—Judgment Creditor.]—Where a company has issued debentures giving

a floating charge on its present and future property, the debenture-holders are entitled to the appointment of a receiver on the sole ground of jeopardy to the security, even although nothing may be due and presently payable to the debenture-holders. The fact that the creditor has issued a writ and signed judgment, and is in a position to issue execution, may constitute jeopardy. Persons supplying such a company with goods have an expectation of being paid only when such payment would be in the ordinary course of business. This expectation is intercepted when a receiver is appointed, but even before the appointment those creditors, as between themselves and the debenture-holders, have no right to enforce payment of their debts in priority to the latter. *London Pressed Hinge Co., In re; Campbell v. Company*, 321.

An execution creditor takes subject to all equities of the debenture-holders. *Standard Manufacturing Co., In re* (60 L. J. Ch. 292, 298; [1891] 1 Ch. 627, 641), followed. *Ib.*

Receiver for Debenture-holders—Powers—Charge on Assets in Priority to Debentures—Pledging Credit of Debenture-holders.]—A receiver was appointed by debenture-holders under a power conferred by the debentures. The receiver was authorised by the terms of the debentures (*inter alia*) to take possession of the property charged by the debentures; to carry on or concur in carrying on the business of the company; and to make any arrangement or compromise which he should think expedient in the interests of the debenture-holders:—*Held*, that, for the purpose of carrying on the business of the company, the receiver might, first, create a valid charge on property comprised in the debentures to have priority over the charge of the debenture-holders; and secondly, pledge the personal credit of the debenture-holders. *Robinson Printing Co. v. "Chico," Lim.*, 399.

Security for Loan—Return to Company on Repayment of Loan—Transfer to Fresh Holder—Rights of Holder against other Debenture-holders.]—A company issued a series of debentures to rank *pari passu* as a first charge, the company not to be at liberty to create any mortgage or charge on the security in priority to or *pari passu* with those debentures. Certain of the debentures having been issued as security for loans were, on repayment of the loans, returned to the company with blank transfers. These debentures were subsequently assigned to fresh holders for value by completing the transfers:—*Held*, that on payment off of the loans for which they were issued as security the debentures were paid off, and that the holders of these debentures could not rank *pari passu* with the other debenture-holders. *W. Tasker & Sons, Lim., In re; Hoare v. W. Tasker & Sons, Lim.*, 141; (C.A.) 643.

IV. SHARES.

Allotment — Minimum Subscription — Cheques for Application Money—Allotment before Cheques Cleared—Dishonoured Cheques.]—In response to the issue of a prospectus the company received applications for the full amount of the minimum subscription named, accompanied by cheques for the application money, and it went to allotment. At the time of allotment a considerable number of the cheques sent for the application money had not been credited to the company's banking account, and certain of those cheques were after the allotment dishonoured:—*Held*, that the sum payable on application for the amount fixed by the prospectus as the minimum subscription had "not been paid to and received by the company" within the meaning of sub-section 1 of section 4 of the Companies Act, 1900, and the allotment was voidable. *Mears v. Western Canada Pulp and Paper Co., (C.A.)* 581.

Glasgow Pavilion, Lim. v. Motherwell (6 Ct. of Sess. Cas. (5th Series), 116) discussed and distinguished. *Ib.*

Per COZENS-HARDY, L.J., and SWINFEN EADY, J.—The intention of sub-section 1 of section 4 is that no allotment should be made until the company has actually received payment of the application money, and if cheques are sent with the applications they ought to be cleared before an allotment is made. *Ib.*

Certificate—Transfer—Note on Certificate as to Production before Registration of Transfer—Duty of Company as regards Transfer—False Statement by Shareholder—Notice of Prior Charge through Officers of Company.]—C., the registered holder of shares in the defendant company, in May, 1903, deposited the certificate for the shares with the plaintiff as security for a loan, and executed a transfer to the plaintiff with the date left in blank. There was a note at the foot of the certificate: "without the production of this certificate no transfer of the shares mentioned therein can be registered." C., who was in the employment of the company, in June, 1903, entered into an arrangement with the managing director and two of the officers of the company for an advance to be made to him by the company, part of the arrangement being that he should sell his shares in the company, and that the proceeds of sale should be paid to the company in part repayment of the loan. C. sold his shares to Y. for 90%, and the money was paid by Y. to the company. C. lodged a transfer of the shares to Y. with the company for registration without the certificate, but with a declaration that the certificate was held by a friend of his, but not "as a charge against any loan or other consideration." C. was trusted by the directors, and they, acting in good faith, accepted his statement, and registered the transfer to Y., and issued a new certificate

to him:—*Held*, on the facts, that the company had received the 90% with such knowledge and under such circumstances that they ought to be treated as having received it to the use of the plaintiff, and the plaintiff was entitled to recover it from the company. *Rainford v. James Keith & Blackman Co.*, 156; (C.A.) 531.

Transfer—Certification—Estoppel—Share Certificates—Return to Transferor—Subsequent Fraudulent Transfer—Liability of Company to Subsequent Transferee—Negligence of Company—Proximate Cause of Loss.—On April 19, 1904, B. became the registered owner of shares in the defendant company, and certificates of his ownership were made out, but were not sent to him. On the same day a transfer by B. to H. and M. of 1,500 shares was presented to the secretary of the company, and the secretary indorsed upon it a certification certifying that the certificates had been forwarded to the company's office, and the transfer so certified was returned to H. and M., and they then executed it, and had since become the registered owners of the shares. On April 22 the secretary, having occasion to send B. certificates for other shares in the company, by mistake inclosed the certificates for the 1,500 shares which had been transferred to H. and M. Subsequently the plaintiffs made advances to B. on a deposit of the certificates for the 1,500 shares, with transfers of the shares. The loans not being repaid, the plaintiffs sent in the transfers to the company for registration. Finding that they were unable to obtain registration, they brought the action for registration of the transfers and delivery of the certificates, and damages. They based their claim on estoppel arising from the negligence of the secretary in returning the certificates to B. after the certification:—*Held*, that, admitting that there was negligence for which the company might have been liable to those who were entitled to rely on the certification, the plaintiffs were not persons who could rely on it, and they had failed to shew that there was any duty on the part of the company to retain the certificates, either to them personally or to the public, or to any section of the public, or to persons desirous of becoming members of the company; under section 31 of the Companies Act, 1862, a certificate was only *prima facie* evidence of title to shares, and the plaintiffs were not entitled to assume as against the company, without enquiry, that there had been no dealing with the shares since the issue of the certificates to B., from the mere fact of finding them in his possession; further, the negligence was not the real or proximate cause of the plaintiffs' loss, but the improper use of the certificates made by B. after they were returned to him; and mere negligence would not raise estoppel. The circumstances, therefore, were not sufficient to raise a case of estoppel against the company. *Longman v. Bath Electric Tramways*, (C.A.) 424.

Statements of the law in *Swan v. North British Australasian Co.* (82 L. J. Ex. 273, 277, 280; 2 H. & C. 175, 182, 192) and *Bishop v. Balkis Consolidated Co.* (59 L. J. Q.B. 565, 571; 25 Q.B. D. 512, 519) adopted and applied. *Id.*

The secretary of the company, on receipt from the plaintiffs of the transfers to them, gave an acknowledgment of the receipt of them for registration in favour of the transferees "subject to the approval of the directors," with a note appended that the receipt must be returned to the company's office in exchange for the relative share certificates, which would be ready on a day named:—*Held*, that the receipts were not a recognition on behalf of the company of the plaintiffs' title, and did not bind the company to issue certificates on the day named. *Id.*

V. WINDING-UP.

Voluntary Winding-up—Dissolution at Expiration of Three Months—Transfer of Assets not Possible within the Time—Staying Proceedings.—Where a company went into voluntary liquidation with a view to amalgamation with another company, and it was subsequently discovered that certain assets of the old company, consisting of mining claims in the Transvaal, which were to be transferred to the new company, could not be transferred within the period of three months, at the expiration of which time the old company would, under section 143 of the Companies Act, 1862, automatically cease to exist, and a contributory before the expiration of the three months applied under section 138 for an order to stay the proceedings in the winding-up, the COURT, exercising the power conferred upon it by section 89 in a compulsory winding-up, made an order staying all proceedings in relation to the winding-up of the old company, with liberty to apply. *Crookhaven Mining Co., In re* (36 L. J. Ch. 226; L. R. 3 Eq. 69), applied. *Eastern Investment Co., Ltd., In re*, 281.

—Action Pending against Company for Damages—Repudiation of Claim by Liquidator—Adoption of Defence—Judgment for Plaintiff with Costs—Liability of Assets for Costs in Full.—Where the liquidator of a company in voluntary liquidation repudiates a claim for damages for which an action is pending or is brought against the company and defends the action, and the plaintiff obtains judgment with costs, the liquidator must pay the costs in full out of the assets. *Thurso New Gas Co., In re* (42 Ch. D. 486), distinguished. *Wendborn & Co., In re*, 283.

The liquidator's proper course would have been to apply to stay the action, when the Court, if allowing it to go on, might have done so on terms that the plaintiff should, if successful, add his costs to the damages recovered. *Id.*

—Agreement of Service—Resolution to Wind Up—Dismissal of Servants.]—A voluntary winding-up of a company, unlike a compulsory winding-up or the appointment by the Court of a receiver and manager in a debenture-holders' action, does not operate as a dismissal of the servants of the company inasmuch as there is no change in the personality of the employer. *Imperial Wine Co., In re; Shirreff's Case* (42 L. J. Ch. 5; L. R. 14 Eq. 417), considered and not applied. *Roid v. Explosives Co.* (56 L. J. Q.B. 388; 19 Q.B. D. 264) discussed. *Midland Counties District Bank v. Atwood*, 286.

Bankrupt Shareholder—Proof by Company for Amount Unpaid on Shares—Surplus Assets—Dividend—Contributories—Claim of Trustee to Hold the Shares as Fully Paid.]—A contributory of a company in liquidation must satisfy his liabilities as owner of shares not fully paid before he can share in the distribution of surplus assets. *West Coast Gold Fields, In re*, 347.

When a shareholder is bankrupt, and the company before winding-up has proved for the amount unpaid on his shares and received a dividend of less than 20s. in the pound, the shares cannot be treated in the liquidation as fully paid. *Ib.*

Proof is not equivalent to payment. It is a record that the estate remains liable, though the bankrupt is discharged. Principle of *Grissell's Case* (35 L. J. Ch. 752; L. R. 1 Ch. 528) applied. *Ib.*

Examination under Section 115 of Companies Act, 1862—Costs of being Represented by Solicitors and Counsel—“Proceeding in the Supreme Court.”—An examination of witnesses under section 115 of the Companies Act, 1862, is a “proceeding in the Supreme Court,” within the meaning of the Judicature Act, 1890, s. 5, and therefore the Court has jurisdiction to order the person procuring the examination to pay the witnesses examined under that section their costs, including the costs of being represented by solicitors and counsel, in addition to their expenses. *Appleton, French & Scafton, Lim., In re*, 471.

Life Assurance Company.]—See INSURANCE.

Petition by Judgment Creditors—Debenture-holders' Action—Business Carried on by Receiver on behalf of Debenture-holders—No Allegation of Surplus Assets—“Just and equitable”—Compulsory Order.]—On a petition for a compulsory winding-up order by judgment creditors it was shewn that the debenture-holders of the company had appointed a receiver of all the assets of the company. The receiver carried on the business

and incurred further liabilities. The assets were more than covered by the debentures, and it appeared that there would be no surplus assets, so that the petitioners would derive no advantage from the winding-up:—*Held*, that it was “just and equitable,” under section 79, sub-section 5 of the Companies Act, 1862, that a winding-up order should be made. “*Chic*,” *Lim., In re*, 597.

Proof—Right to Interest—Stockbroker's Customers—Deposit on Wagering Transactions—Accord and Satisfaction—Compromise.]—On the winding-up of a company, creditors from whose course of dealing with it there can be implied a contract to pay interest are entitled to interest on admitted debts to the date of paying a final dividend, provided there be surplus assets. *Duncan & Co., In re*, 188.

This is so notwithstanding the debt is for money deposited to secure a wagering contract. *Universal Stock Exchange v. Strachan* (64 L. J. Q.B. 728; 65 L. J. Q.B. 429; [1895] 2 Q.B. 329; [1896] A.C. 166) followed. *Ib.*

The duty of a liquidator is to distribute the assets according to the rights of the parties; therefore a receipt for final dividend expressed to be in full discharge of all claims is no release of a claim for interest if the liquidator knew the question was to be raised. *Ib.*

The amount of a debt admitted to proof is the amount at the date of winding-up; therefore, if the amount has been settled by compromise under order of the Court, this does not negative a right to subsequent interest. *Ib.*

Sale of Undertaking—Borrowing Powers—“Irredeemable” Debenture Stock—Ultra Vires—Right to Redeem.]—Where the memorandum of association of a railway company, incorporated under the Companies Acts, 1862 to 1882, and not governed by the Companies Clauses Acts, enables it to borrow money by the issue of debenture stock, and the articles of association provide that the board may issue such stock as redeemable or irredeemable, debenture stock issued as irredeemable is nevertheless redeemable at par on the winding up of the company. *Southern Brazilian Rio Grande do Sul Railway, In re*, 392.

COMPROMISE.

Mistake—Will—Legal Rights—Counsel's Opinion—Common Solicitor—Mistaken Interpretation—Duty of Solicitor.]—Generally the Court will support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may be not quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the

exact relative rights determined by litigation; but the family solicitor is not entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of a compromise. *Roberts, In re; Roberts v. Roberts*, (C.A.) 483.

Where one party entered into a compromise relating to her interests under a will under a false impression as to her legal rights, arising from a wrong interpretation placed upon counsel's opinion by a common solicitor acting for all parties,—*Held*, that the compromise was not binding upon her. *Ib.*

CONDITION.

Bequest to Charity—"Subject to my trustees being made members"—Impossible Condition.—Condition Precedent or Subsequent.—A testator bequeathed legacies to two charities, B. and S., "subject to my trustees being made members or governors . . . to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent." The B. charity had no governors, but had members who were entitled to vote at general meetings. The S. charity had neither members nor governors. One of the trustees refused to become a member of the B. charity:—*Held*, that the condition was a condition precedent, not subsequent; that it referred to the obligation of the charities, not to that of the trustees; and that consequently the gift to B. was good and the gift to S. failed. *Emson, In re; Grain v. Grain*, 565.

Forfeiture Clause—Will—"Shall thenceforth cease and determine"—Marriage within Certain Degrees of Kindred—Marriage in Testator's Lifetime.—A clause in a will by which the interest of any child of the testator who "shall contract any marriage forbidden by me as hereinafter expressed . . . shall thenceforth cease and determine," *held* not to apply to a child who after the date of the will, but before the testator's death, had contracted a forbidden marriage. *Chapman v. Perkins*, (H.L.) 331.

Marriage at any Time without Consent—Forfeiture of Previous Gift—Settlement—Condition Subsequent—Gift Over.—A condition subsequent in a will or deed causing the forfeiture of a previous gift in the event of a marriage at any time without consent is a valid condition if coupled with a gift over, and, where the original gift is by way of settlement on the donee for life with remainder to her children, defeats the interest of the children as well as that of the tenant for life. *Daskwood v. Bulkeley* (Lord) (10 Ves. 230) and *Lloyd v. Branton* (3 Mer. 108) followed. *Whiting's Settlement, In re; Whiting v. De Rutzen*, (C.A.) 207.

Summons—Construction of Settlement—Interests of Unborn Children—Representation by Trustees.—*Per* BYRNE, J.—On a summons raising such a question on the construction of a settlement the trustees of the settlement sufficiently represent the interests of children otherwise unrepresented, whether in existence or not, who may be entitled under the trusts of the settlement. *Ib.*

CONFLICT OF LAWS.

See INTERNATIONAL LAW.

CONTRACT.

Restraint of Trade—Breach—Solicitor—Covenant not to Practise—Prohibited Area—Acts Done Within by Letters from Without.—A covenant by a solicitor that he will not do any professional work within a radius of so many miles from a place is broken if he writes as a solicitor and sends to addresses within the radius, letters, for example, demanding payment from the addressee or giving advice to the addressee, for in such case the demand is made or the advice given at the place at which the letter is received. *Edmundson v. Rorder*, 583.

COPYHOLDS.

Manor—Rights of Common—Quarry—Right to Get Stone—Freehold and Copyhold Tenants—Evidence—Court Rolls.—The copyhold tenant's of a manor may by custom have a right of common to get stone and sand out of the lord's waste to be used by them on their respective tenements within the manor, and there is no legal objection to the existence of a similar right in the freehold tenants. Such a right is not unreasonable, and the court rolls may be given in evidence of its existence. The lord cannot inclose against such a right of common; and the fact that an amercement rent was at one time paid in respect of the quarry from which the stone was taken cannot affect the tenants in respect of the right in question. *Heath v. Deane*, 466.

COPYRIGHT.

Picture—Infringement—Photographic Reproduction—"Copy" of the Work or the Design thereof.—The plaintiff, who was the owner of the copyright in an oil painting representing a winged female kneeling on a rock and gazing into water below, reproduced the picture in various forms and sizes by photographic processes. The defendants sold copies of an American magazine containing on a page of its advertising section a small and rude photographic reproduction of the more distinctive features of this picture, omitting the background and wings. This reproduction was placed amongst various other similar

reproductions of other pictures grouped round an announcement in which the readers were offered a prize if they could name a certain percentage of the advertisers who used the pictures as advertisements. On complaint being made by the plaintiff the page in question was torn out of all copies of the magazine. In an action for an infringement of copyright, —Held, that the reproduction in question must be held to be a "copy" of the original "work, or the design thereof," within the meaning of the Fine Arts Copyright Act, 1862, and there must be judgment for the plaintiff with one farthing damages, and the costs of the action. *Hanfstaengl v. W. H. Smith & Son*, 304.

COSTS.

Judge's Discretion to Deprive Successful Defendant—Appeal without Leave.—Where a Judge exercises his discretion so as to deprive a successful party of costs upon a stated ground which is untenable, an appeal lies without leave. *Civil Service Co-operative Society v. General Steam Navigation Co.* (72 L. J. K.B. 933; [1903] 2 K.B. 756) followed. *King v. Gillard*, (C.A.) 421.

Conduct having no Connection with the Plaintiff's Case.—In an action to restrain the defendant from passing off his goods as those of the plaintiff, it is no ground for depriving the successful defendant of his costs of the action, that the defendant, in the sale of his goods, makes representations calculated to mislead the public as to the nature of certain awards and medals, those representations having nothing to do with the plaintiff's case which fails. *Id.*

Construction of Will—Trustees.—See **APPEAL**.

Purchase-moneys in Court—Re-investment in Purchase of Real Estate—Costs of Simultaneous Lease.—See **LANDS CLAUSES ACT**.

CUSTOM.

Fishermen of Parish—Private Land—Custom to Dry Nets—Variation in User—Validity—Time Immemorial—Impossibility of Custom—Onus of Proof—Recession of Sea—Accretion—Extent of Custom.—A custom, enjoyed from time immemorial and continued without interruption, for all the inhabitants of a parish, being fishermen, to dry their nets on a particular piece of ground adjoining the sea and the property of a private owner, at all times necessary or proper for the purposes of the trade or business of a fisherman, is a valid custom; and the fact of the variation of the user owing to the fishermen taking advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner, does not make the custom invalid. The same customary

right will extend to land added to the original piece of land by accretion owing to the recession of the sea. The principles laid down in *Dyos v. Hay* (1 Macq. H.L. 305, 312) and *Hull and Selby Railway, In re* (8 L. J. Ex. 260; 5 M. & W. 327) applied. *Mercer v. Denne*, 71; (C.A.) 723.

DAMAGES.

Damage to Mill Caused by Subsidence Due to Past Mining Operations—Discontinuance of Operations—Principle of Estimating Damage—Future Apprehended Injury.—In assessing the damages for injury caused to premises by subsidence due to past mining operations, the official referee is not entitled to include an allowance for risk of future injury from apprehended further subsidence, or for present depreciation caused by the risk of future injury. *Tunnicliffe & Hampson, Lim. v. West Leigh Colliery Co.*, 649.

Nuisance—Pollution of River—Continuance of Injury.—See **LOCAL GOVERNMENT**.

Obstruction to Light—Nuisance.—See **EASEMENT**.

DEATH.—See **EVIDENCE**.

DEBENTURES.—See **COMPANY**.

DEED.

Signature—Subsequent Alteration of Date—Material Alteration—Validity.—A deed is not invalid merely because of an alteration, subsequent to execution, in a part that is not material, by whomever such alteration be made. *Pigot's Case* (11 Co. Rep. 26b) dissented from. *Aldous v. Cornwell* (37 L. J. Q.B. 201; L. R. 3 Q.B. 573) followed. *Crediton (Bishop) v. Exeter (Bishop)*, 697.

Misdescription of Purchaser in Conveyance.—See **VENDOR AND PURCHASER**.

Parcels in Conveyance.—See **BOUNDARIES**.

DISCOVERY.

Production of Documents—Right of Inspecting Party to Make Copies.—Under the usual order for production and inspection of documents, the inspecting party is entitled to make copies for himself in the same way as he was entitled to do under the old practice in the Court of Chancery. His right in this respect is not taken away or qualified by sub-rule 18 of rule 27 of Order LXV., which relates to costs only. *Ormerod, Grierson & Co. v. St. George's Ironworks*, (C.A.) 373.

BASEMENT.

Light—Prescription—Extent of Right—Actionable Nuisance—Mandatory Injunction—Damages.]—The result of the decision in *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179) is that the plaintiff in an action for the obstruction of light to his premises must, in order to succeed, establish a nuisance, and a Judge in directing himself or a jury as to what constitutes an actionable nuisance must take the law to be that the owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of it if it is a place of business; and to constitute an actionable nuisance the obstruction must be such as substantially to interfere with that right. The mere proof that a given percentage of light has been taken away is not sufficient, but in considering the sufficiency of the light the locality ought to be borne in mind, and also light coming from quarters other than that where the obstruction is. *Kine v. Jolly*, (C.A.) 174.

In an action by the owner of a dwelling-house for obstruction of the light to one of the rooms in the house, *KEKWICH, J.*, found that the room had been exceptionally well lighted, and still was well lighted, and there was sufficient light to enable it to be used for the purposes for which it was designed; but that there had been a large obstruction of light by the erection of the defendant's house, and a large interference with the cheerfulness of the plaintiffs' room, so that the character of the room had been altered, and it had lost in the obstruction of light one of its chief charms and advantages; and that the obstruction of the light had caused a substantial depreciation in the letting value of the plaintiffs' house:—*Held*, by *VAUGHAN WILLIAMS, L.J.*, and *COZENS-HARDY, L.J.* (*dissentiente* *ROMER, L.J.*), on these findings, that an actionable nuisance had been committed. *Held*, by *ROMER, L.J.*, as an inference from the findings and on the evidence as a whole, that it was not shewn that an actionable nuisance had been committed. *Id.*

In the opinion of the Court, the defendant had not been guilty of any sharp practice or any high-handed or unneighbourly conduct towards the plaintiff, or shewn any desire to evade the jurisdiction of the Court; and the case was not one in which damages could not be considered a reasonable and adequate compensation:—*Held*, that the remedy should be in damages, and not by a mandatory injunction. *Id.*

—Obstruction—Nuisance—Test of Nuisance—Injunction—Damages.]—The decision of the

HOUSE OF LORDS in *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179) has left the obstruction of ancient lights still, as it always has been, a question of nuisance or no nuisance, but has readjusted the law in respect to the test of nuisance; and the test now is, not how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?—but, how much light is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind? *Higgins v. Betts*, 621.

There is nothing in that decision of the **HOUSE OF LORDS** that overrules the decision in *Shelfer v. City of London Electric Lighting Co.* (64 L. J. Ch. 216; [1895] 1 Ch. 287). *Id.*

Right of Way—User for Premises Extending beyond Dominant Land—Abandonment—Excessive User—Injunction.]—The grantee of a right of way is only entitled to use it *bona fide* for purposes of the dominant tenement, and the owner of the servient tenement is entitled to relief if the acts of the grantee of the right of way necessarily involve its use for the purposes of buildings upon other land to which the right of way is not appurtenant, thereby increasing the area of the dominant tenement, and consequently the burden of the servient tenement. *Harris v. Flower*, (C.A.) 127.

The defendant having a right of way over the plaintiffs' land to certain land coloured pink on a plan, and being also the owner of certain adjoining land coloured white, had by his own acts completely landlocked the white land so that the only access thereto was now over the pink land, and had built a factory partly on the pink and partly on the white land. The factory was all one building and a substantial part of it was on the pink land. The only access to it from the highway was by means of the right of way:—*Held* (affirming *SWINFEN EADY, J.*), that the acts of the defendant did not amount to an abandonment or extinction of the right of way; but (reversing *SWINFEN EADY, J.*) that the proposed user for the purposes of the part of the building erected on the white land was in excess of the grant. *Finch v. Great Western Railway* (5 Ex. D. 254) distinguished. *Id.*

—Reservation of "all rights of way hitherto exercised"—Unity of Title—Conveyance.]—See **VENDOR AND PURCHASER.**

ELECTION.

Limited Power of Appointment—Exercise by Will—Limitations Void for Perpetuity—Illegality.]—Where a testator has by will exercised a limited power of appointment in such a way as to contravene the rule against perpetuities,

and has also given benefits out of his own property to the persons entitled in default of appointment, the limitations in the will being illegal and void cannot be used to raise any case of election. The Court is bound on finding illegality to refuse to assist in carrying it out. *Wollaston v. King* (38 L. J. Ch. 892; L. R. 8 Eq. 165) and *Warren's Trusts, In re* (53 L. J. Ch. 787; 26 Ch. D. 208), followed; and *Handcock's Trusts, In re* (23 L. R. Ir. 34), approved. *Bradshaw, In re*; *Bradshaw v. Bradshaw* (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed. *Oliver's Settlement, In re*; *Eccred v. Leigh*, 62.

A case of election cannot be raised on an appointment void for remoteness by reason of the rule against perpetuities. *Bradshaw, In re*; *Bradshaw v. Bradshaw* (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed. *Oliver's Settlement, In re*; *Eccred v. Leigh* (*supra*), followed. *Beale's Marriage Settlement, In re*, 67.

Compensation—Date for Ascertaining Amount—Testator's Death.—The amount of compensation to be made to the disappointed legatees by a devisee under a will, who elects to take a certain estate as against the will, must be ascertained as at the date of the testator's death, and not as at the date of election. *Hancock, In re*; *Hancock v. Pawson*, 69.

ELECTRIC LIGHTING.

"Areas of supply"—Undertakers—Prohibition against Supplying Beyond "area of supply"—Limited Liability Company—Restriction on General Trading Powers—County of London.—A limited liability company incorporated under the Companies Act, 1862, and having for its objects the production and supply generally of electric, magnetic, or other force for lighting and other purposes, undertook to supply certain statutory "areas of supply," within the administrative county of London, with electric energy, under special powers conferred on it by Act of Parliament, and by Provisional Orders confirmed by Act of Parliament, all of which contained a prohibition against the undertakers supplying energy, or erecting or laying down any electric lines or work beyond their statutory areas of supply without the authority of Parliament or the licence of the Board of Trade:—*Held*, that the prohibition did not operate merely in connection with and relation to the particular area in question, but was of universal application, so that the company could be restrained from carrying on its business and supplying energy in any other place whatsoever, however far removed from its areas of supply, and although such business was carried on and supply furnished quite independently of any of the company's special statutory powers. *Att.-Gen. v. Metropolitan Electric Supply Co.*, 145.

Provisional Order—Assignability—Contract for Carrying out Provisional Order—Illegality.—Section 11 of the Electric Lighting Act, 1882, deals with two classes of cases. The first part deals with cases where the local authority remains the party supplying the electricity, though it may contract for the execution of works or buy the electricity from some other person or company; the second part deals with cases of transfer by the local authority or some other company or person of the legal powers for supplying electricity. It is only to the second of these two classes that the prohibition against assignment without the consent of the Board of Trade applies. *Sudbury Corporation v. Empire Electric Light and Power Co.*, 442.

A local authority to which a provisional order had been granted entered into a contract with an electric light and power company by which the company was to supply electricity to the district mentioned in the provisional order. The contract contained a large number of clauses, the effect of which was to place the company in the position of the corporation as regards powers and duties:—*Held*, that the consent of the Board of Trade not having been obtained, the contract was rendered void by section 11 of the Electric Lighting Act, 1882. *Id.*

The contract also contained a clause: "Nothing herein contained shall be deemed to constitute this contract as a lease or agreement for a lease, or to establish between the corporation and the company the relation of lessor and lessee, . . . or partners, or to constitute the company general agents for the corporation or to transfer to the company any powers, or to create any relationship between the corporation and the company which the corporation are prohibited from transferring or creating by the order and the Electric Lighting Acts, 1882 and 1888, and particularly by section 11 of the Electric Lighting Act, 1882, the intention being for the corporation to give to the company every facility in their power for carrying out this agreement, without transferring or assigning any of their powers and duties under the order":—*Held*, that as the agreement as a whole did transfer or assign powers and duties under the order, the clause was inoperative. *Id.*

ESTOPPEL.

Will—Purported Disposition of Realty—Incapacity to Dispose—Adverse Possession.—By her will a married woman gave certain real property (of which she was competent to dispose) to her husband for life, with remainder over. By a codicil she purported to devise in the same way certain other property (to which she had a good title but which she was not competent to devise). Her husband entered on both properties and remained in possession for more than twenty years:—*Held*, that those

claiming under the husband were not estopped from denying the testatrix's power to dispose of the second property, and had a good title by adverse possession against her heir and those claiming in remainder under the codicil. *Anderson, In re*; *Pegler v. Gillatt*, 438.

The principle of *Board v. Board* (43 L. J. Q.B. 4; L. R. 9 Q.B. 48) does not apply to the case of a person who has a good title to property but is not competent to dispose of it. *Paine v. Jones* (43 L. J. Ch. 787; L. R. 18 Eq. 320) applied. *Ib.*

By Parcels of Conveyance.]—See BOUNDARIES.

By Share Certificate.]—See COMPANY (Shares).

EVIDENCE.

Entries in Note-book of Deceased Surveyor—Professional Duty—Admissibility.]—A surveyor had been employed in 1864 by a local board to survey ground comprising the property in question for the purpose of a drainage scheme. He had at the time made in his note-book, for the purpose of his report, entries of certain levels and other figures, and these entries were afterwards used by him in making his report. He was now dead:—*Held*, that the entries were admissible in evidence to shew the line to which the bi-monthly spring tides flowed at the date of the conveyance. *Mellor v. Walmsley*, (C.A.) 475.

Presumption of Death—Person not Heard of for Seven Years—Onus Probandi—No Presumption of Continuance of Life.]—There is no presumption at law in favour of the existence of life, and when a person has not been heard of for seven years the burden of proving that he was alive at a particular date after that at which he was last heard of rests upon those who claim through him. *Phon's Trusts, In re* (39 L. J. Ch. 316; L. R. 5 Ch. 139), followed. *Aldersey, In re*; *Gibson v. Hall*, 548.

The title to the income and capital of a share of residuary estate passing under a will depended upon the exact date of A's death, and as to part, which came by way of accretion, whether he survived March 16, 1896. A was last heard of on March 31, 1895, and was presumed to have been dead on March 31, 1902. Neither of the different claimants was able to prove that A was alive at any particular date after March 31, 1895:—*Held*, that the property in question was distributable on the footing that A must be taken to have died before March 16, 1896, because he was not proved to have been then alive. *Ib.*

Reputation—Public Documents—Statements of Deceased Person—Ancient Surveys and Reports—Maps and Plans.]—Ancient docu-

ments such as surveys, estimates, and petitions of a private character, produced from the Record Office, which do not affect the King's property or revenues, are not public documents which are admissible as such according to the ruling of LORD BLACKBURN in *Sturla v. Freccio* (50 L. J. Ch. 86, 96; 5 App. Cas. 623, 643), or as evidence of reputation. *Mercer v. Denne*, 71; (C.A.) 723.

Depositions of deceased witnesses in support of proceedings by the Crown in the public interest are not admissible against strangers if it is not shewn that the deponents were persons to whom such knowledge of the subject-matter ought to be imputed as to make their statements evidence of reputation. *Ib.*

Confidential plans or reports made to the War Office are not admissible as evidence of reputation if they were not intended as permanent records affecting the property or revenue of the Crown or any grant by the Crown. *Ib.*

Evidence of particular facts cannot be admitted as evidence of reputation. *Ib.*

Written statements by a deceased person are not admissible as made in the course of duty unless it is shewn that it was the duty of the deceased person to do the particular thing and to record the fact of having done it contemporaneously. *Ib.*

Rowe v. Brenton (8 B. & C. 737) and *Newcastle (Duke) v. Browtons Hundred* (2 L. J. M.C. 47; 4 B. & Ad. 273) distinguished. *Ib.*

—Tithe Map—Deposited Plans—Admissibility.]—See WAY.

Unstamped Agreement—Admissibility.]—An agreement in writing for the sale of its undertaking was entered into between a company and a trustee for a new company, but was not stamped. On an application to restrain the agreement being carried out, the Court looked at a copy of the document, not as an agreement, but as a document evidencing the terms upon which the company proposed to sell if not restrained from so doing. *Mason v. Motor Traction Co.*, 273.

EXECUTOR AND ADMINISTRATOR.

Administration—Tenant for Life and Remainderman—Trust for Conversion—Power to Retain Securities—Unauthorised but Non-wasting Securities—Income Pending Conversion.]—Where there is an express trust for conversion and power to retain securities of every kind, authorised and unauthorised, and there is no gift either express or implied of the income

pending conversion, the tenant for life is entitled to the income of authorised securities, but not to the income of unauthorised securities. As regards the latter he is only entitled to interest at 3 per cent. on their value at the testator's death. The rule applies to non-wasting as well as to wasting securities. *Chaytor, In re; Chaytor v. Horn*, 106.

Thomas, In re; Wood v. Thomas (60 L. J. Ch. 781; [1891] 3 Ch. 482), and *Woods, In re; Gabellini v. Woods* (73 L. J. Ch. 204; [1894] 2 Ch. 4), applied. *Bulkeley v. Stephens* (3 N. R. 105; 10 L. T. 225) not followed. Statement in *Theobald on Wills* (5th ed.), pp. 480, 481, approved. *Ib.*

Letters of Administration Granted while Will Appointing Executor in Existence—Acts done before Administration—Validity.]—Where letters of administration are granted while a will appointing an executor is in existence, and the will is subsequently proved and the letters of administration revoked, the grant of administration is void *ab initio*; and, generally speaking, dispositions of the assets by the supposed administrator are void also. *Abram v. Cunningham* (2 Lev. 182) followed. *Graysbrook v. Fox* (1 Plow. 275, 282) distinguished. *Ellis v. Ellis*, 296.

A mortgagor who had deposited the lease of a house to secure his mortgage-debt died, leaving a will by which he appointed an executor. The mortgagor's son paid off the debt with money which he borrowed for the purpose, deposited the lease with the lender of the money as security for the loan, and obtained letters of administration to his father's estate. The will was subsequently proved, and the letters of administration were revoked. The house having many years afterwards been sold by the sole beneficiary under the will, the lender's representatives brought an action against the purchaser for foreclosure:—*Held*, that, the letters of administration being wholly void, the son had no power to create a valid mortgage to the lender, and, in the circumstances of the case, that any claim of the plaintiffs by subrogation was barred by the Statute of Limitations and by the fact that the son was a debtor to the father's estate. *Ib.*

Retainer—Creditor—Judgment against Executrix—No Plea of Plene Administravit or Retainer—Subsequent Administration Action—Insolvent Estate—Right to Set up Retainer against Judgment Creditor.]—Where an action is brought by a creditor against an executor in respect of a debt due to him from the testator, and in the action the executor does not either plead *plene administravit*, or set up his retainer, and the creditor recovers judgment, the executor cannot in an action brought to administer his testator's estate set up his right of retainer as against the judgment creditor. *Marvin, In re; Cranter v. Marvin*, 699.

Right of Retainer.]—See HUSBAND AND WIFE.

FIXTURES.

Lease of Mill by Tenant for Life—Machinery Erected by Lessee—Purchase under Covenant by Lessor at End of Term—Right of Executrix to Remove as against Remainderman—“Quicquid plantatur solo, solo cedit.”—The principle which, as between tenant and landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life and remainderman, and allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment. *Hulse, In re; Beattie v. Hulse*, 246.

This is an exception to the maxim “*Quicquid plantatur solo, solo cedit*,” and not a concession allowing what has become part of the soil to be removed. *Ib.*

The question is one not of the nature of the attachment, but of its purpose and of the intention with which it was made. *Leigh v. Taylor* (71 L. J. Ch. 272; [1902] A.C. 157) followed. *Ib.*

FRAUD AND MISREPRESENTATION.

Money-lending—Harsh and Unconscionable Bargain—Excessive Rate of Interest—Absence of Risk.]—Money-lenders advanced to a borrower 2,000*l.* repayable by twelve consecutive monthly instalments, with interest amounting in all to 3,300*l.*, and in the event of default being made in any one payment the whole amount remaining unpaid was to become immediately payable. There was evidence that the money-lenders were aware when making the loan that, owing to the borrower's financial position, they were running no risk:—*Held*, that, having regard to the lenders' knowledge of the absence of risk, the rate of interest was excessive, and the transaction was harsh and unconscionable within the meaning of sub-section 1 of section 1 of the Money-lenders Act, 1900, and it ought to be re-opened and an order made for repayment of the amount actually advanced, with interest at 10 per cent. *Saunders v. Newbold*, (O.A.) 120.

—Re-opening Closed Transaction.]—Sub-section 1 of section 1 gives the borrower relief only in respect of the transaction the subject of an action brought by the money-lender, and the power of the Court to re-open under that sub-section is limited to that transaction, and the account can only be taken in that transaction, or some transaction which is relevant to it, and not in a previous transaction altogether closed. *Ib.*

—Proceedings for Relief—Time—"Liable."—Under sub-section 2 a borrower can obtain relief in proceedings taken by him, and he may take proceedings either when he is sued by the money-lender, or before he is sued. The sub-section applies even after the loan has been repaid, and under it the Court could re-open a closed transaction. "Liable" in that sub-section is not to be read as "liable in fact." *Ib.*

—Re-opening Transaction—Harsh and Unconscionable—Misstatement of Fact—Contracting without being Registered—Prohibitory Statute—Illegal Contract.]—Where by a statute a penalty is imposed—not solely for protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal. *Victorian Dayleford Syndicate v. Dott*, 673.

So if a money-lender enters into any agreement or takes any security in contravention of section 2, sub-section 1 (c) of the Money-lenders Act, 1900, without having registered himself as required by section 2, sub-section 1 (a), his contract cannot be enforced, and there is no transaction to re-open under the powers of section 1, sub-section 1. *Ib.*

A misstatement made by a money-lender to a borrower during negotiations is a fact to be borne in mind in determining whether the transaction is harsh and unconscionable. *Ib.*

Rescission of Contract—Misrepresentation—Absence of Fraud—Election—Delay.]—A completed contract for the sale of the shares in and business of a company will not, in the absence of fraud, be set aside on the ground of misrepresentation. *Seddon v. North-Eastern Salt Co.*, 199.

The plaintiff contracted to buy all the shares in a trading company on certain statements as to the trading profits and losses. Three months after taking over the business he commenced an action to set aside the contract, alleging misrepresentation by concealment, but not alleging fraud, and claiming rescission of the contract and an injunction.—*Held*, that such a contract was not one which, in the absence of fraud, the Court would set aside either in equity or at law; and that, even if it were, the plaintiff had delayed in repudiating it, and had not proved either concealment or misrepresentation or that he had been induced by misrepresentation. *Wilde v. Gibson* (1 H.L. O. 605, 632), *Brownlie v. Campbell* (5 App. Cas. 925), and *Kennedy v. Panama, New Zealand, and Australian Royal Mail Co.* (36 L. J. Q.B. 260; L. R. 2 Q.B. 580) applied. *Ib.*

HUSBAND AND WIFE.

Administration—Insolvent Estate—Executor's Right of Retainer—Right of Wife to Retain as Executrix Money Lent to Husband for Purposes of Business.]—Section 3 of the Married Women's Property Act, 1882, which deals with loans by a wife to her husband, does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, the right of a woman who is executrix of her late husband to retain out of assets of his estate come to her hands the amount of a loan made by her out of her separate estate to her husband for the purpose of his business is not taken away by the joint operation of that section and section 10 of the Judicature Act, 1875, in cases where the estate is insolvent. *Long, In re*; *Tarn v. Emmerson* (64 L. J. Ch. 468, 471, 472; [1895] 1 Ch. 652, 657, 660), and *May, In re*; *Cranford v. May* (60 L. J. Ch. 34; 45 Ch. D. 499), followed. *Ambler, In re*; *Woodhead v. Ambler*, (C.A.) 367.

Jointuring—Fraud on Power.]—See POWER.

Nullity of Marriage—Settlement—Covenant to Pay if Marriage "Solemnised."—See SETTLEMENT.

Separation Deed—Construction—Covenant to Pay Annuity to Wife "for her life if she shall so long continue to live separate and apart"—Cessation of Annuity on Death of Husband.]—In a separation deed a husband covenanted to pay to his wife for her sole and separate use during her life if she should "so long continue to live separate and apart," 150*l.* for her maintenance, clothing, and other necessities. The husband having died, the wife re-married:—*Held*, on the construction of the deed, that the annuity ceased to be payable on the death of the husband. *Charlesworth v. Holt* (43 L. J. Ex. 25; L. R. 9 Ex. 38) distinguished. *Gilling, In re*; *Procter v. Watkins*, 335.

Separate Property—Restraint on Anticipation—Order for Payment of Costs—Receiver.]—Where an order is made against a married woman for payment of costs out of her separate estate, the party obtaining the order is *prima facie* entitled, under section 2 of the Married Women's Property Act, 1893, to enforce payment by obtaining the appointment of a receiver of her property which is subject to a restraint on anticipation, and the onus is upon her to shew why the appointment should not be made. *Pawley v. Pawley*, 344.

INJUNCTION.

Motion—Undertaking by Defendant—Cross-undertaking in Damages.]—Where on an interlocutory motion for an injunction an undertaking is offered by the defendant and accepted by the plaintiff, there is no general practice

that a cross-undertaking as to damages by the plaintiff is to be implied. *Howard v. Press Printers, Ltd.*, (C.A.) 100.

Nuisance—Pollution of River.]—See LOCAL GOVERNMENT.

Public Highway—Right not Established—Trespass.]—See TRESPASS.

INSURANCE.

Life Assurance — Company — Compulsory Winding-up — Other Business — Reduction of Contracts.]—Where a company carries on life insurance business in conjunction with other business, and, in consideration of an enhanced price charged for an article it sells, offers its customers contingent insurance benefits, the requirements of section 4 of the Life Assurance Companies Act, 1870, are not capable of being satisfied, for the price paid is a contributory sum to secure two benefits, and the proportion paid as premium cannot be appropriated in accordance with the section. *Nelson & Co., In re*, 290.

The Court will not sanction a scheme for carrying on such a life insurance business so as to avoid a compulsory winding-up on the petition of creditors. *Ib.*

Section 22 of the same Act allows a reduction of the contracts between a company and its creditors, but does not authorise a provision under which the latter would get reduced benefits from those contracts as the result of new contracts entered into with a new company. *Ib.*

What the last-named section allows is a reduction of all contracts for the relief of the common debtor, and not one which operates unequally as between the common creditors. Absolute arithmetical equality is not required, but a scheme which proceeds upon a principle of inequality of reduction is not within the Act. *Ib.*

— Company—Other Business besides Life Assurance — Insufficiency of Insurance Fund — Winding-up Petition—Scheme of Future Working.]—A company which carried on the business of selling tea combined with that of life assurance was ordered to be wound up by BUCKLEY, J. On appeal, a scheme having been prepared and approved by all parties enabling the company to carry on its businesses separately, so as to comply with section 4 of the Companies Assurance Act, 1870, and affording reasonable security to the assured, the COURT sanctioned the scheme and discharged the order of BUCKLEY, J., the company undertaking to carry on its business in accordance with the scheme. Form of scheme. *British Widows Assurance Co., In re*, (C.A.) 525.

Life Policy—Misstatement of Age—Receipt of Premiums after Knowledge of Misstatement—Affirmation of Policy.]—In a proposal for a life policy a lady, by mistake, declared her age to be forty-one next birthday, instead of forty-four, which it in fact was. The policy was effected in 1888, and by it the defendant company undertook to pay the sum of 2,000*l.* upon the death of the assured, or on her attaining the age of sixty years. The mistake was not discovered until 1897, and after being informed of it the defendant company accepted from an assignee of the policy two premiums on the old footing, but subsequently declined to receive any more, and claimed to avoid the policy under the terms of the proposal and contract. The lady attained the age of sixty on March 6, 1904, and was still living:—*Held*, that the defendants must be treated as having affirmed the policy as it stood, and were liable to pay the moneys secured thereby when the lady in fact attained sixty years. *Hemmings v. Sceptre Life Association*, 231.

INTERNATIONAL LAW.

Conflict of Laws — Assignment — Chose in Action—Reversionary Interest in Personality—Assignment made Abroad—Property in England—Notice—Priority.]—An Englishman executed in New York (where he was temporarily domiciled) an assignment to his wife of a reversionary interest in personality in England in the hands of trustees. By the law of New York notice to the trustees was not necessary to complete the assignee's title. He subsequently executed in England a mortgage of the same property to the plaintiff. The plaintiff gave to the trustees notice of his mortgage before notice of the assignment was given:—*Held*, that the mortgage had priority over the assignment. *Kelly v. Selwyn*, 567.

LAND TRANSFER.

See CHARITY.

LANDLORD AND TENANT.

Covenant not to Assign without Leave—Leave not to be "Unreasonably" Withheld—Unreasonableness.]—Where a landlord and tenant occupy different parts of the same premises, and the tenant has covenanted not to assign or under-let his part of the premises without the written leave of his landlord, but this leave is not to be unreasonably refused, it is not unreasonable for the landlord, as conditions of granting such leave, to enquire for what purposes the proposed under-tenant intends to use the premises, and to stipulate that the under-tenant shall enter into a covenant with him with reference to the assignment or sub-letting of the premises similar to the covenant already in existence between him and his own immediate tenant. *Spark's Lease, In re; Berger v. Jenkinson*, 318.

Distress—Lease—Assignment.—A sub-lease for a period co-extensive with, or longer than, the sub-lessor's term operates as an assignment, and the sub-lessor cannot distrain for rent in arrears. *Parmenter v. Webber* (8 Taunt. 593; 2 Moore, 656) and *Preese v. Corrie* (6 L. J. (O.S.) C.P. 205; 5 Bing. 24) followed. *Lewis v. Baker*, 39.

Neither section 5 of the Landlord and Tenant Act, 1730, nor section 44 of the Conveyancing and Law of Property Act, apply so as to give a right of distress where the original right has been lost by reason of the lessor of a term at a rent parting with the whole of his interest. *Ib.*

Reversionary Term — Interesse Termini—Merger.—A reversionary lease only confers an *interesse termini* until after entry under the lease when the date fixed for the commencement of the term has arrived. It cannot, therefore, coalesce with an earlier subsisting term so as to cause a merger. *Smith v. Day* (6 L. J. Ex. 219; 2 M. & W. 684) and *Doe d. Rawlings v. Walker* (4 L. J. (O.S.) K.B. 93; 5 B. & C. 111) followed. *Ib.*

Lease—Forfeiture—Relief—Parties Necessary to Application—Original Lessee—Original Assignee.—Although as a general rule upon an application by under-lessees for relief against forfeiture of the head-lease the Court will require the original lessee to be made a party to the proceedings, yet this will be dispensed with where good reason is shewn for not making him a party. Where, therefore, in an action by mortgagees by sub-demise of an under-lease for relief against forfeiture of the lease for non-payment of rent it appeared that the original lessee became bankrupt in 1877, that his trustee assigned the lease, and that the assignee subsequently disappeared and had not been heard of for twenty-six years, the Court dispensed with the necessity of making either the original lessee or assignee parties to the action. *Hare v. Elms* (62 L. J. K.B. 187; [1893] 1 Q.B. 604) discussed. *Humphreys v. Morton*, 370.

—Costs.—Where in such an action the right of the applicants to relief is contested by the lessor, the order as to costs made in *Howard v. Fanshawe* (64 L. J. Ch. 666; [1895] 2 Ch. 581) should be followed—namely, that the applicants must pay the costs of obtaining the relief except so far as they have been increased by the resistance to the claim by the lessor. *Newbolt v. Bingham* (72 L. T. 852) distinguished. *Ib.*

—Long Term—Option to Purchase Fee-simple—Perpetuity—Covenant Running with Land.—S., the owner in fee of certain land, by lease dated July 6, 1867, demised it to W., his executors, administrators, and assigns, for ninety-nine years from June 24, 1866, at a

yearly rent. The lease contained a provision that if the lessee, his heirs or assigns, should at any time during the term become desirous of purchasing the fee-simple in the land demised at the rate of 500*l.* per acre, and such further sum for the timber thereon as should be ascertained by a fair valuation, upon the receipt of the purchase-money, the lessor, his heirs or assigns, would execute a conveyance of the premises with the timber thereon in favour of the lessee, his heirs and assigns. On July 14, 1869, S. demised another piece of land to W. for ninety-nine years from September 29, 1868, at a yearly rent. This lease also contained a provision giving the lessee an option to purchase the fee-simple in substantially the same form as in the former lease, except that the option to purchase was given to the lessee, "his executors administrators and assigns," and the price was to be 600*l.* per acre. The plaintiff was the assignee of the two leases, and he desired to exercise the option to purchase. The defendants were, as trustees of a settlement, the owners of the fee-simple subject to the leases:—*Held*, by WARRINGTON, J., that the options to purchase created an estate or interest in land, and were void as infringing the rule against perpetuities. *Held*, by the COURT OF APPEAL, that the provisions giving the option to purchase were concerned with something wholly outside the relations of landlord and tenant, and could not be said to run with the land under the statute 32 Hen. 8. c. 34, and therefore could not be enforced by the plaintiff. *Woodall v. Clifton*, (C.A.) 555.

A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute 32 Hen. 8. c. 34, as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. *Ib.*

London and South-Western Railway v. Gomm (51 L. J. Ch. 530; 20 Ch. D. 562) applied by WARRINGTON, J. *Ib.*

LANDS CLAUSES ACT.

Purchase Moneys in Court—Re-investment in Purchase of Real Estate—Contract for Sale—Simultaneous Conveyance and Lease—Sanction of Court—Costs of Lease.—An order of the Court under section 80 of the Lands Clauses Consolidation Act, 1845, sanctioning the re-investment of moneys in Court in the purchase of real estate, directed that, pursuant to that section, the promoters should pay to the purchasers their costs (including all reasonable charges and expenses of and incident thereto) of obtaining that order and of all proceedings relating thereto, such costs to be taxed by the Taxing Master in case the parties differed:—*Held*, that the order did not authorise the

allowance on taxation of the costs of a lease which the purchasers had by the contract for sale agreed to grant to the vendors immediately upon the completion of the purchase, the purchasers bearing their own costs of such lease. *Thavie Estate (Trustees), Ex parte*, 326.

struction, is not among the purposes authorised by the Act. *Ib*

LOCAL GOVERNMENT.

Nuisance—Injunction—Pollution of River—Discharge of Sewage—Prescriptive Right of Inhabitants to Discharge into Sewers of Local Authority—Measure of Damages—Continuance of Injury.—Where householders have acquired a prescriptive right to drain into the sewers of a local authority through which sewage is discharged into a river, and an order has already been made against the local authority under the Rivers Pollution Prevention Act, 1876, and the local authority are taking steps to abate the nuisance caused by the pollution, the Court will refuse to interfere by injunction against the local authority. *Harrington (Earl) v. Derby Corporation*, 219.

Where a local authority have neglected their duty under the Public Health Acts, the remedy of a person aggrieved is not by action but by complaint to the Local Government Board under section 299 of the Public Health Act, 1875. *Ib*.

Owing to the pollution of a river by a local authority the plaintiff's lake, which was fed from it, became silted up, and the water-supply from the lake to the plaintiff's house destroyed:—*Held*, that the plaintiff was entitled to damages for the expense to which he had been put in obtaining another water-supply to his house, but not in respect of the silting up of the lake, as his remedy was to exclude the water when he found it was polluted, and claim damages for the loss sustained by not enjoying the supply. *Ib*.

Water-supply to Adjoining District—Contract for Supply—Enlargement of District—Sanction of Local Government Board.—The sanction of the Local Government Board required by section 61 of the Public Health Act, 1875, for the supply of water by a local authority to the local authority of an adjoining district, is a sanction merely to the supply, and not to the terms of the agreement under which such supply is to be furnished. The sanction can be properly limited to particular places in a district. *Soothill Upper Urban Council v. Wakefield Rural Council*, 116; (C.A.) 703.

Prior to 1895 the plaintiffs made certain contracts with the defendants for the supply of water, the sanction of the Local Government Board under section 61 of the Public Health Act, 1875, being obtained for the supply to particular places within the defendants' district. In 1895 it was contemplated that the plaintiffs should furnish a larger supply for the defendants' whole district, and a new agreement was made whereby the plaintiffs agreed

LIMITATIONS, STATUTE OF.

Real Property—Infancy—Adverse Possession—Subsequent Accrual of Infant's Title.—Where the title of an infant to real property vests in possession at a time when a stranger is in adverse possession as against the infant's predecessor, the Statute of Limitations will continue to run against the infant, notwithstanding his infancy. *Murray v. Watkins* (62 L. T. 796) followed. *Garner v. Wingrove*, 545.

Simple Contract Debt—Part Payment by Tenant for Life—Order for Administration of Real Estate.—Testator, who died on October 30, 1894, was at his death indebted to the plaintiffs as simple contract creditors. By his will the testator devised part of his real estate to a tenant for life, and subject thereto he devised his residuary real estate to other devisees in fee. In 1895, the plaintiffs made an arrangement with the executors and the tenant for life, under which they received payments on account of their debt and interest out of the rents of the real estate given to the tenant for life, and these payments continued until 1903. In 1905 the plaintiffs took out a summons asking for the administration of the real and personal estate of the testator:—*Held*, that the part payment by the tenant for life of the simple contract debt of his testator and of interest thereon was sufficient to keep the debt alive, not only as against the devisees in remainder after the life estate, but also as against devisees of other real estate of the testator. *Hollingshead, In re; Hollingshead v. Webster* (57 L. J. Ch. 400; 87 Ch. D. 651), followed. *Roddam v. Morley* (26 L. J. Ch. 438; 1 De G. & J. 1) and *Dibb v. Walker* (62 L. J. Ch. 536; [1893] 2 Ch. 429) applied. *Chant, In re; Bird v. Godfrey*, 542.

LITERARY INSTITUTION.

Trustees' Power to Mortgage—Rebuilding or Improving—Necessary Repairs—Authorised Purposes—Billiard and Card Rooms.—Trustees to whom land has been conveyed as a site for an institution under the Literary and Scientific Institutions Act, 1854, have power to mortgage the same for the purpose of paying for necessary repairs to the buildings of such institution, but not for rebuilding or improving them. *Mansel v. Cobham (Viscount)*, 327.

The provision, in such an institution, of rooms, or of facilities, for billiards, cards, or other amusements, as distinguished from in-

to deliver and the defendants to take for the supply of their district, or such part thereof as they might wish to supply, or any place outside their district which they might contract to supply, the quantities agreed on, the minimum being largely increased beyond the minimum under the previous contracts. Clause 9 provided that unless within six months the sanction of the Board to the agreement should be obtained or found to be unnecessary, the agreement should be void. The Board having refused to give a general sanction to the extended area contemplated by the agreement,—*Held*, that the previous sanctions were limited to the particular places, and that, no sanction having been given to the extended area contemplated by the agreement, clause 9 applied and the agreement was void. *Ib.*

Penalty Clause—Avoidance of Contract.]—*Held* also (VAUGHAN WILLIAMS, L.J., dissenting), that section 174, sub-section 2 of the Public Health Act, 1875, which, with regard to contracts made by an urban authority under the Act, requires that they shall specify some pecuniary penalty in case the terms of the contract are not duly performed, is directory only, and a contract of an urban authority containing no penalty clause is not void on that account. *Ib.*

Special Act—Local Authority—Land Acquired for One Purpose—User for Another.]—See STATUTE.

See also METROPOLIS.

LUNATIC.

Power of Disposition—Deed made in Lucid Interval—Validity.]—A lunatic so found is, until the inquisition has been superseded, absolutely incapable of making a valid deed disposing of his property even in a lucid interval, as such a deed would conflict with the rights and powers of the Crown and of the committee over the lunatic's property. *Sir Benjamin Wright, Ex parte* (1 Vern. 155), considered. *Walker, In re*, (C.A.) 86.

Committee—Payment of Estate Duty on Real Estate—Charge.]—See REVENUE.

MASTER AND SERVANT.

Servants of Company—Resolution to Wind up—Dismissal.]—See COMPANY (Winding-up).

MERGER.]—See LANDLORD AND TENANT.

METROPOLIS.

Local Authority—Sanitary Conveniences—Statutory Powers—Trespass.]—A public body invested with statutory powers must take care

not to exceed or abuse those powers, and must act in good faith within the limits of its authority. *Westminster Corporation v. London and North-Western Railway*, (H.L.) 629.

Where a corporation under the Public Health (London) Act, 1891, constructs public conveniences, the mere provision in connection with such a convenience of a subway capable of being used as a thoroughfare under a crowded street is not evidence of bad faith or excess of authority. To establish such a case it would have to be shewn that the corporation constructed the subway as a means of crossing the street under colour of providing public conveniences. *Ib.*

The HOUSE (LORD JAMES OF HEREFORD dissenting) reversed the decision of the COURT OF APPEAL (73 L. J. Ch. 386; [1904] 1 Ch. 759), and restored that of JOYCE, J. (71 L. J. Ch. 34; [1902] 1 Ch. 269). *Ib.*

Street Widening—Compulsory Powers—Adjudication to take Whole of House—Part only Required for Improvement—Previous Agreement to Sell Part not Required—Bona Fides.]—There is no rule that the owner of premises has an absolute right to restrain a local authority acting under the powers of Michael Angelo Taylor's Act, 1817, from taking more of his premises than they require for the purpose of widening a road. *Thomas v. Daw* (36 L. J. Ch. 201; L. R. 2 Ch. 1), *Touliere v. St. Mary Abbott's Vestry* (55 L. J. Ch. 23; 30 Ch. D. 642), and *Gordon v. St. Mary Abbott's Vestry* (63 L. J. M.C. 193; [1894] 2 Q.B. 742) followed. *Pescod v. Westminster Corporation*, 684.

A local authority adjudicated that the possession, occupation, and purchase of the plaintiff's premises were necessary to enable them to carry out the widening of a certain road. The premises had a depth of 64 feet from the road, and of this the defendants proposed to throw a strip 22 feet 6 inches wide into the roadway. Prior to the adjudication the local authority had entered into a contract to sell so much of the premises as they did not require for the purposes of their improvement to an hotel company. The plaintiff was willing to sell to the local authority a strip of 22 feet 6 inches, but objected to their taking the whole of his premises:—*Held*, that the adjudication was not either *ultra vires* on the ground that the local authority were not proposing to throw the whole of the plaintiff's premises into the road, or *malà fide* by reason of the local authority having entered into a previous contract to sell so much of the premises as they did not require for the purposes of their improvement. *Ib.*

MISTAKE.

See ATTACHMENT OF DEBTS; COMPROMISE; TRUST AND TRUSTEE.

MONEY-LENDER.

See FRAUD AND MISREPRESENTATION.

MORTGAGE.

Mortgages in Possession—Special Provision as to Interest—Interest in Arrear.]—A mortgage contained a special provision that if interest should be twenty-one days in arrear it should be capitalised and bear interest. The mortgagee entered into possession when interest was in arrear, but payment of the arrears was subsequently tendered and accepted, and the rents and profits were afterwards (at least *prima facie*) sufficient to keep down the interest:—*Held*, on taking the accounts, that the mortgagee had not established a case to be entitled to compound interest under the special provision. *Union Bank of London v. Ingram* (50 L. J. Ch. 74; 16 Ch. D. 53), *Bright v. Campbell* (41 Ch. D. 388), and *Cockburn v. Edwards* (51 L. J. Ch. 46; 18 Ch. D. 449) considered. *Wrigley v. Gill*, 160.

—Sale of Portion of Mortgaged Property—Action for Redemption—Taking Accounts—Rests.]—It is not the practice, in taking the account against a mortgagee in possession who has sold a portion of the mortgaged property, that a rest as at the date of sale should be taken of the rents and profits as well as of the principal and interest. *Thompson v. Hudson* (40 L. J. Ch. 28; L. R. 10 Eq. 497) distinguished. *Id.*

—Redemption—Accounts—Sale-moneys—Rents and Profits—Rests—Practice.]—In taking the accounts in a mortgagee's redemption action against a mortgagee in possession, and in the absence from the order, according to the practice, of any direction for making any rests in such accounts, the account of rents and profits, unlike that of purchase-moneys, should be taken as a whole without rests. *Wrigley v. Gill* (74 L. J. Ch. 160; [1905] 1 Ch. 241) approved. *Thompson v. Hudson* (40 L. J. Ch. 28; L. R. 10 Eq. 497) explained. *Ainsworth v. Wilding*, 256.

Priority — Constructive Notice — Non-disclosure by Solicitor to all Parties—Statute of Limitations.]—A mortgagee, who was also a solicitor, deposited the mortgaged deeds with his bankers to secure an overdraft on his current account. No notice of such deposit was given to the mortgagor. Subsequently the mortgagor and mortgagee joined in a further mortgage of the property to S. The mortgagee acted throughout the transactions as solicitor for all parties, but he did not disclose the existence of the bankers' mortgage either to the mortgagor or to S.:—*Held*, that S. was affected with constructive notice of the bank's mortgage, and that therefore the bank was entitled to priority over S.; but that the mortgagor had not through his solicitor notice of the bank's mortgage. *Dixon v. Winch* (69 L. J. Ch. 465; [1900] 1 Ch. 736) distinguished. *Berwick v. Price*, 249.

Literary Institution — Trustees' Power to Mortgage.]—See LITERARY INSTITUTION.

NUISANCE.

Pollution of River—Discharge of Sewage.]—See LOCAL GOVERNMENT.

PARTNERSHIP.

Goodwill—Deceased Partner—Brokers on London Stock Exchange.]—There is no objection in law to the existence of a goodwill in a partnership business of brokers on the London Stock Exchange, and, unless provision is made to the contrary in partnership articles, the value of the goodwill must be included among the assets of the partnership. *Wilson v. Williams* (29 L. R. Ir. 176) explained. *Hill v. Fearis*, 237.

Lease of Partnership Premises—Purchase of Freehold Reversion—Trustee.]—The principle of *Keech v. Sandford* (Select Ca. Ch. 61) as extended by *Phillips v. Phillips* (54 L. J. Ch. 943; 29 Ch. D. 673), that a trustee, or person in a fiduciary position, cannot purchase for his own benefit the freehold reversion expectant on the determination of a lease, being part of the trust property, only applies in the case of leases renewable by contract, or where there is a reasonable expectation that the lease will be renewed. *Randall v. Russell* (3 Mer. 190) and *Longton v. Wilshy* (76 L. T. 770) followed. *Bevan v. Webb*, 800.

Sale by one Partner to Co-partner—Fiduciary Relation—Duty to Disclose Assets—Action to Set Aside Sale—Consent Order—Confirmation of Sale—Election.]—In a transaction between co-partners for the sale by one to the other of a share in the partnership business there is a duty resting on the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows. Unless such information has been furnished the sale is voidable. *Law, In re; Law v. Law*, (C.A.) 169.

After the sale by one partner to his co-partner of his interest in the partnership business the selling partner discovered that certain partnership assets had not been disclosed to him at the time of the sale, and brought an action for misrepresentation against the purchasing partner. This action was settled by a consent order, by which all charges of fraud were withdrawn and a sum was paid to the selling partner in discharge of every claim between the plaintiff and defendant. The selling partner alleged the subsequent discovery of further assets of the partnership, and brought an action to set aside the sale and the consent

order:—*Held*, that the plaintiff had elected not to avoid the transaction, and that the sale could not, after the consent order, be re-opened. *Clough v. London and North-Western Railway* (41 L. J. Ex. 17; L. R. 7 Ex. 26) followed. *Ib.*

PATENT.

Infringement—Combination—Subject-matter—Supplying and Fitting New Component Part—Repair.—A patentee by his specification claimed to have invented a wheel rim of a particular shape intended to receive a solid rubber tyre. The merit claimed for the invention was that the rim would hold the tyre without pinching and without the aid of inextensible wires. The patentee made separate claims for the rim, and the rim in combination with the tyre, but made no claim for the tyre itself. The defendants made a new rubber tyre and fitted it to an old patent rim of the plaintiffs, the owners of the patent, to replace a previous tyre which had become worn out. In an action brought by the plaintiffs for infringement,—*Held*, that what the defendants had done was a fair repair, and not a repair amounting to a reconstruction and a new article, and that there was therefore no infringement. *Held*, also, that, assuming the claim for the rim to be valid, the claim for the combination of the rim with the rubber tyre was invalid, inasmuch as that was the only and obvious manner in which the rim was intended to be used, and that there was no invention or merit in the combination apart from the novelty in the shape of the rim itself. *Sirdar Rubber Co. v. Wallington*, 315.

—“Exercise and vend”—**Profit and Advantage—Contract in England—Delivery Abroad.**—The defendant contracted in England to sell to a purchaser in England goods manufactured abroad according to an invention protected by the plaintiffs' English patent, and pursuant to the contract completed the sale by delivery of the goods to the purchaser's order in Switzerland. The purchaser afterwards imported the goods into England:—*Held*, that there had been no infringement of the plaintiffs' patent by the defendant. *Saccharin Corporation v. Reitmeyer & Co.* (69 L. J. Ch. 761; [1900] 2 Ch. 659) approved and followed. *Badische Anilin- und Soda-Fabrik v. Hickson*, (C.A.) 669.

PERPETUITIES.

Devise—Limitations—Unborn Persons—Successive Life Estates—Contingent Interest in Remainder to Survivor—Legal Contingent Remainder—Perpetuity—Determination of Settlement by Beneficiaries.—Legal contingent remainders are subject not only to the rule that an estate for life to an unborn person cannot be followed by an estate to the child of such unborn person, but also, equally with contingent

equitable limitations of real estate and all contingent limitations of personality, to the rule against perpetuities. *Ashforth's Trusts, In re; Ashforth v. Sibley*, 361.

A testatrix devised her real estate to her trustees and their heirs upon trust to pay the rents and profits unto her three children and the survivors and survivor of them during their lives and the life of the survivor, and after the death of the survivor upon trust to pay and divide the rents and profits as soon as conveniently could be after Lady Day and Michaelmas Day in each year unto and equally amongst all such of the children born in her lifetime or within twenty-one years after her death of her said three children who should be living on the Lady Day or Michaelmas Day preceding such payment and division; and after the death of all such grandchildren except one she devised her said real estate to such surviving grandchild and the heirs of his or her body in tail, with remainder over. Of the testatrix's three children, all of whom survived her, two died without issue, and the third died leaving three children, the plaintiffs, who desired, in the events which had happened, to determine the settlement. Upon a summons for the determination of the question whether any of the above trusts or limitations were void for remoteness,—*Held*, that the contingent estates tail in remainder were void inasmuch as they would not become indefeasibly vested in any person necessarily ascertainable within the limits prescribed by the rule against perpetuities, and that therefore the plaintiffs could not by combining to release or destroy the right of survivorship render themselves presently entitled to the property in fee-simple, because, the contingent interests being void, there was no present estate of inheritance in existence available for dealings by way of conveyance or otherwise, and nothing would be left but the three life estates of the grandchildren. *Ib.*

Held also, that as the rule against perpetuities is applicable to legal contingent remainders, the fact that the limitation in question was a legal contingent remainder supported by a particular estate vested in trustees during the lives of the grandchildren did not avail the plaintiffs. *Ib.*

Power to Appoint Life Estate to Surviving Husband—Ultimate Gift—Perpetuities—Independent and Alternative Trusts.—A testatrix directed her executors to stand possessed of an aggregate principal sum in trust as to a certain specified share thereof for each of her four nieces for life with power to appoint a life or any less interest to any husband who might survive her, and subject thereto in trust for such nieces' children at twenty-one, with a proviso for accretion to the other shares of the share of any niece dying without leaving

either husband or children who should take an interest in her share; and in case neither of her nieces should have any child who should become entitled to her share under the trusts aforesaid, then the testatrix directed the aggregate principal sum to be held in trust for such of her nephews, sons of a deceased sister, as should be living at the time of the determination of the trusts aforesaid, or the issue then living of any of her said nephews who might be then dead leaving issue, as the last surviving of her said four nieces might by her will appoint. None of the nieces ever had any children, or exercised her power of appointment in favour of a husband, and the survivor duly appointed the fund to objects of the power. On the death of the survivor the question arose whether the ultimate gift or power was not void for remoteness, because the husbands to whom the nieces had power to appoint life interests need not necessarily have been born in the testatrix's lifetime, and consequently the period for ascertaining the class to take under the ultimate gift might have been postponed beyond the period prescribed by the rule against perpetuities:—*Held*, that this was a case of independent and alternative gifts, and that the ultimate gift or power to appoint in favour of the testatrix's nephews and their issue was not void for perpetuity, and that the appointment in their favour was valid. *Bowles, In re*; *Page v. Page*, 338.

Charity—Gift Over.—See CHARITY.

Cy-près—Real Property—Limitation to Uncertain Person.—See WILL.

Conditional Gift.—See CHARITY.

Lease—Option to Purchase Fee-simple.—See LANDLORD AND TENANT.

Limitations Void for Perpetuity—Election.—See ELECTION.

POWERS.

General Power of Appointment—Personal Property—Exercise by Will—Foreign Domicil—Unattested Will—Validity.—Such words as "all the property which comprises my estate in England as well as in France," contained in a foreign will, which is not attested in conformity with English law, is not such an indication that the will is to be construed with reference to English law as to import section 27 of the Wills Act so as to operate as an exercise of a general power of appointment. *D'Este Settlement Trust, In re*; *Poulter v. D'Este* (72 L. J. Ch. 305; [1903] 1 Ch. 898), followed. *Price, In re*; *Tomlin v. Latter* (69 L. J. Ch. 225; [1900] 1 Ch. 442), explained and distinguished. *Scholefield, In re*; *Scholefield v. St. John. Young, In re*; *Smith v. St. John*, 610.

C. having, under each of two English wills, a general power to appoint a fund by will, and being a domiciled Frenchwoman, made a will and codicils in French form, appointing her niece S. general and universal legatee of "all the property which comprises my estate in England as well as in France." The will and codicils were unattested, but valid according to French law, and were admitted to probate in England, together with other documents in the handwriting of the testatrix referring to the property and the power:—*Held*, that the will and codicils did not operate as an execution of the power. *Id.*

Limited Power of Appointment—Settlement—Construction—Donee of Power Appointing to Himself.—Under the terms of a settlement, and in a particular event, a lady had a power to appoint the settled trust funds by deed or will in favour of a grandchild or grandchildren of her paternal grandfather, and in default of any such appointment the trust funds were to be held in trust for all such grandchildren equally. The lady was thus an object of the power and also entitled to a share in default of appointment:—*Held*, that, upon the true construction of the power, the lady might appoint to herself as one of the grandchildren. *Taylor v. Allhusen*, 350.

Exercise by Will—Limitations Void for Perpetuity.—See ELECTION.

Jointuring—Fraud on Power—Bargain between Husband and Wife—Appointment in Consideration of Payment by Wife to Husband—Validity of Appointment.—The exercise of a power of jointuring can be the subject of a bargain between a husband and wife; and so long as no part of the jointure itself is under the appointment to be received by any person other than the wife, the husband can exercise the power in favour of the wife in consideration of receiving some benefit out of her property, and the fact that the consideration given by her is the full actuarial value of the jointure annuity is immaterial. *Saunders v. Shafte*, (C.A.) 110.

A tenant for life of real estate had a power to charge the estate with a jointure to his wife of 300*l.* a year. He married in 1865, and in 1882 he exercised the power to the full extent in favour of his wife in consideration of a sum of 50*l.* then paid to him by his wife out of her own money. He died in 1902. There was evidence of an actuary that 50*l.* was at the time the full market value of the annuity secured by the jointure, having regard to the respective ages of the husband and wife:—*Held*, that the execution of the power was not a fraud upon the power, and was valid. *Baldwin v. Roche* (5 Ir. Eq. R. 110) followed. *Whelan v. Palmer* (57 L. J. Ch. 784; 39 Ch. D. 648) overruled. *Id.*

PRACTICE.

Co-plaintiffs—Compromise of Action by One of Co-plaintiffs—Application by Defendants to Strike out his Name as Co-plaintiff—Discretion of Court.]—A co-plaintiff who has compromised an action is not entitled as a matter of course to have his name struck out as a co-plaintiff. *Mathews, In re; Oates v. Mooney*, 656.

Where two of three defendants in an action applied to have the name of one of three co-plaintiffs struck out on the ground that they had entered into a binding agreement with such co-plaintiff for the compromise of the action so far as she was concerned, the Court refused to make the order. *Id.*

Default in Appearance—Amendment of Writ by Addition of Plaintiff—Filing in Central Office—Personal Service—Notice of Motion for Judgment.]—There is nothing in the Rules of Court which requires an amended writ of summons to be personally re-served on a non-appearing defendant who was personally served with the original writ. The amended writ therefore can *prima facie* be filed in the Central Office against a non-appearing defendant under Order LXVII. rule 4, without any personal re-service on him, but the Court in each case has a discretion to require stricter service, either as a term of granting leave to amend or as a condition of giving judgment by default, if the nature of the amendment is such as to raise a new case against the non-appearing defendant. *Hartley, In re; Nuttall v. Whittaker* ([1891] 2 Ch. 121), *Gee v. Hell* (56 L. J. Ch. 718; 35 Ch. D. 160), *Webster v. Myer* (54 L. J. Q.B. 101; 14 Q.B. D. 231), *Tilling v. Blythe* (68 L. J. Q.B. 350; [1899] 1 Q.B. 557), and *The Cassiopeia* (48 L. J. P. 39; 4 P. D. 188) discussed and explained. *Jamaica Railway v. Colonial Bank*, (C.A.) 410.

Frivolous and Vexatious Applications—Interlocutory Proceedings before Judgment—Order to Prevent—Costs.]—Before the trial of the action the defendant made twenty-four interlocutory applications with reference to pleadings, discovery, and the like. Most of these applications had been dismissed with costs, and the remainder had proved abortive owing to some irregularity in service or the failure of the defendant to appear. None of the costs incurred in these applications had been paid by the defendant:—*Held*, that there was jurisdiction to make an order prohibiting any further application by the defendant under the summons for directions, or on any matters of procedure, without the leave of the Judge in chambers, and an order was made to that effect. *Gripe v. Loam* (57 L. J. Ch. 435; 37 Ch. D. 168) applied. *Kinnaird (Lord) v. Field*, (C.A.) 554.

Originating Summons—Construction of Document—Questions of Fact—Jurisdiction.]—An

originating summons under Order LIV.A, rule 1, is not the proper mode of procedure in a case where questions both of fact and of construction of a written instrument arise, and where the decision of the questions of construction will not necessarily put an end to the litigation. *Lewis v. Green*, 682.

Pleading—Particulars—Claim to Ownership without Setting out Title—Embarrassing Statement of Claim.]—The plaintiffs, being owners of a mill, claimed to be owners of a watercourse, alleging that by a deed of 1805 their predecessor in title became possessed of the mill and watercourse, and that the watercourse had ever since belonged to the mill. The defendants, before delivering their defence, applied for further and better particulars on the ground that the plaintiffs ought to set out their title, and that the statement of claim was embarrassing:—*Held*, that no further particulars were necessary for pleading, and that the statement of claim was not embarrassing. *Pledge v. Pomfret*, 357.

Summons for Directions—Notice of Application—Security for Costs after Judgment—Proceedings before Official Referee—Jurisdiction.]—A summons for directions taken out under Order XXX. of the Rules of the Supreme Court ceases to operate with the trial of the action, so that an application for security for costs for subsequent proceedings—for example, the taking of an account before an official referee ordered at such trial—must be made by separate summons, and cannot be made on notice under rule 5 of Order XXX. *Brown v. Haig*, 591.

But the Court has jurisdiction under Order LXV. rule 6 to order security for such costs in a proper case on a proper application. *Id.*

Trial—Action in Chancery Division—Counterclaim for Slander, Libel, and Malicious Prosecution—Defendant's Right to Trial by Jury.]—A defendant to an action in the Chancery Division, who counterclaims for libel, slander, or any of the other matters mentioned in rule 2 of Order XXXVI., is not by virtue of that rule entitled to have the action and counterclaim transferred to the King's Bench Division for trial by a Judge with a jury; but the Court, in the exercise of its discretion under rule 7 (a) of the same Order, will, at the defendant's request, generally direct the issues raised by the counterclaim, so far as they relate to libel, slander, or the other matters mentioned in rule 2, to be tried by a Judge with a jury. *Kinnaird (Lord) v. Field*, (C.A.) 692.

Writ—Defendant out of Jurisdiction—Order for Substituted Service at Places Abroad and within the Jurisdiction—Regularity.]—In ordering substituted service of a writ on a

person out of the jurisdiction the kind of service ordered need not be restricted to service out of the jurisdiction, but may be extended to include substituted service within the jurisdiction. *Western Suburban and Notting Hill Permanent Benefit Building Society v. Ruckledge*, 751.

PRESUMPTION OF DEATH.

See EVIDENCE.

PUBLIC AUTHORITIES PROTECTION.

Time for Commencement of Proceedings.—By the Public Authorities Protection Act, 1893, an action against a person for an act done in pursuance of an Act of Parliament or in respect of an alleged neglect or default in the execution of any such Act must be commenced "in case of a continuance of injury or damage within six months next after the ceasing thereof":—*Held*, that the words "in case of a continuance of injury or damage" do not refer to a damage inflicted once and for all which continues unrepaid, but to a new damage recurring day by day in respect of an act done, it may be, once for all at some prior time, or repeated, it may be, from day to day. *Held*, therefore, that where there was such a continuing injury an action would lie, when instituted within six months after the ceasing of the continuing injury, for damages up to the period of six years limited by the Statute of Limitations. *Harrington (Earl) v. Derby Corporation*, 219.

RAILWAY.

Construction of Private Act—Statutory Bargain for Protection of Private Individual—Subsequent Agreement by Company with Third Party Inconsistent with Statutory Obligation—Impossibility of Performance—Ultra Vires—Specific Performance—Damages.—A private Act of Parliament authorising the construction of a railway contained a clause whereby "for the protection of" an adjoining owner, his heirs and assigns, it was provided, "unless otherwise agreed" between him and the railway company, that the company should (*inter alia*) construct and maintain a station at a particular point on the proposed line. Some years afterwards the company's successors, through oversight and in good faith, entered into an agreement with the proprietor of a building estate traversed by the line in question to remove the station, which had been built in pursuance of the statutory provision above mentioned, to a spot more advantageous for the development of his estate; but subsequently, on discovering their mistake, they refused to carry out this latter agreement. In an action by the proprietor for specific performance or damages,—*Held*, that the pro-

vision in the Act was a private statutory bargain between the company and a private individual who could waive or release performance thereof; that it was not *ultra vires* of the defendants to enter into the later agreement while the earlier was still effective; and that the defendants were liable in damages for breach of the agreement. *Corbett v. South-Eastern and Chatham Railway*, 659.

Deposited Plan—Proposed Junction with Existing Line—Limits of Deviation.—Section 15 of the Railways Clauses Consolidation Act, 1845, which permits deviation by a railway company to a limited extent from the line delineated on the Parliamentary plans, and the decisions under that section to the effect that the *medium flum viæ* of the line of railway actually laid down may be shifted as far as the limits of deviation shewn on the deposited plan, do not apply to the junction of a proposed with an existing line. *Finck v. London and South-Western Railway* (59 L. J. Ch. 458; 44 Ch. D. 330) applied. *Cardiff Railway v. Taff Vale Railway*, 490.

RECEIVER.

See COMPANY (Debentures).

RENTCHARGE.

Release of Part of Hereditaments Charged—Concurrence of Owner of the other Part—Extinguishment—Apportionment.—A wife was entitled to certain real property, out of which her husband was entitled to a rentcharge. Subsequently she made a voluntary settlement of a moiety of this property, and she and her husband concurred to "grant release dispose of and confirm" this moiety, "and all the estate right title interest property claim and demand whatsoever of them," the said husband and wife, "or either of them in to and out of the same premises":—*Held*, that this concurrence on the part of the husband operated to release the moiety granted from all liability in respect of the rentcharge, but had not the effect of conveying the whole rentcharge, or any part of it, to the grantees of the settlement. *Drown v. Norbury (Lord)* (9 Ir. Eq. 171) and *Johnston v. Webster* (24 L. J. Ch. 300; 4 De G. M. & G. 474) distinguished. *Pries v. John*, 469.

Held also, that the unsettled moiety remained liable for the whole of the rentcharge. *Id.*

See also ANNUITY.

RESTRAINT OF TRADE.

See CONTRACT.

REVENUE.

Estate Duty—Lunatic—Committee—Estate Duty on Real Estate Paid out of Personal

Estate—Charge on Real Estate—Surplus Rents—Discharge of Incumbrance—Next-of-Kin—Heir-at-Law—Incidence of Duty.]—The committee of a lunatic absolutely entitled to residuary real and personal estate, paid the estate duty on the real estate out of the personal estate, the committee himself being the executor and devisee in trust of the real estate under the will. The surplus rents of the real estate, after providing rateably for the lunatic's maintenance, would have been sufficient, if so applied during the lunatic's life, to keep down the interest on and pay off the capital amount of the estate duty paid in respect of the real estate. On a petition by the lunatic's next-of-kin for a declaration that they were entitled to a charge on his real estate in respect of the estate duty in question, the Court, assuming but without deciding that the estate duty so paid became a charge on the real estate under section 9, sub-section 1 of the Finance Act, 1894,—*Held*, that the surplus rents of real estate ought to be treated as having been applied in discharging the incumbrance—in the first place by keeping down the interest, and then by paying off out of the accumulations the charge itself. **LORD ST. LEONARDS'** decision in *Leitrim (Lord) v. Enery* (6 Ir. Eq. 357) adopted and followed. *Hole, In re; Davies v. Witta*, 689.

Legacy Duty—Payment—Direction to Pay "free from duty"—Insufficient Estate—Duties Treated as Additional Legacies—Abatement.]—Where legacies are given "free from duty," and the estate is insufficient to pay the legacies and the respective duties in full, the duty on each particular legacy is to be regarded as an additional legacy and added to the original legacy, and then both legacies must abate rateably. *Turnbull, In re; Skipper v. Wade*, 438.

Settlement Estate Duty—"Express provision to the contrary."]—A direction to pay legacies free from duty is "an express provision to the contrary" within the meaning of section 19, sub-section 1 of the Finance Act, 1896, and throws the burden of the settlement estate duty leviable in respect of a settled legacy upon the deceased's general estate. If the estate is deficient, the settlement estate duty must, like the legacy duty, be also treated as an additional legacy, and be added to the original legacy for the purposes of abatement. *Id.*

—Will—Legacy of Specific Chattels—Direction to Pay "death duties" out of Specific Fund—Exoneration of Specific Chattels.]—The bequest of a specific fund of money upon trust "to pay thereout . . . the death duties payable out of my estate" throws the burden of the payment of settlement estate duty, payable in respect of property specifically bequeathed, upon the specific fund in exoneration of the property

specifically bequeathed. *Lewis, In re; Lewis v. Smith* (69 L. J. Ch. 406; [1900] 2 Ch. 176), distinguished. *Pimm, In re; Sharpe v. Hodgson* (73 L. J. Ch. 627; [1904] 2 Ch. 345), applied. *Cayley, In re; Andrey v. Cayley*, 31.

RULES OF THE SUPREME COURT.

Order IX. rule 2, 751.

—XXX. rule 5, 591.

—XXXVI. rule 2, 692.

—LIV. A, rule 1, 682.

—LXV. rule 6, 591.

—LXV. rule 27 (18), 373.

—LXVII. rule 4, 410.

SCHOOL.

National School—Teacher Appointed by Managers under Trust Deed—Notice of Dismissal before "appointed day"—Expiration of Notice Afterwards—Consent of Local Education Authority.]—The plaintiff was in July, 1899, appointed teacher at a National school by the then managers under the trust deed, by an agreement, one of the terms of which was that his engagement should be determinable by three months' notice. On May 6, 1904, the then managers gave the plaintiff notice that they would not require his services as master after August 9, 1904. On July 1, 1904, the Education Act, 1902, came into operation in the county in which the school was situated, that being the "appointed day" in that county. The county council, the local education authority, refused to consent to the plaintiff's dismissal. Under section 7, sub-section 1 (c), in the case of a non-provided school maintained by the local education authority the consent of the authority is required to the dismissal of a teacher except in the case there mentioned:—*Held*, that on the day when the Act came into operation the plaintiff was being employed for a term which ended on August 9, 1904, when the term came to an end by the expiration of the time fixed by the previous notice, which was validly given in accordance with the terms of the contract; that the managers had not to give any further notice, or do anything which would amount to a dismissal within the meaning of the Act; and that section 7, sub-section 1 (c) of the Education Act, 1902, had no application to the case. *Jones v. Hughes*, (O.A.) 57.

—Parties to Action.]—The action was brought for an injunction restraining the defendants from preventing the plaintiff from exercising his duty as teacher. The defendants were the four persons who were "foundation managers"

under the Education Act, 1902. They were not the persons with whom the plaintiff made his contract, neither were they the whole body of managers under the Act:—*Held*, that the action was not properly constituted. *Ib.*

Bequest of Annuity for Support of National School—Gift Over.]—See CHARITY.

SETTLED LAND.

Capital Money — Improvements Enabling Mansion-house to be Let—“Additions to or alterations in buildings”—Detached Vinery and Peach-house—Rebuilding.]—Upon the negotiation for an occupation lease of the principal mansion-house upon settled land, the intending tenant agreed to take the lease on condition that the dilapidated lean-to vinery and peach-house, situated near the kitchen garden and five hundred feet away from the mansion-house, were rebuilt. The tenant for life accordingly pulled them down and removed them and built an entirely new vinery and peach-house on the same sites. Upon the application of the tenant for life under section 13, sub-section (ii.), and section 15 of the Settled Land Act, 1890, to have this expenditure recouped out of capital moneys,—*Held*, that the removal of an old building and the erection of a new one in its place was not an improvement authorised by the words of section 13, sub-section (ii.)—namely, “making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let.” *Leveson-Gower’s Settled Estate, In re*, 540.

—Short Occupation Lease—House Agent’s Commission—Incidence.]—The commission payable to house agents for procuring a tenant for the principal mansion-house, on a short occupation lease granted by the tenant for life under his Settled Land Act powers, is not such an expense as ought to be paid out of capital moneys. *Ib.*

—Tenant for Life—Investment—Selection—Fiduciary Position—Discretion—Improper Investment—Interference by Court—Bona Fides—Leaseholds.]—In the selection of investments for capital moneys under the Settled Land Acts, the tenant for life is in the position of an ordinary trustee who has a discretionary power, and it is not enough for the selected investment merely to fall within the description of investments authorised by those Acts, it must in other respects also be a proper and suitable investment, and one which a trustee would be justified in accepting. Whether the tenant for life in selecting such investments has acted *bona fide* or not, the Court will, in the interest of the remaindermen, interfere to prevent improper or unsuitable investment, and in such a case the trustees of the settlement are not bound to comply with the direction of the

tenant for life, but are justified in obtaining the direction of the Court. *Hunt’s Settled Estates, In re; Bulteel v. Lawdeskayne*, 759.

Eight leasehold houses of the artisan class, held for a term of ninety-two years unexpired, at ground rents amounting to 50*l.* per annum, and which were described by the surveyor employed by the trustees as “badly planned, badly built, badly drained,” and as likely to be “increasingly expensive to maintain in repair and keep occupied,” *held* not to be a proper investment for capital money. *Ib.*

Compound Settlement—Separate Instruments—Trusts by Reference—Appointment of Trustees for Purposes of Act—Discharge of Incumbrance on One Estate by Mortgage of Both.]—Where it is necessary to appoint trustees for the purposes of the Settled Land Acts, and the settlement consists of two instruments forming one compound settlement, the trustees must be appointed of the compound settlement and not of either one or other of the separate instruments. *Coull’s Settled Estates, In re*, 378.

Semble, a power of sale does not constitute trustees for the purposes of the Acts unless it is a general power—that is, a power exercisable at any time and for any purpose, and not a power exercisable on a contingency and for a particular purpose. *Ib.*

Leaseholds—Purchase of Freehold Reversion—“Enfranchisement”—Capital Money Required—Mortgage of Settled Land—Infant.]—The purchase by the trustees of settled property of a freehold reversion of leaseholds comes within the meaning of the word “enfranchisement” in section 18 of the Settled Land Act, 1882, and the raising of money upon mortgage of the settled property in order to make such purchase may be authorised. *Bruce, In re; Halsey v. Bruce*, 578.

Leasing Power—Easement—Right to Let Down Surface of Settled Land.]—A tenant for life under a settlement of the surface of lands, being also entitled in fee-simple to the mines and minerals under the settled lands, may grant to the lessee of the mines and minerals a right to let down the surface, although the tenant for life could not, under the terms of the settlement, himself so work the mines as to let down the surface. *Sitwell, In re; Sitwell v. Londesborough (Earl)*, 254.

The rent to be reserved is not incapable of ascertainment if experts can say what rent should be reserved. *Ib.*

Section 6 and section 7, sub-section 3 of the Settled Land Act must be read together, and a lease may be granted of an incorporeal hereditament to which a condition of re-entry is inapplicable. *Ib.*

Mortgage by Tenant in Tail—Proviso for Reconveyance on Redemption to Uses of Original Settlement—Absolute Bar of Estate Tail.—Under a settlement of real estates made in 1831, A, in 1884, was tenant for life in possession, B first tenant in tail, and C second tenant in tail in reversion. B being a lunatic, C, with the consent of A, disentailed his interest and re-settled the estates, with a power to charge the same, which was exercised. In 1893 B, who was then tenant in tail in possession, acting by C as his committee, mortgaged the estates with a proviso that on redemption they should be "reconveyed by the mortgagees to the uses, upon the trusts and with and subject to the powers and provisions in and by the settlement (of 1831) declared and contained":—*Held*, that, notwithstanding that the estate tail was barred by virtue of section 21 of the Fines and Recoveries Act, 1833, the proviso for redemption in the mortgage of 1893 was valid and operative, so that the uses created by the settlement of 1831 were revived subject to the re-settlement of 1884. *Owenden's Settled Estates, In re; Owenden v. Chapman*, 234.

Tenant for Life—"Settlement"—Trusts for Settlor for Life—Remainder to Settlor subject to Rentcharge to Wife and Term for Securing Portions to Children.—By a settlement dated in 1862, and made upon the marriage of the plaintiff, certain lands and hereditaments were limited by the plaintiff to the use of himself for life, with remainder to the use that if his wife should survive him she might receive a jointure during her life, and to further uses limiting powers of distress and entry for the purpose of enforcing payment of such jointure, and subject and charged as aforesaid to the use of trustees for the term of one hundred years, to commence from the decease of the plaintiff, upon trusts for raising portions for the children of the marriage, and subject thereto and to the trusts of the term to the use of the plaintiff, his heirs and assigns for ever:—*Held*, that under or by virtue of the settlement the lands in question, or some estate or interest in them, stood "limited to or in trust for persons by way of succession" so as to create a "settlement" within the meaning of section 2, sub-section (1) of the Settled Land Act, 1882, and that under sub-section (5) the plaintiff was the tenant for life of those lands for the purposes of that Act. *Mundy and Roper's Contract, In re* (68 L. J. Ch. 135, 141; [1899] 1 Ch. 275, 290), applied. *Marshall's Settlement, In re; Marshall v. Marshall*, 688.

Right to Fixtures.—See **FIXTURES**.

SETTLEMENT.

Covenant to Settle After-acquired Property—Vested Reversionary Interest.—"Shall become entitled."—A marriage settlement contained a covenant that all property to which the wife

during her then intended coverture "shall become entitled" should be settled. At the date of her marriage the wife was entitled to a vested reversionary interest in certain property expectant upon the death of tenants for life:—*Held*, that the words "become entitled" meant entitled "in interest" and not "in enjoyment," and that even if the reversionary interest in question fell into possession during the coverture it would not become subject to the trusts of the settlement. *Bland's Settlement, In re; Bland v. Perkin*, 28.

Nullity of Marriage—Covenant to Pay if Marriage be "solemnised"—Effect of Decree Absolute.—By a settlement made in contemplation of the marriage of his daughter, a father covenanted that if the marriage were "solemnised" his executors would, within twelve months from his death, pay 25,000*l.* to the trustees of the settlement. The marriage took place. Under an order made in an action for the administration of the estate of the father his executors were directed to pay and did pay over the 25,000*l.*, being unaware of the fact that on the previous day a decree absolute had been made in the Divorce Court declaring the marriage to have been and to be absolutely null and void on the ground of the impotence of the husband:—*Held*, that, inasmuch as the marriage had been declared null *ab initio*, it had never been "solemnised"; consequently the covenant to pay the 25,000*l.* never became operative, and the money in question must be repaid to the executors of the testator. *Garnett, In re; Richardson v. Greenop*, 570.

Realty—Legal Estate in Trustees—Trust for Children of Marriage—No Words of Limitation—Intention—Equitable Fee—Life Estates.—Real and personal estate were vested in the trustees of an antenuptial settlement, their heirs, executors, and administrators, upon the usual trusts in favour of the intended husband and wife and the children of the marriage. The trusts of the settlement contained apt words referable to the real estate, a power of advancement in the ordinary form, and an ultimate gift over to the settlor on failure of children of the marriage, but words of limitation had been omitted from the trust for the children in default of appointment, an event which happened:—*Held*, that there was sufficient on the face of the deed to shew an intention that the children should take the equitable fee-simple, and not merely life estates. *Tringham's Trusts, In re; Tringham v. Greenhill* (73 L. J. Ch. 693; [1904] 2 Ch. 437), followed. *Oliver's Settlement, In re; Evers v. Leigh*, 62.

Trust for Wife "if she shall survive her now intended coverture"—Termination of Coverture by Divorce—Effect of Trust.—By a marriage settlement the wife's father covenanted that his executors should within twelve months of his death, if the wife were then

living, pay to the trustees 10,000*l*. on trust (in default of issue, which happened) for the wife absolutely "if she shall survive her now intended coverture, but if she shall die during her now intended coverture," then in trust for the father absolutely. The husband obtained an absolute decree for dissolution of the marriage, and the wife survived her father:—*Held*, that the wife had survived the coverture within the meaning of the settlement, and was therefore entitled to receive the 10,000*l*. from the trustees when paid to them. *Cranford, In re; Cooke v. Gibson*, 22.

Semble, that, an order of the Divorce Court having dealt with the settled property as if the husband were dead, the husband must be considered as dead for the purpose of construing the settlement, and the coverture might be considered as terminated in this manner also. *Id.*

Quere, whether under the Matrimonial Causes Acts, 1857, 1859, and 1878, the Divorce Court has power to interfere with the interests, rights, and liabilities of persons not parties to the suit—for example, a wife's father covenanting to settle a fund. *Id.*

SOLICITOR.

Costs—Taxation—Third-party Order—Compromise of Litigation—Agreement to Pay Costs.—By an agreement compromising two actions one of the parties agreed to pay the costs of the other party "as between solicitor and client relating to the matters in dispute in the said two actions." On taxation upon petition by the party agreeing to pay, the Taxing Master disallowed all costs of an unusual or extraordinary nature, although incurred by the solicitors at the request of their client, the other party:—*Held*, that this was not an indemnity taxation, but that when once the items for which the third party was liable under the agreement had been ascertained, the taxation of those items must be on the footing of a taxation between the solicitor and the party chargeable—that is, the client; and not as between the solicitor and the party liable to pay—that is, the third party. *Cohen & Cohen, In re*, 192.

—Taxation—Third-party Order—Compromise of Litigation—Agreement to Pay Costs.—On a taxation at the instance of a third party under section 38 of the Solicitors Act, 1843, according to the rule established by *Longbotham & Sons, In re* (73 L. J. Ch. 681; [1904] 2 Ch. 152), the Taxing Master is right in disallowing, as against the third party, any unusual and unnecessary costs, though incurred by the special instructions of the person chargeable, which, apart from such special instructions would not have been allowed against the person charge-

able on an ordinary taxation between solicitor and client; and it makes no difference whether the liability of the third party arises out of an implied contract as in the case of mortgagor and mortgagee, or under an express agreement by the third party to pay the costs, not amounting to a complete indemnity to the person chargeable. *Holliday and Godlee, In re* (58 L. T. 301), overruled. *Cohen & Cohen, In re* (No. 2), (O.A.) 517.

—Lien of Town Agents for Country Solicitors—Bankruptcy of Country Solicitors—Taxation of Country Solicitors' Bill by Client—Right of Country Solicitors to Production of Documents.

—Country solicitors owed their London agents more than 100*l*. for general agency business, which included the agency charges in a bill of 24*l*. owing to the country solicitors from their client E. The country solicitors became bankrupt, and their trustee delivered a bill of costs to E., who obtained an order of course to tax the same against the trustee, the order being obtained through the London agents, who were acting in the matter as agents for another firm of country solicitors. The London agents were afterwards changed, and ceased to act in the matter. In the course of the taxation it became necessary for the trustee to produce documents in the hands of the London agents on which they claimed a lien for their general agency charges, and the Taxing Master directed the trustee to issue a subpoena, on which the London agents attended and refused to produce the documents on the ground of their lien:—*Held*, by JOYCE, J., that the London agents were not bound to produce the documents at the instance of the country solicitors or their trustee except upon payment of the whole of their general agency charges, and that it made no difference that the London agents had acted in obtaining the order for taxation on behalf of E. *Jones & Roberts, In re*, (C.A.) 458.

An appeal from this decision was settled by the London agents delivering the documents to the trustee upon his undertaking to pay to them the whole amount received from E., less the costs of taxation. *Id.*

Employment by Local Authority—Conveyancing Business—Remuneration—Election—Bill of Costs—Taxation—Scale Fee.—A solicitor employed by a school board in a purchase of real estate duly elected under rule 6 of the General Order under the Solicitors' Remuneration Act, 1881, to charge under Schedule II. to the Order instead of taking the scale charge under Schedule I. The board assented to the election, but on taxation of the bill for the purposes of public audit the Taxing Master disallowed all the items, and in lieu thereof allowed only the scale fee, on the ground that a public authority dealing with public moneys occupied a fiduciary position and was not en-

titled to employ a solicitor for ordinary conveyancing work on other than usual terms. On a summons for a review of taxation.—*Held*, that there was no justification for modifying the express provisions of rule 6 so as to except from their operation local authorities or other public bodies, and that the bill must go back for taxation on the basis of the election. *Evans, In re*, 204.

Restraint of Trade—Covenant not to Practise.]
—See CONTRACT.

SPECIFIC PERFORMANCE.

Private Act of Parliament—Statutory Bargain for Protection of Private Individual—Agreement Inconsistent with Statutory Bargain—Impossibility of Performance—Damages.]—See RAILWAY.

STATUTE.

Special Act — Local Authority — Land Acquired for One Purpose—Proposed User of Part for Another—Electric Lighting—Destruction of Refuse—Combined Scheme—Ultra Vires—Acquisition of Land by Agreement—Compulsory Powers.]—It is *ultra vires* for a local authority who have obtained powers and acquired land for particular purposes under a special Act to use permanently the land so acquired, or any part thereof, for another purpose, although the same may be within powers given to them by some other Act. *Att.-Gen. v. Pontypridd Urban Council*, 716.

It makes no difference whether the special Act confers power upon the local authority to acquire land by agreement only, or whether it also confers upon them compulsory powers of acquisition. *Ib.*

The Court granted an injunction restraining the defendants, who had acquired land for the purposes of their special Order under the Electric Lighting Acts, from using part of that land for the purposes of a refuse destructor connected in such a way with the electrical generating station that the refuse could be used instead of coal as fuel for the purpose of generating electrical energy. *Ib.*

Permissive Statute.]—See WATER.

Prohibitory Statute.]—See FRAUD.

TELEPHONE.

Rival Systems—Right to Intercommunication.]—Where an action is brought to obtain telephonic intercommunication under the Telegraph Act, 1899, between the systems of two licensees of the Postmaster-General, the Court may indicate that a certain way of carrying out intercommunication is the proper one,

leaving it to the parties to determine how, as matter of working and with or without modifications as the exigencies of business require, it can be carried into effect, and can decide that a particular way of carrying out intercommunication is not the proper one, but will not direct particular works to be done or order facilities for intercommunication to be given in any defined or exhaustive form. *Swansea Corporation v. National Telephone Co.*, 449.

Defendants, who were licensees whose licence had been extended in respect of an exchange area under the provisions of section 3 of the Telegraph Act, 1899, and who were requested by the plaintiffs, who were subsequent licensees for the same exchange area, to provide intercommunication with their system, contended that for the purpose of such intercommunication the plaintiffs should duplicate the junction lines already existing between the central and subsidiary telephonic exchanges of the defendants:—*Held*, that this contention was unreasonable, and not justified by the Act. *Ib.*

The general scope and effect of the Telegraph Act, 1899, as regards telephonic intercommunication, considered. *Ib.*

TENANT FOR LIFE AND REMAINDERMAN.

Railway Bonds—Cumulative Interest—Payment out of Net Earnings of any Year Remaining Available—Deficiency of Earnings—Arrears of Interest—Sale of Bonds—Apportionment of Proceeds as between Capital and Income.]—Bonds of a company were settled on trust for one for life, with remainders over. They contained a proviso for payment of interest "accumulative" at a rate per cent. twice in each year "as and when earned out of any net earnings of any year remaining after" certain other payments, "and if in any year the net earnings so remaining available . . . shall not be sufficient to pay such interest in full . . . any deficiency shall . . . be paid . . . out of the net earnings of any subsequent year or years as and when there shall be any net earnings available for such purpose." Coupons attached stated interest to be payable "only as and when earned out of any net earnings available." There were never sufficient earnings to pay the interest in full. The bonds were sold in the lifetime of the tenant for life for a sum not sufficient to pay both principal and arrears of interest:—*Held*, as between tenant for life and remainderman, that the sum was not apportionable between capital and income, but must be treated wholly as capital. *Taylor, In re; Matheson v. Taylor*, 419.

Administration — Trust for Conversion — Income of Unauthorised Securities.]—See EXECUTOR AND ADMINISTRATOR.

Remuneration Received by Trustees as Directors of Company—Capital or Income.—See **TRUST AND TRUSTEE.**

TRADE MARK.

Registration—"Invented word"—Rectification of Register.]—The word "Absorbine" used in connection with a veterinary preparation, which professed to absorb and remove certain equine ailments, is not an "invented word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, s. 64, sub-s. 1, as amended by the Patents, Designs, and Trade Marks Act, 1888, s. 10, and therefore is not properly registered as a trade mark, and should be expunged from the register. *Christy v. Tipper*, (C.A.) 55.

—Word Representing Sound of Letters.]—The applicants were owners of an old trade mark consisting of the letters "V Z." An application by them for the registration of the word "Vezet" was granted. Whether a word which is merely a combination of the sound of letters can be registered as a new mark, *quære*. *Verschure & Zoon's Trade Mark, In re*, 684.

TRESPASS.

Public Highway—Right not Established—User of Country Paths—Absence of Injury—Injunction Refused.]—Where a defendant sets up, as a defence to an action for trespass, a public right of way which he fails to establish, and the public use of the way does no present injury to the landowner, who, moreover, disclaims any intention of stopping it so long as it does not conflict with the due enjoyment of his property, the Court will not interfere by injunction, but will make a declaration and impose nominal damages for the trespass. *Behrens v. Richards*, 615.

From the public use of country paths by permission for the purpose of pleasure no dedication can be inferred. *Ib.*

TRUST AND TRUSTEE.

Breach of Trust—Consent of Tenant for Life—Payment into Court at Suit of Remaindermen—Surplus after Replacing Capital—Bankruptcy of Tenant for Life—Right to Surplus Moneys.]—As a general rule a *cestui que trust* who consents to a breach of trust by a trustee cannot complain, as between himself and the trustee, of loss occasioned by that breach of trust. This rule is quite independent of, and is not affected by, section 45 of the Trustee Act, 1893, which empowers the Court to impound, by way of indemnity to the trustee, any interest in the trust estate of a *cestui que trust* at whose instigation or request, or with whose consent in writing, the trustee has committed a breach

of trust; and the rule does not require the consent to the breach of trust to be in writing. *Fletcher v. Collis*, (C.A.) 502.

A trustee, with the consent of the tenant for life, sold the trust funds, and gave the proceeds in his presence to his wife. The trust funds were lost through this breach of trust, and in an action by infant remaindermen an order was made in the nature of a compromise, by which the trustee was to pay into Court out of a pension and the proceeds of certain life policies the whole of the sum paid away to the wife of the tenant for life, with interest. The order directed that these moneys should be applied in the first instance in satisfaction of the capital of the trust funds, and then of interest thereon on application for the purpose. The tenant for life at the date of this order was bankrupt, and his trustee in bankruptcy declined to consent to the order, which was made without prejudice to his rights. The trustee of the settlement was now dead, and the moneys in Court exceeded the capital of the trust funds. The surplus of such moneys, after replacing the capital, was claimed by the personal representative of the deceased trustee on the one hand, and by the trustee in bankruptcy of the tenant for life on the other hand:—*Held*, that the trustee in bankruptcy stood in no better position than the tenant for life; that the tenant for life could not have called on the deceased trustee to make good his life interest, and that his trustee in bankruptcy had therefore no right to any of the surplus moneys as against the personal representative of the deceased trustee. *Ib.*

—Joint and Several Liability—Compromise with one Trustee—Release—Insolvency of Co-trustee's Estate—Right to Prove for Whole Debt.]—Where an action has been brought by plaintiffs as beneficiaries under a settlement to enforce liability against trustees for a breach of trust, and a sum has been certified to be due from the insolvent estate of a deceased trustee, and from the other two trustees, the plaintiffs will be entitled to prove against the insolvent estate for the full amount of the sum certified to be due. The liability of all the trustees being joint and several, until the plaintiffs have received 20s. in the pound they are entitled to claim the whole debt from any one trustee, notwithstanding that another trustee has made a payment by way of compromise in respect of his several liability. *Edwards v. Hood-Barrs*, 167.

Resulting Trust—Fund Subscribed "for or towards the education of B.'s children"—Surplus—Division among Adult Beneficiaries.]—A fund having been subscribed to defray the educational expenses of certain children, various sums had been spent out of their father's estate, to which they were entitled equally, upon their education and maintenance during

their minorities. Upon a summons taken out by them when all of full age asking for a division of the remaining subscribed fund proportionate to the respective expenditure on each child,—*Held*, that there was no resulting trust in favour of the subscribers, and that the children were not entitled to be recouped the expenditure upon them respectively, but that the balance of the fund belonged to the children absolutely, and must be equally divided between them. *Sanderson's Will, In re* (26 L. J. Ch. 804; 3 K. & J. 497), distinguished. *Andrew's Trust, In re; Carter v. Andrew*, 462.

Fraud of Co-trustees—Inscribed Stock—"Stock receipt"—Negligence—Liability.—One of two co-trustees, who was also a stock-broker, had in his hands a certain sum of money which it was intended to invest in inscribed West Australian stock. In due course he shewed his co-trustee the usual bought-note for this stock, and also the usual "stock receipt" signed by the vendor and by the bank clerk at the time of the purchase. The co-trustee did not attend at the time of the purchase, nor did he afterwards make enquiries at the bank as to whether the stock had actually been transferred into the names of himself and of the broker-trustee. It appeared, however, from the evidence that it was not the usual practice among business men either thus to attend at the time of the transfer or to institute such subsequent enquiries; but that they were content to rest upon the evidence of the "stock receipt," though this was not a document of title. It was finally discovered that the "stock receipt" was a forgery, that no such purchase of West Australian stock had ever been made, and that the broker-trustee had embezzled the money:—*Held*, that the co-trustee was not liable for the loss of the trust money resulting from the fraud of the broker-trustee, as he had taken all the precautions that were usually taken in such a case by an ordinary prudent man of business in the conduct of his own affairs. *Shepherd v. Harris*, 574.

Investment Clause—"Securities"—Power to Vary or Transfer—Purchase of Ground-rents—Implied Power to Sell—Trustees for Purposes of Settled Land Acts.—Under a marriage settlement the trustees were directed to stand possessed of certain scheduled shares, stock, and securities upon trust at any time, with the usual consents, to sell the same and invest the proceeds in various investments, including "the purchase of freehold ground rents," with power from time to time "to vary or transfer such stocks, funds, shares or securities into or for others of the same or a like nature." The trustees purchased freehold ground-rents, and in 1901 the tenant for life under the settlement agreed to sell the same. The purchasers objected to the title on the ground that the trustees were not trustees for the purposes of the Settled Land Acts:—*Held*, that the word

"securities" in this settlement meant anything to be purchased under the power, and that, having regard to the power to vary and transfer the "securities," the trustees had power to sell the ground-rents, and were consequently trustees for the purposes of the Settled Land Acts. *Tapp and London and India Docks Co.'s Contract, In re*, 523.

—**"Freehold ground-rents"—"Leasehold ground-rents"—Power to Purchase.**—A testator gave his estate and effects upon trust for conversion and to invest, amongst other things, "upon freehold ground-rents or upon leasehold ground-rents not having less than 60 years unexpired and held direct from the freeholder." The will contained no trust or power for conversion of freehold or leasehold property purchased by the trustees:—*Held*, that the investment clause authorised not mortgages upon the security of, but purchases of, freehold and leasehold ground-rents. *Mordan, In re; Legg v. Mordan*, (C.A.) 319.

Power to Invest in Purchase of Land—"Securities"—"Investments"—Power to Vary and Transpose Securities—Purchased Land—Power of Sale.—A testator authorised his trustees to invest trust moneys in the purchase or upon mortgage of freehold or leasehold properties, or in or upon Government stocks or funds, or debentures or preferential stocks of certain railway companies, or in or upon trustee investments authorised by law, with "power to vary and transpose such securities for other securities of any of the descriptions hereinbefore authorised." On the sale by the trustees of real estate purchased by them out of the trust funds,—*Held*, that the testator had used "securities" as synonymous with "investments," and that, by virtue of the power to vary and transpose securities, the trustees could sell the real estate in question and give the purchaser a valid receipt for the purchase-money. *Gent and Eason's Contract, In re*, 333.

Power to Appoint New Trustees—Appointment of Limited Company as Joint Trustee—Validity.—A limited company may be a trustee, and may hold trust property in joint tenancy with a natural person as co-trustee. Where a settlement contains a power for the appointment of a new trustee, the donee of the power is entitled to appoint a limited company as such trustee jointly with a continuing trustee, in the absence of indications in the settlement of a contrary intention. *Thompson's Settlement Trusts, In re; Thompson v. Alexander*, 133.

Remuneration Received by Trustees as Directors of a Company—Capital or Income—Tenant for Life and Remaindermen.—Where trustees hold shares belonging to the trust, and

they are appointed directors of the company in respect of such holding, and there is no provision in the will enabling them to retain their remuneration as such directors for their own benefit, they must account for such remuneration to the trust, and the remuneration is to be treated as capital and will go to the remaindermen as an accretion to their shares. *Noble v. Cass* (2 Sim. 343) distinguished. *Francois, In re*; *Barrett v. Fisher*, 198.

Same Person Trustee and Beneficiary—Overpayment to Co-beneficiaries—Underpayment to Himself—Absence of Mistake—Right of Adjustment.—A trustee, in administering an estate bequeathed to his brothers and himself for their respective lives, during a period of seventeen years made payments of income to the beneficiaries in irregular sums not corresponding with their respective shares, with the result that at his death he had overpaid his brothers and underpaid himself. The payments were not made by mistake, and his brothers' attention was not called to the fact that they were being overpaid:—*Held*, that his estate was not entitled to be repaid the amount overpaid. *Horne, In re*; *Wilson v. Cos-Sinclair*, 25.

Construction of Will—Appeal—Right of Trustees to Appear—Costs.—See APPEAL.

Lease of Premises—Purchase by Trustee of Freehold Reversion.—See PARTNERSHIP.

Precatory Trust.—See WILL.

Trust for Children—No Words of Limitation—Equitable Fee.—See SETTLEMENT.

VENDOR AND PURCHASER.

Conveyance—Realty—Misdescription of Purchaser—Evidence of Identity.—William Wray, in partnership with his two sons and another person, carried on business at Laurel House, North Hill, Highgate, under the style of "William Wray," without the addition of the words "& Co." or any other words. William Wray died in 1885, and his widow was admitted as a partner in his place and the business was carried on as before and under the same name. In 1890 the partners bought North Hill House, Highgate, as an investment, and paid for it out of partnership assets. The conveyance was made between the vendor of the one part and "William Wray of Laurel House, North Hill, Highgate," of the other part, and the property was conveyed to William Wray in fee-simple:—*Held*, that the legal estate passed by the conveyance to the four partners as joint tenants. *Maughan v. Sharpe* (34 L. J. C.P. 19; 17 C. B. (N.S.) 443) followed. *Wray v. Wray*, 687.

Implied Covenants for Title—"Beneficial owner"—Breach of Covenant—Easement—

Knowledge of Purchaser—Claim for Interference with Easement—Arbitration—Action to Enforce Award—Costs—Repayment by Vendor—Solicitor and Client Costs—Interest—Indemnity.—The defendant conveyed "as beneficial owner" to the plaintiffs certain plots of land forming part of a building estate, including part of the site of a road. The conveyance did not contain any express covenants for title or any qualifications of the implied covenants. The plaintiffs had notice at the date of the deed that the purchasers of other plots had rights of way over the road. As between the plaintiffs and the defendant the agreement was that the plaintiffs should take the land discharged from such rights. The plaintiffs constructed works upon the land purchased by them, and blocked up the road. In 1902 a previous purchaser of other plots claimed damages against the plaintiffs as compensation for the loss of his right of way over the road, and was awarded by an arbitrator 510*l.* and interest. The plaintiffs did not pay this sum, and the previous purchaser brought an action to enforce the award. The Court ordered the plaintiffs to pay the 510*l.* and interest, and the costs of the arbitration proceedings and the action. The plaintiffs, having paid these sums, sued the defendant on his implied covenants for title for repayment of the sums so paid and of their own costs of the arbitration proceedings and the action:—*Held*, that the plaintiffs were entitled to maintain the action, and that their right to do so was not affected by their knowledge of the rights of the previous purchaser. *Held*, therefore, that the defendant being under his implied covenants bound to indemnify the plaintiffs, he must repay them the 510*l.* and interest and the costs paid to the previous purchaser, and must also pay subsequent interest on the 510*l.* and the plaintiffs' costs of the arbitration proceedings as between solicitor and client, but that he was under no liability to repay them their costs of the action to enforce the award. *Turner v. Moon* (70 L. J. Ch. 822; [1901] 2 Ch. 825) followed. *Great Western Railway v. Fisher*, 241.

Possessory Title—Restrictive Covenants—Extinction—Notice—Constructive Notice.—A "squatter," who gains a possessory title to land by virtue of twelve years' uncontested adverse occupation, is not relieved from the burden of restrictive covenants affecting the land merely by lack of notice of the existence of such covenants during the period of his adverse occupation. Restrictive covenants constitute an equitable interest in the land, and this equitable interest is prior in validity to all equities on the land subsequently created, including the equity of a subsequent purchaser for value. The question of notice is only material as binding the conscience of a purchaser for value so as to prevent him from setting up possession of the legal estate. As a "squatter," however, cannot even set up the preliminary plea of purchaser for value, it becomes immaterial, in his

case, further to consider whether he can or cannot set up the additional plea of possession of the legal estate, and in his case, accordingly, it is also immaterial to consider whether he has or has not had notice of the existence of restrictive covenants. *Nesbit and Potts's Contract, In re*, 310.

Restrictive covenants are not extinguished by virtue of section 34 of the Real Property Limitation Act, 1833. *Ib.*

Subsequent purchasers for value from the "squatter" are not protected against restrictive covenants by lack of actual notice, unless they shew that they would not have been affected with actual notice had they searched the title for the usual period of forty years. It is not necessary for those who claim the benefit of the covenants to shew that the title, if searched, would have affected the purchaser with actual notice; the burden, on the contrary, is on the purchaser to prove the negative. *Ib.*

Right of Way—Reservation of "all rights of way hitherto exercised"—Unity of Title—Way used by Tenant of One Property—Conveyance not Executed by Purchaser.—The plaintiff purchased two farms, W. and C., which had been held in unity of title for thirty-five years, during which time there had been user, in favour of C., of a way over W. He sold W. The contract contained a reservation of "all rights of way hitherto exercised" over W. The conveyance contained a similar reservation, but was not executed by the purchaser. The purchaser entered into possession and executed a mortgage. The mortgage became vested in the defendant, who took possession. The plaintiff's tenant of C. having been interfered with by the defendant in the use of the way over W.,—*Held*, that the plaintiff was entitled to an injunction restraining the defendant from interfering with the user of the way over W. *May v. Bellville*, 678.

Title—Condition for Rescission—Objection as to Title—No Title to Part—Error in Particulars—Compensation—A condition in a contract for sale, giving the vendor the right to rescind in case the purchaser should insist on any objection or requisition "as to title or evidence of title" which the vendor should be unable or should decline to remove or comply with, does not admit of rescission where the vendor has no title to a part of the property. Principle of *Bowman v. Hyland* (47 L. J. Ch. 581; 8 Ch. D. 588) applied. *Mawson v. Fletcher* (40 L. J. Ch. 131; L. R. 6 Ch. 91) distinguished. *Jackson and Haden's Contract, In re*, 389.

A sale of freeholds, without reservation of mines and minerals (to which the vendor has no title), gives a right to compensation where the contract provides for compensation in case of error, misstatement, or omission in the particulars. *Ib.*

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WATER.

River—Charter—Exclusive Licence—Validity.—A Royal charter purporting to confer upon the patentee the exclusive navigation for all time of part of a public navigable river, and the exclusive licence of transporting goods thereover, is void both by the Statute of Monopolies, 1623, and by the common law. *Simpson v. Att.-Gen.*, (H.L.) 1.

Locks and Sluices—Grant by Crown to Owners of Right to take Reasonable Tolls—Franchise—Right of Public to Navigate—Dedication to Public—Duty of Person taking Tolls to keep Locks in Repair.—There is no presumption in favour of the legal obligation of an immemorial burden. Consequently, a person who under patent or statute has succeeded to the ownership of locks or other mechanical appliances for facilitating navigation, with the right to charge for their use a reasonable toll, is not bound to work or keep them in repair to his own detriment if the tolls are not sufficient to defray the cost of maintenance and repairs, and is justified in closing them altogether. *Ib.*

Permissive Act of Parliament.—An Act of Parliament authorising and empowering a person to improve the passage of boats, and for that purpose to cleanse, scour, and deepen the river where and as often as occasion should require, although intended to serve a public purpose, must be construed to be permissive only, and not obligatory. *Ib.*

Decision of the COURT OF APPEAL, 70 L. J. Ch. 828; [1901] 2 Ch. 671 (LORD DAVEY and LORD LINDLEY dissenting), reversed. *Ib.*

WAY.

Bridge—Liability to Maintain—Approaches to Bridge—Liability to Repair Highway for 300 feet from Each End of Bridge.—By the common law, where a person cuts through a highway, even although empowered to do so by statute, there is an obligation imposed upon him, even if the statute is silent on the subject, to make a bridge for the passage of the King's subjects and to maintain it for all time. The Statute of Bridges, 1531, which imposes upon the person liable to maintain a bridge the liability to maintain the highway also to the extent of 300 feet from each end of the bridge, applies to a case where the county at large is liable to repair the bridge, and where a party is liable to do so by prescription, or *ratione tenure*, but the Court will not extend the operation of the statute to a case where the obligation to make and maintain the bridge is imposed by the statute which enables the interference to be made with the highway. *Hertfordshire County Council v. New River Co.*, 49.

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The New River Company's Act, 1606, empowered the corporation to interfere with the highway by making cuts across it, but required them to make and maintain convenient bridges and ways:—*Held*, that the expression "bridge," as used in the statute, did not necessarily mean a bridge with the approaches defined by the Statute of Bridges—namely, a bridge and approach to the extent of 300 feet from each end. *Ib.*

Highway—Ancient Monument—Stonehenge—Free User and Access by Public—Trust—Presumption—Absolute Ownership—Thoroughfare—Cul de Sac.—Where the owner of an ancient monument of great public interest produces his title-deeds shewing that he holds under conveyances made to him and his ancestors without any trust for the free user of and access to the monument by the public, it is impossible for the Court to presume a lost grant or lost Act of Parliament in order to establish such a trust. *Att.-Gen. v. Antrobus*, 599.

On the evidence at the trial,—*Held*, that, with the exception of the Netheravon Way, admittedly a public highway, there were no roads or tracks subject to public rights of way running up to and through the circle of stones at Stonehenge. *Ib.*

The rights of the public in relation to a *cul de sac* in a town and in the country discussed. *Ib.*

Evidence — Reputation — Tithe Map and Award — Deposited Plans — Admissibility.—A tithe map and award produced from the proper custody and acted upon, and the deposited plans of a proposed railway, though subsequently abandoned, are admissible as evidence of reputation on a question whether there was or was not a public road across two fields appearing on such documents. *Ib.*

Highway or Main Road—Retaining Walls—Liability to Repair—County Council.—A county council is not, by virtue of the Local Government Act, 1888, under any direct liability to repair retaining walls by the side of a main road. *Att.-Gen. v. Staffordshire County Council*, 163.

The liability of a road authority to repair a highway, whether at common law or by statute, is general; and the Court will not, either by declaration or mandatory order or otherwise, prescribe what particular works or repairs are necessary, or whether any particular work or repairs be necessary for the maintenance of the road. *Quare*, whether there be any legal liability to repair a highway upon any one other than the inhabitants of the parish. *Ib.*

Highway—Right not Established—User of Country Paths.—See **TRESPASS**.

Right of Way.—See **EASEMENT; VENDOR AND PURCHASER**.

WILL.

Construction—Absolute Gift—Share of Residue—Gift Over if before "actual payment" Legatee has Deprived Himself of Benefit of Share—Contingency Definite and Certain—Gift Over not Void for Uncertainty.]—Bequest of share of residue to J. G. for his own use absolutely, with a gift over in the event of J. G. being unable at any time prior to the actual payment of the share to give a receipt for the same by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share. Before the money was handed over, J. G. had committed an act of bankruptcy, which was followed by a receiving order and adjudication:—*Held*, that the contingency was described with definite certainty, and that consequently the gift over was not void for uncertainty, but took effect. *Gouldor, In re; Gouldor v. Gouldor*, 552.

Johnson v. Crook (48 L. J. Ch. 777; 12 Ch. D. 639), *Chaston, In re; Chaston v. Seago* (50 L. J. Ch. 716; 18 Ch. D. 218), and *Wilkins, In re; Spencer v. Duckworth* (50 L. J. Ch. 774; 18 Ch. D. 634), followed. *Martin v. Martin* (85 L. J. Ch. 679; L. R. 2 Eq. 404) and *Bubb v. Padwick* (49 L. J. Ch. 178; 13 Ch. D. 517) not followed. *Ib.*

Class to Take—Gift to Children at Twenty-one—Period for Ascertaining Class—Advancement Clause—Power to Advance out of Vested Share.—Where there is a gift to children at twenty-one the general rule is that the class is fixed when the eldest child attains twenty-one, and no child born after can take. But if maintenance or advancement is continued beyond the time when the eldest child attains twenty-one—if, for instance, advancement is directed out of vested shares—all children will be let in. *Iredell v. Iredell* (25 Beav. 485) followed. *Courtenay, In re; Pearce v. Foxwell*, 654.

Cy-près — Real Property — Limitation of Estates for Life to Unborn Persons—Remoteness.—Testator, who died in 1871, devised real estate to the use of G. for life, with remainder to the use of his first and other sons successively for life, and after the death of each such son to the use of the sons of that son successively according to seniority in tail male, with remainder to the use of all and every the daughters of each of the sons of G. as tenants in common in tail with cross-remainders in tail between such daughters if more than one, with remainder, after the determination of all the

aforesaid uses, to the use of all and every the daughters of G. as tenants in common in tail, with cross-remainders in tail between them if more than one; and there was an ultimate remainder to the use of G., his heirs and assigns. G. died in 1903 without ever having had any issue. It was contended that though the limitations after the life estate of G. were bad as being too remote, the ultimate limitation to G., his heirs and assigns, might be supported under the doctrine of *cy-près* by substituting for the limitations in the will limitations to the use of G.'s sons successively in tail male, with remainder, if on the determination of those estates tail male there should be a failure of the issue of the sons of G. other than daughters or issue of daughters, to the use of G.'s sons successively in tail general, with remainder to the daughters of G. as tenants in common in tail general with cross-remainders between them, with remainder to G. in fee-simple:—*Held*, that the Court could not insert such a contingent limitation as suggested, as that would be a large extension of the doctrine of *cy-près*, and would be, in effect, making a new will for the testator. The ultimate remainder therefore failed, and the estate on the death of G. without issue devolved on the heir-at-law of the testator. *Mortimer, In re; Gray v. Gray*, (C.A.) 745.

Seaward v. Wilcock (5 East, 198) and *Mony-penny v. Dering* (17 L. J. Ex. 81; 16 M. & W. 418; 22 L. J. Ch. 313; 2 De G. M. & G. 145) followed. *Nicholl v. Nicholl* (2 W. Bl. 1159) observed upon. *Ib.*

—**Real Estate—Gift to Some of Several Co-heiresses after Death of A—Life Estate—Necessary Implication.**—A gift of real estate after the death of A to persons who are some, but not all, of the co-heiresses of the testator does not confer upon A a life estate by necessary implication. *Hutton v. Simpson* (2 Vern. 722) and *Willis v. Lucas* (1 P. Wms. 472) examined and explained. The reasoning in *Ralph v. Carrick* (48 L. J. Ch. 801; 11 Ch. D. 873) applied. *Willatts, In re; Willatts v. Artley*, 269; (C.A.) 564.

—**"What is left"—Intestacy during Life of A.**

—A testator gave his household effects to his wife absolutely, and directed that at his death his wife was to have power to sell all property and land belonging to him, and that at her death "what is left" was to be divided between two out of his five daughters:—*Held*, by FARWELL, J., that the words "what is left" meant the net residue after payment of debts and costs of realisation, and that the testator died intestate during the life of his widow as to his personal estate (other than his household effects) and as to all his real estate. *Ib.*

Appeal from decision of FARWELL, J., was allowed on the construction of the words of the

will, and order made by agreement without determining the questions of law decided by him. *Ib.*

—**"Pecuniary investment"—Money on Deposit at Bank.**—Money on deposit at a bank is not a "pecuniary investment" in ordinary parlance and under ordinary circumstances will not pass under a bequest of "pecuniary investments" contained in a will. *Rean Price, In re; Price v. Newton*, 437.

—**Residuary Legatee—Erroneous Recital of Indebtedness—Account.**—A testator in his will recited that a son, to whom he had previously given a share of residue, was indebted to him in the sum of 5,000*l.*, and that he (the testator) was desirous of reducing the amount of such indebtedness to 3,000*l.*, and then proceeded to forgive the son the balance of his debt over and above 3,000*l.*, and to declare that the said sum of 3,000*l.*, or so much thereof as should remain unpaid at the period of distribution, should be deducted and taken into account as part of his son's share of residue. The recital was erroneous, and the son, in fact, was never indebted to his father in the sum of 5,000*l.*, or any other sum as stated, the only sum his father had ever advanced on his account being a sum of 80*l.* for an indenture of apprenticeship:—*Held*, that on the true construction of the will, the testator only intended the son to bring into account so much, not exceeding 3,000*l.*, of the sum which the son owed the testator and as remained unpaid at the period of distribution. The only sum, therefore, for which the son was liable to account was the sum of 80*l.* *Taylor's Estate, In re; Tomlin v. Underhay* (23 Ch. D. 495), followed. *Kelsey, In re; Woolley v. Kelsey; Kelsey v. Kelsey*, 701.

—**Residue—Pecuniary Legacies—Gift of "remainder of my property"—Residuary Legatee Appointed—Destination of Lapsed Pecuniary Legacy.**—Where, in a will, pecuniary legacies are followed by a gift of "the remainder of my property" to one or more, this is a good residuary bequest, and is not revoked by the subsequent appointment of a residuary legatee in the will. *Isaac, In re; Harrison v. Isaac*, 277.

A lapsed pecuniary legacy will fall into the first and not the second of such residuary dispositions; but a lapse, in whole or in part, of the first residuary disposition will enure for the benefit of the person entitled under the second. *Ib.*

—**Strict Settlement—Devise of Estate Tail—Provision for Reduction to Life Estate if Devisee "Born" within Testator's Lifetime—Devisees en Ventre sa Mère at Time of Testator's Death.**—There is no rule of law that the word "born" includes a child *en ventre sa mère* under all circumstances. Where, accordingly, a will devised an estate tail to a child unborn

at the date of the will, with a proviso that this estate tail was to be cut down to a life estate in case the devisee should be "born" within the testator's lifetime.—*Held*, that the devisee was not "born" within the testator's lifetime, although he was *en ventre sa mère* at the date of the testator's death. *Villar v. Gilbey*, 529.

Executory Limitation—Devise to A "when she shall attain the age of 25 years"—Controlling Context—Contingency—Vesting.]—A devise to A "when she shall attain the age of 25 years," in the absence of some controlling circumstance, or context, confers upon A an estate in fee-simple contingent upon her attaining that age, and not a vested estate in fee-simple liable to be divested if she die under the age of twenty-five years. *Francis, In re; Francis v. Francis*, 487.

Exoneration of Personality—Bequest of "all my personal estate"—Devise of Real Estate subject to Debts, &c.—Expression of Intention.]—A specific gift of all a testator's personal estate to A, followed by a devise of real estate to B and C subject to the payment of his debts, &c., is not an expression of intention sufficient to exonerate the personality from its primary liability for those payments, especially when in the will a wish is expressed that none of the realty shall be sold while any descendants of testator's name are living. *Banks's Trusts, In re; Banks v. Busbridge*, 336.

Legacy—Servants—"One year's wages."]—A testator bequeathed one year's wages to all servants who should be in his employment at his death, and should have been in his employment for five years previously thereto.—*Held*, that servants hired at a weekly wage paid monthly or fortnightly were not included in the bequest. *Blackwell v. Pennant* (22 L. J. Ch. 155; 9 Hare, 551) followed. *Ravenworth, In re; Ravenworth v. Tindale*, (C.A.) 353.

Naturalised British Subject—English Domicil—Will Made in Italy in Foreign Form—Validity to Pass Leaseholds—"Personal estate."]—"Personal estate" in the Wills Act, 1861, includes leasehold property. A will made out of the United Kingdom by a British subject, whatever his domicile at the time of making it or at his death, and made according to the law of the place where it was made, or where he was domiciled when it was made, or where in the King's dominions he had his domicile of origin, is effectual to pass his beneficial interest in leaseholds. *Grassi, In re; Stubbsfield v. Grassi*, 341.

Precatory Trust—"In full confidence"—Gift in Default of Disposition.]—A testator gave to his wife the whole of his real and personal

estate "absolutely in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces":—*Held* (LORD LINDLEY dissenting), that there was a gift in favour of the surviving nieces on the widow's death, subject to a power of testamentary appointment by the widow to one or more of the nieces, who in default of appointment were to share equally; and that if the nieces predeceased the widow the latter would become absolutely entitled. *Comiskey v. Bowring-Hanbury*, (H.L.) 263.

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